



## EEOC Issues Proposed Regulations on Genetic Information Nondiscrimination

*The Genetic Information Nondiscrimination Act of 2008, which restricts the use of genetic information by health plans and employers, was signed into law last year. Title II of the new law prohibits employment discrimination based on genetic information, and restricts employers and certain other entities from acquiring and disclosing such information. The EEOC has now issued proposed regulations on Title II.*

### Background

On May 21, 2008, President Bush signed into law the [Genetic Information Nondiscrimination Act of 2008](#) (GINA), which restricts the use of genetic information in connection with health coverage and employment. (See our May 27, 2008 [For Your Information](#).) Title I of GINA prohibits employer-sponsored group health plans and insurers from restricting plan enrollment or adjusting premiums or contribution amounts on the basis of genetic information, and from requiring or requesting genetic testing. Title II of GINA prohibits employment discrimination based on genetic information, restricts employers and other covered entities from deliberately acquiring genetic information, and strictly limits its disclosure.

On March 2, the EEOC issued [proposed regulations](#) on Title II. Title II, which takes effect on November 21, 2009, was intended to extend the same protections against genetic discrimination as Title VII of the Civil Rights Act of 1964 (Title VII) provides against employment discrimination on the basis of race, color, religion, sex and national origin. Regulations implementing Title I have not yet been issued, but are expected later this year.

### Overview of Title II

Title II restricts the deliberate acquisition of genetic information by employers and prohibits employers from using it as a basis for discriminating against employees, job applicants, and others with respect to hiring, firing or other terms and conditions of employment. For purposes of Title II, genetic information includes information about a covered individual's or family member's genetic tests (excluding tests for alcohol or drug use), and family medical history. It does not, however, include information about sex or age, or information about an individual's current disease or disorder.

Title II requires that genetic information (in paper or electronic form) be maintained as a confidential medical record, and imposes strict limitations on its disclosure. Written information must be kept apart from other personnel information in separate medical files, but may be kept in the same file as medical information subject to

the Americans with Disabilities Act (ADA). Generally, genetic information may only be disclosed to the individual it relates to, occupational health researchers, certain government officials, and as required by court order.

Importantly, Title II does not preempt state or local laws that provide equal or greater protections. Further, Title II does not limit privacy rights or protections under other federal, state or local laws, or affect an individual's rights under the ADA, Rehabilitation Act, or other state or local disability discrimination laws.

**BUCK COMMENT.** *Although the ADA generally allows an employer to obtain family medical history or conduct genetic tests of job applicants after making a job offer, this will no longer be permitted once Title II takes effect. Likewise, employers will be barred from obtaining genetic information through fitness for duty exams.*

## The Proposed Regulations

**Who is protected.** The proposed regulations make clear that the “employees” protected by GINA include job applicants, both current and former employees, union members, apprentices and trainees.

**What is a covered entity.** GINA covers both private and public sector employers with 15 or more employees, as well as employment agencies, labor organizations, and joint labor-management training and apprenticeship programs. However, Indian tribes and certain other organizations are not covered.

**BUCK COMMENT.** *The use of the term covered entity under Title II is not intended to be synonymous with its use in Title I, HIPAA, or Section 206(c) of GINA, which expressly refers to HIPAA covered entities.*

**GINA-Specific Definitions.** The proposed regulations provide guidance on six terms that are not found in any of the other employment discrimination statutes enforced by the EEOC –

- *Family member* is a dependent who is or becomes related to an individual through marriage, birth, adoption, or placement for adoption. Persons related from the first to the fourth degree are included.
- *Family medical history* is information about the manifestation of disease or disorder in an individual's family members.
- *Genetic information* is information from an individual's or family member's genetic tests, family medical history, genetic information of a fetus or embryo of an individual or family member, and information about an individual's or family member's request for or receipt of genetic services.
- *Genetic monitoring* is the periodic examination of employees to evaluate modifications to their genetic material as a result of workplace exposures to toxic substances.
- *Genetic services* are genetic tests, counseling and education.

- *Genetic test* is an “analysis of human DNA, RNA, chromosomes, proteins, or metabolites” that detects whether an individual carries a particular gene or gene variant. Routine tests such as blood counts, cholesterol tests and liver-function tests are not considered to be genetic tests.

**BUCK COMMENT.** *The above definitions of dependent and genetic test differ from those used in Title I.*

The proposed regulations also define “manifestation or manifested” to mean that an individual has been or reasonably could be diagnosed with a disease, disorder or medical condition by a health care professional with appropriate training in the field. The regulations clarify that a disease is not manifested if the diagnosis is primarily based on genetic information or genetic test results.

**Prohibited practices.** The proposed regulations prohibit discrimination by a broad range of employers (or their agents) with respect to a broad range of practices, including hiring, firing, promotion, demotion, seniority, discipline, compensation, and other terms and conditions of employment. The regulations expressly prohibit limiting, segregating or classifying employees because of genetic information. They also bar retaliation against those who file discrimination charges under GINA or testify in connection with a charge.

Although employers may not generally request, require or purchase genetic information, there are certain exceptions when the employer –

- inadvertently requests or acquires genetic information (the “water cooler” exception)
- requests or requires genetic information to comply with the Family and Medical Leave Act (FMLA) or similar state family and medical leave laws
- uses information for genetic monitoring of the biological effects of toxic substances in the workplace
- purchases commercially and publically available information that includes family medical history or other genetic information (e.g., newspapers or magazines, but not medical databases or court records)
- conducts DNA analysis for law enforcement purposes
- obtains genetic information in conjunction with certain health or genetic services it provides (e.g., as part of a voluntary wellness program).

**BUCK COMMENT.** *The EEOC is seeking comments on these last three exceptions. With respect to wellness programs, the EEOC is seeking input on the scope of the term “voluntary.” More substantive guidance on how GINA will affect health risk assessments and other aspects of wellness programs will likely be contained in the Title I regulations.*

**Interplay with HIPAA privacy regulations.** Generally, the provisions of Title II do not apply to health information subject to HIPAA privacy requirements. The regulations clarify that entities subject to those requirements must continue to apply HIPAA – not GINA Title II – requirements to genetic information that is protected health information. For example, if a hospital subject to HIPAA privacy requirements treats a

hospital employee, any genetic information obtained or created by the hospital as the health care provider is subject to the requirements of HIPAA but not GINA. If, however, the hospital obtains genetic information in its role as the employer (e.g., part of an employee's leave request), it would be subject to Title II.

## Remedies for Violation and Penalties

The same remedies available to employees and others covered by Title VII are available under Title II of GINA (e.g., reinstatement, hiring, promotion, back pay, compensatory and punitive damages). Like Title VII, combined compensatory and punitive damages (excluding past monetary losses) under Title II are capped, and range from \$50,000 for employers with 15-100 employees to \$300,000 for employers with more than 500 employees. However, punitive damages are not available against public-sector employers.

**BUCK COMMENT.** *GINA contains a firewall between Title I and II, which is intended to eliminate double liability by preventing claims to be brought under Title II for acts or omissions relating to health plan eligibility, benefits or premiums, or a health plan's request for or collection of genetic information. These matters remain subject to Title I and enforcement through ERISA, the Public Health Service Act, and the Internal Revenue Code as appropriate. However, the firewall does not immunize covered entities from liability for employment decisions based on health benefits that violate Title II (e.g., firing an employee to avoid expected health claims based on genetic information).*

## Effective Date

GINA requires the EEOC to issue final Title II regulations by May 21, 2009. Title II, and the final regulations implementing it, will take effect on November 21, 2009.

## Conclusion

Employers should review their discrimination and harassment policies, family and medical leave forms, and related employment practices to ensure they are not inappropriately requesting, receiving or using genetic information about employees, job applicants, or their family members. Buck's consultants are available to discuss the new law with you and assist in your review.

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*This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.*