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# Employment Law

## Alert

January 14, 2011

**TWO ALERTS**

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## Final GINA Regulations Mandate Changes in Employers' Medical Certification Practices

by Silvia Courtney

On January 10, 2011, the long-awaited regulations from the Equal Employment Opportunity Commission ("EEOC") clarifying Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA") went into effect. The GINA statute is designed to prevent the use of genetic information for employment purposes and significantly curtails the acquisition and dissemination of an individual's genetic information by employers.

Under GINA, "genetic information" includes genetic information about the individual and his/her "family member," defined to include all dependents and other family members up to fourth-degree relatives (great-great-grandparents, great-great-grandchildren, and first cousins once-removed).

GINA not only bars an employer from using genetic information when making employment decisions, but also prohibits an employer from acquiring genetic information *except* in the following narrow circumstances:

- inadvertent acquisition of genetic information by the employer;
- acquisition through the employer's request for family medical history as part of a medical certification under the Family Medical Leave Act or equivalent state law;
- acquisition where the employer offers health or genetic services;
- acquisition from commercially and publicly available documents;
- acquisition for use in the genetic monitoring of biological effects of toxic substances in the workplace; and
- acquisition where an employer conducts DNA analysis for law enforcement purposes.

Violations of GINA may result in hiring/reinstatement, compensatory and punitive damages and attorney's fees.

### GINA Implications for Requests for Medical Certifications and FMLA Policies

The final regulations provide that the acquisition of genetic information in response to a lawful request for medical information *will not* be eligible for the "inadvertent acquisition" safe harbor *unless* the employer specifically directs the provider of the medical information not to provide genetic information. The regulations suggest the inclusion of the following statement in all employer requests for medical information:

*The Genetic Information Nondiscrimination 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*

*(cont'd →)*

*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.*

Thus, when requesting medical information in connection with a fitness for duty examination or a request for reasonable accommodation under the Americans with Disabilities Act or the New Jersey Law Against Discrimination, it is imperative that employers include this notice to ensure the availability of the inadvertent acquisition defense.

In addition, while the regulations expressly carve out medical certifications permitted under the FMLA, it is unclear whether the "safe harbor" language needs to be included in the FMLA certification form. Until this uncertainty is resolved by the EEOC, employers should consider updating their FMLA certification forms to include the safe harbor statement. Employers utilizing the FMLA certification forms issued by the U.S. Department of Labor should consider including the language in an appropriate cover letter or addendum to the form.

## **Pay Obligations For Snow Days**

*by Scott Zucker*

In light of the wintry weather that is upon us, employers should be aware of their compensation responsibilities to employees who report to work on a day that the employer closes business early due to weather or other factors.

New Jersey Department of Labor (DOL) regulations mandate that where an employee "who by request of the employer reports for duty on any day" be paid for at least one hour at the applicable wage rate.

The regulations carve out an exception where the employer makes available to the employee an opportunity to work the minimum number of hours in the work week agreed upon between them. For

example, an employer requires his employees to work 35 hours a week. From Monday to Thursday, the employer made available to employee A, B and C the opportunity to work 30 hours and employee D had the opportunity to work 35 hours. On Friday, employees A and B report to work at 12 p.m., and employees C and D report to work at 2 p.m. Due to a snowstorm, the employer closes the business at 2:30 p.m. The employer would be responsible for paying employees A and B for 2.5 hours, the amount of hours actually worked on Friday. Although employee C worked only .5 hours, he would receive payment for 1.0 hours because in that work week he had not worked the agreed upon 35 hours in advance of the closing. Employee D would be paid for only .5 hours for time actually worked because he had worked the agreed upon hours of work prior to the closing.

Employers should undertake all necessary efforts to notify employees in advance of an unscheduled closing by way of a posting on the company website, sending text messages, providing a recording for call-in phone messages or using other reliable methods. In the event employees receive ample notice of closure and do not report for duty, there is no requirement for the payment of wages under New Jersey law, but employers must be mindful of internal policies or collective bargaining agreements that might require a different outcome.

In addition, employers should implement or modify their closing policies to provide instruction to employees about notification procedures in the event of a weather or other emergency. Otherwise, employees reporting to duty because they did not have reasonable notice of closure will be entitled to an hour of wages. Where appropriate, closure policies should address additional matters, such as whether employees will nevertheless be paid in the event of a closing, and if so, the treatment of employees who are on vacation during the closing; whether employees will be required to exhaust vacation or other paid time off benefits for the missed day; and whether "essential" employees may be called upon to report for duty in the event of a closure.

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*The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact [Kathleen M. Connelly](mailto:kconnelly@lindabury.com) at [kconnelly@lindabury.com](mailto:kconnelly@lindabury.com).*