

PUBLICATION

EEOC Issues New Preliminary "GINA" Guidance

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On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act (GINA). Title II of GINA, which addresses employment discrimination, will become effective on November 21, 2009. This new law expands the prohibitions of Title VII of the Civil Rights Act of 1964 to forbid employers from discriminating against employees on the basis of genetic information. Specifically, GINA will prohibit employers from intentionally collecting genetic information from employees or gathering information regarding a person's family history respecting a particular disease, among other things. Moreover, GINA imposes strict confidentiality requirements. Like Title VII, Title II of GINA applies to employers with 15 or more employees. GINA provides similar remedies as Title VII and also includes a prohibition on retaliation.

GINA contains a mandatory provision directing the Equal Employment Opportunity Commission (EEOC) to implement regulations by May 21, 2009, one year after the law's passage. In keeping with this obligation, the EEOC on February 25, 2009, issued proposed implementing regulations in the Federal Register. Interested parties have 60 days in which to submit comments to the EEOC on these proposed regulations.

These proposed regulations cover a variety of topics, including a statement of the law's purpose, examples of prohibited practices, employer confidentiality obligations, and enforcement mechanisms and available remedies, as well as examples of medical information that GINA does not protect. Specifically, these regulations make it unlawful for employers to:

- refuse to hire, fire, limit, segregate, or classify, or otherwise discriminate, deny opportunities, or withhold training and retraining opportunities based on protected genetic information;
- take adverse employment actions against an employee because he or she has opposed any act or practice made unlawful under Title II, or made a charge, testified, or participated in an investigation or hearing; or
- request, require, or purchase genetic information about an employee or his or her family members.

There are six enumerated exceptions to the prohibition of acquiring genetic information about applicants and/or employees. For example, inadvertent requests for the genetic information do not violate Title II. Likewise, employers may continue to offer health and/or genetic services as part of a voluntary wellness program.

While some of these provisions may be modified in light of the public comment period, employers are encouraged to begin to familiarize themselves with the gist of these provisions in advance of November 21st, when the new law becomes effective.