

GENETIC INFORMATION NON-DISCRIMINATION ACT OF 2008: IMPLEMENTING REGULATIONS

Recently, the U.S. Equal Employment Opportunity Commission (“EEOC”) published a Notice of Proposed Rule Making regarding the implementation of the employment provisions of the Genetic Information Non-Discrimination Act of 2008 (“GINA”). As applied to employers, GINA generally prohibits discrimination based on an individual’s genetic information. In addition, GINA prohibits the intentional acquisition of genetic information pertaining to applicants and employees, and in the event of inadvertent acquisition, imposes strict confidentiality requirements. The public comment period for the EEOC’s implementing regulations ends May 1, 2009 and it is anticipated that the regulations will be finalized by May 21, 2009.

In addition to revising handbooks and other policies in light of GINA, employers should consider the potential interaction between GINA and the Americans with Disabilities Act (“ADA”). Under GINA, family medical history is considered “genetic information” and subject to GINA’s protection. Thus, even though the ADA allows an employer to require a medical examination of post-offer, pre-employment individuals (*e.g.*, to test for a heart disease that would affect one’s ability to perform a physically demanding job), GINA prohibits inquiries regarding family medical history of heart disease as part of such an examination. As such, employers should ensure that any medical inquiries made of post-offer, pre-employment individuals are modified so as not to request any genetic information, including family medical history.

The implications of GINA should also be considered in the event an employer seeks information from an individual upon request for a reasonable accommodation under the ADA. While the acquisition of genetic information as a result of such a request is considered “inadvertent” and thus not a violation of GINA, employers that are in receipt of such information are nonetheless required to abide by GINA’s confidentiality provisions (discussed below). As a best practice, employers that ask an employee to have a health care professional provide documentation about a disability in support of a request for a reasonable accommodation should specifically indicate on the questionnaire that family medical history or other genetic information about the employee not be provided. This simple proactive measure could help employers avoid even the inadvertent acquisition of genetic information.

To the extent genetic information is obtained, employers are bound by GINA’s confidentiality provisions. Specifically, genetic information must be placed in a separate medical file and treated in the same manner as confidential medical records. Pursuant to the EEOC’s proposed implementing regulations, genetic information may be maintained in the same file in which the employer maintains confidential medical information otherwise subject to the ADA.

If you have any questions regarding the operation of GINA or the requirements it places on the acquisition or inadvertent acquisition of genetic information, please contact one of the members of Koley Jessen’s Employment, Labor and Benefits Practice Group.

E-VERIFY UPDATE

The U.S. District Court for the Central District of Illinois recently ruled that an Illinois state law designed to prohibit employers from participating in the federal E-Verify program pending satisfaction of certain accuracy and timeliness standards is invalid. In the wake of speculated problems regarding the accuracy of E-Verify, the State of Illinois amended its Right to Privacy Act to prohibit the state’s

employers from enrolling in E-Verify (the “Illinois Act”). The Illinois Act was set to become effective on January 1, 2008 but the federal government challenged its enforceability, citing conflict with federal law. The federal district court agreed with the government and invalidated the Illinois Act, holding that it frustrated Congress’ purpose by prohibiting Illinois employers from participating in E-Verify absent satisfaction of Illinois’ own declared standards for accuracy and timeliness. The court reasoned that Illinois cannot dictate to Congress the standards that E-Verify must meet and that the Illinois Act frustrated the Congressional purpose of making E-Verify available to all employers.

If you have any questions regarding E-Verify, please contact one of the members of Koley Jessen’s Employment, Labor and Benefits Practice Group.

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