

Legislative Update

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Genetic Information Nondiscrimination Act of 2008

The Equal Employment Opportunity Commission (EEOC) has issued final regulations for the new Genetic Information Nondiscrimination Act (GINA) effective 11/9/10. Basically, employers and their agents are prohibited from requesting, requiring or purchasing genetic information in regard to hiring or disciplinary actions of existing or possible employees. As explained in detail elsewhere [Polygraph, Vol 38, No3, 2009], the EEOC specifically prohibits requiring “health” information of polygraph subjects even when only used to determine examination suitability for testing. When polygraph examinations are given prior to Conditional Offer of Employment, most polygraph schools and the APA Standards of Practice indicate that there are very good reasons for requesting such information and two federal Appellate Courts had determined that pre-employment polygraph examinations must be given prior to Conditional Offer of Employment.

In addition, the EEOC now requires employers to warn vendors providing healthcare information to not include genetic information and provides the following language as an example of fulfilling this requirement:

“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 employees or their family members. In order 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 assertive reproductive services.”

While the EEOC permits employers and their agents to note “health” information obtained by inadvertent means prior to Conditional Offer of Employment (on credit reports, mentioned during reference checking, observed during interviews and polygraph examinations, etc.), the EEOC forbids discussing the information in the pre-offer phase. In addition to suitability for testing issues, examiners should be concerned about requests for reasonable accommodation without being able to adequately evaluate the basis for the request. The Americans With Disabilities Act Amendments Act requires employers to focus on determinations of reasonable accommodation rather than what qualifies as a disability. Examiners are advised to discuss the new GINA requirements with legal counsel to determine if any changes to polygraph procedure and policy are necessary.