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GINA Impacts Employers

On November 9, 2010, the Equal Employment Opportunity Commission ("EEOC") issued final regulations interpreting the Genetic Information Nondiscrimination Act of 2008 ("GINA" or the "Act"). The new EEOC regulations go into effect on January 10, 2011. Employers subject to the Family and Medical Leave Act ("FMLA") should add disclaimer language to medical information requests to avoid running afoul of the new regulations.

In addition to prohibiting an employer from discriminating against an employee on the basis of genetic information, GINA makes it generally unlawful for an employer to obtain genetic information regarding employees. Genetic information is defined broadly to not only include information about an individual's or family member's genetic tests but also family medical history.

Regarding the FMLA, employers may obtain medical certification forms describing a *family member's* serious health condition without violating GINA so long as the employer requests medical certifications in all such circumstances. However, a distinction is made regarding FMLA medical certification forms which relate to *an employee's own* serious health condition. Employers can continue to obtain employee FMLA medical certification forms by simply attaching the following notice to the DOL medical certification form when giving it to the employee to forward to his or her health care provider:

> The Genetic Information Non-Discrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Alternatively, employers have the option of showing that the request for medical information is narrowly tailored so that it is not likely to result in an employer obtaining genetic information. The EEOC may ultimately take the position that the DOL's model medical certification form is sufficiently narrowly tailored to fall within this exception. If that is the case, then it will not be necessary for an employer to include the above notice when requesting certification using the DOL model forms. Without any official guidance from the EEOC, our recommendation is to include the above notice as an attachment to the medical certification form provided employees to forward to the health care provider. The notice should also be included on other requests for medical information, such as requests for documentation of an employee's need for accommodation, post-offer medical inquiries, and fitness for duty certifications. Please contact us if you need assistance in updating your forms or for more information about the new EEOC regulations or GINA.

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