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Attorneys At Law

HR Alert (Title II of GINA)

November 13, 2009

Clients and Friends:

Since the most recent *HR Alert*, questions have arisen concerning Title II of the Genetic Information Non-Discrimination Act of 2008 (“GINA”). Highlights and tips follow.

Effective Date: November 21, 2009

Covered Employer: With certain exceptions, employers with 15 or more employees.

“Employee”: “Employee” includes applicants and former employees.

“Genetic Information”: “Genetic information” means information relating to:

- An individual’s genetic tests or requests for genetic counseling/education;
- Genetic tests of an individual’s family members;
- The manifestation of a disease or disorder in family members of an individual (family medical history).

“Genetic Test”: A “genetic test” is an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

Prohibitions: Employers may not:

- Discriminate on the basis of genetic information;
- Retaliate against an employee for opposing actions prohibited by GINA or participating in an investigation, proceeding, or hearing under GINA;
- Request, require, or purchase an employee’s genetic information (*See* “Exceptions”, below).

Exceptions: With important limitations not addressed here, the general prohibition against acquiring genetic information does not apply to:

- Inadvertently acquired information;
- Aggregate information relating to voluntary wellness programs;
- Requests for family medical history to comply with the certification provisions of the FMLA;
- Commercially and publicly available information;
- Aggregate information used in the genetic monitoring of the biological effects of toxic substances in the workplace; and
- Certain law enforcement uses.

Of course, genetic information lawfully obtained may not be used to discriminate and must be maintained according to GINA’s confidentiality requirements (*See* below).

Confidentiality: Genetic information must be kept in confidential files separate from personnel files. With important limitations not addressed here, the information may be disclosed:

- To the subject employee;
- To an occupational or other health researcher;
- In response to a court order;
- To government officials investigating compliance;
- To comply with the FMLA certification provisions;
- To a public health agency with regard to contagious diseases.

Notice Posting: Employers must post a GINA notice. See http://archive.eeoc.gov/self_print_poster.pdf.

Tips:

- Post the required notice by November 21, 2009.
- Update equal employment opportunity, workplace harassment, and related policies to prohibit discrimination based on genetic information.
- Audit your practices with respect to applicant and employee medical inquiries/exams to ensure that individuals are not asked for family medical history. If applicants/employees must explain identified medical conditions, consider this instruction: "Please do not include any family medical history or any genetic information about you."
- When requesting employee medical information, consider an instruction that the employee and healthcare provider should not include family medical history or other genetic information.
- If you receive family medical history or other genetic information as a result of the reasonable accommodation process and/or FMLA certification process, maintain that information in a confidential file separate from the individual's personnel file.
- Do not disclose family medical history or other genetic information in response to a court order unless the order expressly covers such information. Ensure the employee knows about the order and the genetic information disclosed.

Please do not hesitate to contact either one of us, or your preferred Wooden & McLaughlin contact, with questions or if you would like us to help train your management teams on these developments. On behalf of our Employment and Labor Law Group, we appreciate the opportunity to be of service to you.

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***Because different fact scenarios may create different legal obligations, this HR Alert does not constitute legal advice. Please consult an attorney for advice about any specific matter.**