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## EEOC Final Regulations on Genetic Information Nondiscrimination Take Effect

*Title II of GINA prohibits employment discrimination based on genetic information, including requesting, requiring, purchasing, or disclosing such information. The EEOC's final regulations implementing the employment-related provisions of Title II of GINA took effect on January 10, 2011.*

### Background

The [Genetic Information Nondiscrimination Act of 2008](#) (GINA) 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 governs the collection and use of genetic information by health plans and insurers. The Department of Labor issued regulations implementing Title I (GINA I final regulations) in 2009. (See our October 15, 2009 [For Your Information](#).) Title II of GINA governs the acquisition and use of genetic information by employers by prohibiting employers from discriminating against current and former employees, job applicants, and their families on the basis of their genetic information.

On March 2, 2009, the Equal Employment Opportunity Commission (EEOC) issued [proposed regulations](#) on Title II. (See our March 17, 2009 [For Your Information](#).) On November 9, 2010, the EEOC issued [final regulations](#) implementing Title II (GINA II regulations), along with [background information](#) and [question-and-answers](#) for small businesses. The GINA II regulations, which took effect on January 10, 2011, generally follow the proposed regulations but also include some changes and helpful clarifications.

### Final GINA II Regulations

#### Genetic Information

For purposes of GINA, genetic information includes information about an individual's or family member's genetic tests, a request for or receipt of genetic services by an individual or family member, and the manifestation of disease or disorder in an individual's family members (i.e., family medical history). Genetic information does not include information about an individual's or family member's sex, age, race, or ethnicity that is not derived from a genetic test.

***BUCK COMMENT.*** *GINA only protects against discrimination based on genetic information. However, job applicants and employees may be protected under other federal, state or local anti-discrimination laws,*

*such as the Americans with Disabilities Act (ADA) or the Family and Medical Leave Act (FMLA). Thus, employers must consider on a case-by-case basis whether those individuals and information about their conditions are entitled to protection under such laws.*

The GINA II regulations clarify what constitutes a request for genetic information, when requests for and the acquisition of genetic information will not violate Title II of GINA, and how Title II of GINA applies to voluntary wellness programs and health risk assessments.

## **Requesting, Requiring or Acquiring Genetic Information**

The GINA II regulations substantially broaden the proposed regulations' prohibition against the "deliberate acquisition" of genetic information by employers, clarifying that an employer can violate GINA without a specific intent to acquire genetic information. The final regulations bar employers generally from requesting, requiring, or purchasing genetic information of job applicants, current or former employees or their family members. The regulations broadly define "requesting" to include direct inquiries as well as actions that are likely to result in the acquisition of genetic information. Such actions would include, for example, running a targeted Internet search, actively listening to third-party conversations, searching an individual's personal effects, and making requests for information about an individual's current health status likely to result in obtaining genetic information.

The regulations carve out several narrow exceptions against requesting, requiring or purchasing genetic information. These include situations in which the employer –

- inadvertently requests or acquires genetic information (the "water cooler exception")
- obtains genetic information in connection with voluntary wellness programs
- requests or requires genetic information to comply with FMLA or similar state or local family and medical leave laws
- purchases commercially or publicly available genetic information (e.g., in newspapers, electronic media).

***BUCK COMMENT.*** *Regardless of how genetic information is obtained, employers will still violate GINA if they use the information to make employment decisions or improperly disclose it.*

***Exception for Inadvertent Acquisition.*** The GINA II regulations offer some protection for employers that inadvertently request or obtain genetic information of employees or their family members. Examples of inadvertent acquisitions provided by the final regulations include a manager or supervisor acquiring genetic information through casual conversation with the employee, by overhearing the conversations of others, or through accessing (with permission) e-mail or social media sources. However, the inadvertent acquisition exception no longer applies if the manager or supervisor pursues the matter, such as by asking follow-up questions likely to elicit further information.

The GINA II regulations also add a safe harbor for employers that inadvertently acquire genetic information through a lawful request for medical information. The safe harbor generally is available *only* if the employer instructs the employee and/or health care provider from whom health-related information is requested not to disclose genetic information when responding to the request. The regulations provide model language that employers may incorporate into their requests for medical information to protect against impermissible disclosures.

Although the GINA II regulations anticipate that the warning not to disclose will be in writing, they do allow for verbal notice if the employer does not typically make written requests for medical information. The regulations also allow an employer that failed to provide notice to establish that a specific receipt of information was inadvertent if it was not likely that its request would have resulted in disclosure of genetic information (e.g., an overly broad response received in response to a narrow question).

***BUCK COMMENT.*** *In some circumstances, disclosure of genetic information by health care providers (including family medical histories) may be required and will not violate GINA. For example, such information may be part of the medical certification process needed for FMLA leave based on a family member's serious health condition or needed to assess an employee's request for an accommodation under the ADA. In such circumstances, the employer may have to modify the EEOC's model language to ensure that any needed family medical history is provided.*

The GINA II regulations also make clear that the prohibition against requesting genetic information or family medical history extends to lawful employment-related medical examinations (e.g., fitness-for-duty or post-offer examinations). Thus, employers should caution their health care providers not to collect or provide genetic information in connection with these examinations.

***Social Networking Sites and the Exception for Commercially and Publicly Available Information.***

Generally, the acquisition of genetic information (including family history) from public and commercial sites will not violate GINA unless the employer actively searches sites for such information or accesses sources likely to provide genetic information. GINA's exception for commercially and publicly available information applies to genetic information obtained via electronic media, including certain Internet resources, but does not extend to information in medical databases, court records, and limited access media sources.

An employer's internet search that is likely to result in obtaining an individual's genetic information (even if publicly available) is viewed as a prohibited "request" under GINA. However, an employer that inadvertently discovers an employee's genetic information during a Google search will likely not violate GINA. Of course, using the information to make employment decisions would still be prohibited.

The regulations clarify that personal websites and blogs that simply require users to obtain a user name and/or password, but do not otherwise restrict access, would be considered commercially and publicly available sources. By contrast, non-public social networking sites (e.g., Facebook, LinkedIn) and other media sources with restricted

or limited access (e.g., requiring permissions of an individual or membership in a particular group such as a professional organization) are not considered public sources and, thus, would not fall within the GINA exception.

Although employers generally would not be permitted to acquire genetic information from non-public social networking sites, they may still escape GINA liability for acquiring genetic information from these sites in certain circumstances. If the employer has access to the site (e.g., an employee has “friended” his or her supervisor), there would be no violation if genetic information was inadvertently found while on the site. However, the inadvertent acquisition exception would no longer apply if the employer returned to the site to find additional genetic information.

**Exception for Voluntary Wellness Programs.** The GINA II regulations provide a specific exception to the general prohibition against acquiring genetic information for employers that offer health or genetic services, including as part of a voluntary wellness program. The exception applies if all of the following conditions are satisfied –

- disclosure of genetic information by participating employees is voluntary
- the employee gives knowing, voluntary, written authorization
- individually identifiable genetic information is provided only to the individual or family member and the health care professional or genetic counselor providing services
- the information cannot be accessed by the employer (except in aggregate terms).

**BUCK COMMENT.** *The preamble to the GINA II regulations makes clear that voluntary wellness programs can be administered in-house as well as through a third-party. If administered in-house, the program must take particular care that individually identifiable genetic information cannot be accessed by managers, supervisors, or others who make employment decisions.*

The GINA II regulations also clarify the extent to which employer-sponsored wellness programs can offer financial incentives for program participation without violating GINA. Although employers may offer certain financial inducements to encourage participation in wellness programs, they cannot offer an inducement to provide genetic information. An employer may offer financial incentives for an employee’s completion of a health risk assessment that includes questions about family medical history and other genetic information, as long as the health risk assessment identifies which questions request genetic information and the employer makes clear that employees will receive the reward whether or not they answer those questions.

With respect to individuals who voluntarily provide genetic information that indicates they are at increased risk of developing a health condition, the GINA II regulations allow employers to provide financial incentives to encourage them to participate in disease management or other wellness programs and/or meet particular health goals (such as weight loss, cholesterol level, blood pressure). However, these programs and incentives must



also be offered to other individuals who did not provide genetic information but have current health conditions or are at risk of developing such conditions.

**BUCK COMMENT.** *Because wellness programs also have to comply with the nondiscrimination rules of the Health Insurance Portability and Accountability Act (HIPAA), programs that condition a reward on satisfying a health standard must provide a reasonable alternative if it is unreasonably difficult for an individual to satisfy the standard due to a medical condition.*

Although the GINA II regulations include several helpful examples of permissible financial incentives (e.g., \$150 to participate in a wellness program designed to reduce health risks identified by the employee's health risk assessment, \$150 for achieving a designated health outcome such as weight loss), they do not clarify whether a reward of 20% of the cost of health coverage, which is permitted by the HIPAA standards, would be permissible under Title II of GINA.

**BUCK COMMENT.** *In addition to uncertainty about whether 20% rewards are permitted under GINA, it also remains unclear whether financial incentives or penalties to induce participation in workplace wellness and prevention programs may violate the ADA. The EEOC is expected to issue ADA regulations in the near future.*

## Confidentiality

GINA requires employers to protect genetic information in a separate, confidential medical file. The GINA II regulations clarify that genetic information may be kept in the same file as confidential information subject to the ADA, but not in an employee's personnel file with one narrow exception. Genetic information placed in personnel files prior to November 21, 2009 (when GINA took effect) need not be removed and can continue to be maintained in those files.

**BUCK COMMENT.** *Although the GINA II regulations do not require removal of genetic information housed in personnel files prior to November 21, 2009, employers may want to consider consolidating all genetic information records in a separate, confidential medical file to protect against improper disclosure.*

## Relationship to Other Laws

The GINA II regulations make clear that GINA establishes a "firewall" separating Title I and Title II of GINA for enforcement and liability purposes. The firewall is intended to ensure that group health plan and health insurance issuer provisions or actions are addressed and remedied through ERISA, the Public Health Service Act, or the Internal Revenue Code, while employer actions are remedied through GINA Title II.

Title II of GINA would not cover a health plan's or issuer's actions related to the imposition of a preexisting condition exclusion, discrimination in health plan eligibility, benefits, or premiums based on genetic information, a

request that an individual undergo a genetic test, or collection of genetic information. These actions would be subject to enforcement under Title I of GINA exclusively. However, employers would remain liable under Title II even where the employer's actions prevent access to health plans. For example, an employer that fires an employee because of anticipated high health costs based on genetic information would be liable under Title II. The GINA II regulations provide other examples of employer conduct that would violate Title II including directing employees to undergo genetic testing to be eligible for a health plan, contracting with a health insurance issuer to request genetic information, and amending a health plan to require an individual to undergo a genetic test. In the last two examples, the health plan's or issuer's request for genetic information and the plan's implementation of required genetic testing may violate Title I as well.

Employers are also subject to any federal, state, or local law that provides equal or greater protections to an individual than Title II of GINA.

## Effective Date

The GINA II regulations took effect on January 10, 2011.

## Conclusion

Title II of GINA impacts a wide range of employer actions affecting employees, job applicants and their families. In light of that, employers will need to update existing employment policies, handbooks, training, recordkeeping, and EEO postings to incorporate GINA provisions. Medical request forms should be modified to incorporate the EEOC's safe harbor language. Employers that sponsor wellness programs should ensure their programs, health risk assessments, and any related financial incentives are GINA-compliant.

Buck's consultants are available to assist you in assessing the impact of the GINA II regulations on your workplace and in your ongoing compliance efforts.

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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.*