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Mr. Stephen Llewellyn
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, DC 20507

**RE: Comments Of The Equal Employment Advisory Council And HR Policy Association Responding To RIN 3046-AA84; Regulations Under the Genetic Information Nondiscrimination Act of 2008; Proposed Rule; Request For Public Comment
74 Fed. Reg. 9056 (March 2, 2009)**

Dear Mr. Llewellyn:

The Equal Employment Advisory Council (EEAC) and HR Policy Association (HR Policy) welcome the opportunity to submit written comments on the Proposed Rule issued by the U.S. Equal Employment Opportunity Commission (the "Commission") and published in the *Federal Register* on March 2, 2009 to implement Title II of the Genetic Information Non-Discrimination Act (GINA), (Pub. L. No. 110-233).

Statement Of Interest

EEAC is a nationwide association of employers organized in 1976 to promote sound approaches to the elimination of employment discrimination. Its membership is comprised of over 300 major U.S. corporations. EEAC's directors and officers include many of the nation's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched depth of knowledge of the practical, as well as legal, considerations relevant to the proper interpretation and application of equal employment policies and practices. EEAC's members are firmly committed to the principles of nondiscrimination and equal employment opportunity.

HR Policy represents the senior human resource executives of over 275 leading employers doing business in the United States. Collectively, HR Policy's members employ over 12 percent of the United States private sector workforce or some 19 million Americans. HR Policy's members have a strong interest in ensuring the appropriate

interpretation and administration of GINA. The Association's members are committed to principles of nondiscrimination and equal employment opportunities.

All of EEAC and HR Policy's members are employers as defined in the Genetic Information Discrimination Act of 2008, (Pub. L. No. 110-233), as well as other federal equal employment statutes and regulations. Their members thus have a direct and ongoing interest in the proper application and interpretation of these laws and regulations by the courts, the Commission, and other enforcement agencies.

As discussed more fully below, EEAC and HR Policy support several provisions of the Proposed Rule that seek to clarify Title II's scope and its applicability to particular situations. There are several aspects of the Proposed Rule that require further clarification – or which we believe simply go too far – however, including for instance the Commission's interpretation, expressed in Proposed Section 1635.3(b), that any genetic information, including family medical history, received (though not requested) as part of a post-offer, pre-employment medical examination conducted in compliance with the Americans with Disabilities Act (ADA) falls outside of the “inadvertent request or require” exception and would violate GINA.

Our comments regarding sections of the Proposed Rule that are of particular interest to our members can be found below.

Proposed Section 1635.2 - General Definitions

Section 1635.2 of the Proposed Rule contains a list of “general” definitions of terms incorporated into GINA from Title VII and/or the ADA, such as “employee,” “employer,” and “covered entity.” The Proposed Rule explains with greater clarity what is a covered employer under Title II, and creates a new “covered entity” term that includes employers, employing offices, employment agencies, labor organizations, and joint labor-management committees. The Preamble to the Proposed Rule explains that this definition is included “as a simplifying shorthand to aid in the readability of the proposed regulations” that is similar to the Commission's use of that term under the ADA. EEAC and HR Policy support this proposed clarification.

Proposed Section 1635.3 – GINA-specific Definitions

In the Preamble, the Commission explains that GINA contains six new terms that are “not found in any of the other employment discrimination statutes that the Commission enforces.” EEAC and HR Policy's comments on several of the proposed definitions are reflected below.

Proposed Section 1635.3(b) – Family Medical History

The term “family medical history” is used in the section of GINA that discusses prohibited employment practices, but is not specifically defined in the statute. The

Commission seeks to fill that gap in Proposed Section 1635.3(b), by defining “family medical history” as “information about the manifestation of disease or disorder in family members of the individual.” The term “manifestation or manifested” is defined separately in Section 1635.3(g).

As noted in the Preamble, the legislative history of Title II suggests that “family medical history” “should be understood as it is used by medical professionals when treating or examining patients” such as, for instance, by looking at the American Medical Association-approved “adult family history form” that physicians use to request from patients medical history of their parents (and their parents’ siblings and children), siblings (and their siblings’ children), and grandparents. Because most employer representatives will have little or no formal medical training, it will be very difficult for them to distinguish, in practice, between information containing broad “family medical history” – the deliberate acquisition of which violates Title II – and information submitted pursuant to a legitimate request regarding the employee or applicant’s own medical history.

This is of particular concern in the post-offer, pre-employment context, since employers in most instances will have literally no control over the form and format used by personal physicians in providing medical information pursuant to legitimate requests. While employers may attempt to narrow the scope of each request to minimize the risk of acquiring irrelevant genetic information, in reality, the average HR practitioner with little or no medical expertise likely will have difficulty identifying on a request form what information *is* or *is not* genetic in nature. Furthermore, many physicians often fail to conform their responses to specific, narrow requests for particular information in any event, perhaps due to a misperception on their part that *more* information is *better*.

If an employer’s request for medical information is legitimate and does not on its face seek or encourage the submission of irrelevant genetic information (e.g., family medical history) the employer should be protected from liability in the event it inadvertently acquires such information through an overly broad response from a personal physician or other medical professional. Therefore, EEAC and HR Policy strongly urge the Commission to make clear in its Proposed Rule that the acquisition of any genetic information (including family medical history) during an employer’s post-offer, pre-employment medical evaluation process that was not specifically requested or required should always be treated as inadvertent (discussed more fully below), subject only to Title II’s prohibited use, disclosure and confidentiality provisions.

Proposed Section 1635.3(d) – Genetic Monitoring

This term also is specifically defined in the statute, but the Proposed Rule expands on that definition to include “the periodic examination of employees to evaluate acquired modifications to their genetic material, such as chromosomal damage or evidence of increased occurrence of mutations, caused by the toxic substances they use or are exposed to in performing their jobs, in order to identify, evaluate, and respond to the effects of or control adverse environmental exposure in the workplace.”

In the Preamble to the Proposed Rule, the Commission notes that an employer may acquire genetic information as part of genetic monitoring “that is either required by law or voluntarily undertaken, provided the entity complies strictly with certain conditions.” There a number of federal laws and regulations that require covered employers to collect detailed medical information, including family medical information and/or other genetic information, in order to determine, for instance, specific health risks and suitability for certain tasks and in order to provide critical information in the event of a medical emergency. Furthermore, retention of such information is subject to federal Occupational Safety and Health Administration (OSHA) minimum record retention requirements.

We thus urge the Commission to state *explicitly* in Section 1635.3(d) that genetic monitoring performed by employers as required by state and/or federal health and safety rules does not violate Title II’s prohibition against deliberate acquisition of genetic information.

Proposed Section 1635.3(f) – Genetic Test

“Genetic test” is defined in the statute itself, and the Proposed Rule incorporates that definition, under which “genetic test” means generally “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, of chromosomal changes.” The Proposed Rule currently describes two specific types of tests that are not genetic: (1) a test for the presence of a virus that is not composed of human DNA, RNA, chromosomes, proteins, or metabolites, and (2) a test for the presence of alcohol or drugs. With regard to the latter, proposed Section 1635.3(f) specifies that while an ordinary drug or alcohol test would not be covered, a test to “determine whether an individual has a genetic predisposition for alcoholism or drug use is a genetic test.”

EEAC and HR Policy support proposed Section 1635.3(f), but recommend that the Commission provide additional examples within the provision itself of other tests that are not genetic, such as those described in the Preamble regarding tests that detect for “infectious and communicable diseases that may be transmitted through food handling,” and routine screenings such as complete blood counts (CBCs), cholesterol tests and liver-function tests.

Proposed Section 1635.3(g) – Manifestation or Manifested

Proposed Section 1635.3(g) defines the term “Manifestation or Manifested” to mean, “with respect to a disease, disorder, or pathological condition:

That an individual has been or could reasonably be diagnosed with the disease, disorder, or pathological condition by a health care professional with appropriate training and expertise in the field of medicine involved. For purposes of this part,

a disease, disorder, or pathological condition is not manifested if the diagnosis is based principally on genetic information or on the results of one or more genetic tests.”

Proposed Section 1635.12, discussed more fully below, provides that medical information about a manifested disease, disorder, or pathological condition is not “genetic information.” Because the use, acquisition, or disclosure of medical information that is not “genetic information” does not violate GINA, it is important that the Commission provide as much clarity as possible regarding how the term “manifest or manifested” is to be construed. For instance, would medical information obtained post-offer, pre-employment to confirm a preliminary diagnosis of a manifested disease constitute genetic information? EEAC and HR Policy appreciate any clarification the Commission is able to provide on this issue.

Proposed Section 1635.5 – Limiting, Segregating and Classifying

The Commission’s Proposed Rule reiterates the statutory prohibition against “limiting, segregating, or classifying” individuals based on their genetic information. The Preamble provides the example of an employee with a family medical history of heart disease, stating that an employer would violate GINA if it reassigned that person based on a belief that his or her current job would be “too stressful and might eventually lead to heart-related problems for the employee.”

As discussed above, to the extent employers may be required by law to limit or restrict an employee’s performance of a particular job based on the presence of genetically determined characteristics, we urge the Commission to explicitly state that under such circumstances, an employer will not be deemed to have unlawfully limited, segregated, or classified an employee based on genetic information.

EEAC and HR Policy fully support Proposed Section 1635.5(b), which makes clear that GINA provides no cause of action for disparate impact discrimination.

Proposed Section 1635.8 – Acquisition of Genetic Information

Proposed Section 1635.8 attempts to clarify the six narrow exceptions that apply to an employer’s acquisition of genetic information.

Inadvertently Requesting or Requiring Genetic Information (Proposed Section 1635.8(b)(1))

The first exception under GINA pertains to inadvertently requesting or requiring genetic information. Because of the many ways in which employers may innocently acquire an employee’s genetic information – including, in particular, family medical history – EEAC and HR Policy especially appreciate the Commission’s efforts to provide practical guidance regarding how this exception should be applied. We note that the

Proposed Rule correctly notes that the exception “applies in, *but is not necessarily limited to,*” situations in which:

- A manager, supervisor, union representative, or employment agency personnel learns genetic information about an individual by overhearing a conversation between the individual and others;
- A manager, supervisor, union representative, or employment agency personnel learns genetic information about an individual by receiving it from the individual or third parties without having solicited or sought the information;
- An individual provides genetic information as part of documentation to support a request for reasonable accommodation under the ADA or similar state law, “so long as the covered entity’s request for such documentation is lawful;”
- An employer requests medical information (other than genetic information) as permitted by law from an individual who responds by providing, among other things, genetic information;
- An individual provides genetic information to support a request for leave not mandated by law, as long as the request for documentation complies with the ADA and other laws that limit a covered entity’s access to medical information; or
- A covered entity learns genetic information about an individual in response to an inquiry about the individual’s general health, an inquiry about whether the individual has any current disease, disorder, or pathological condition, or an inquiry about the general health of an individual’s family member.

The Commission in the Preamble to the Proposed Rule also notes correctly Congress intended this exception to address the so-called “water cooler” situation in which an employer “unwittingly receives otherwise prohibited genetic information” through “casual conversations” with its employees. While this statutory exception “specifically refers to family medical history,” the Preamble observes that Congress “did not want casual conversation among co-workers regarding health to trigger federal litigation whenever someone mentioned something that might constitute protected family medical information.”

Proposed Section 1635.8(b)(1) confirms, as described in the Preamble, that an employer will be considered to have inadvertently acquired genetic information “where a manager or supervisor overhears a conversation among co-workers that includes information about family medical history, or receives an unsolicited e-mail message from

a co-worker that includes genetic information.” The Commission in the Preamble to the Proposed Rule makes clear that Congress simply did not intend for employers to be held liable for GINA violations based on having overheard conversations in which genetic information is disclosed such as, for instance, a conversation in which “one employee tells another that her mother had a genetic test to determine whether she was at increased risk of getting breast cancer.”

The Preamble correctly points out that if the exception were read narrowly to cover only family medical history, the type of acquisition described in the example above “would violate GINA, even though it occurred inadvertently, because information that a family member has had a genetic test, while genetic information, is not information about the occurrence of a disease or disorder in a family member.” The Preamble further provides that the exception would apply “in any situation in which an employer might inadvertently acquire genetic information, not just conversations between co-workers that are overheard,” and provides specific examples of practical, real-world situations that would fall within the exception. EEAC and HR Policy strongly support the Commission’s use of practical examples in describing the many circumstances in which the exception would apply.

We strongly disagree, however, with the Commission’s position in the Preamble to the Proposed Rule that *any* acquisition of family medical history or other genetic information through a post-offer, pre-employment medical examination falls outside of the “inadvertent” exception and thus would violate GINA. According to the Commission, as of November 21, 2009, Title II’s effective date, “employers no longer will be permitted to obtain *any* genetic information, including family medical history, from post-offer applicants.” (Emphasis in original).

The Commission’s proposed interpretation fails to distinguish between the employer that simply *obtains* as part of a post-offer, pre-employment medical examination – or a fitness-for-duty examination conducted for legitimate business reasons during employment – genetic information that is unresponsive to the employer’s legitimate and sufficiently narrowly tailored request, and the employer that *deliberately* requests or requires submission of the prohibited genetic information. As a result, it places the former unwary employer in the untenable position of being deemed to have violated the Act, not based on its own actions, but rather on the (possibly deliberate) actions of (potentially opportunistic) applicants and employees seeking to create a violation where one otherwise would not exist. EEAC and HR Policy urge the Commission to make that necessary distinction clear in the Final Rule.

Employer-Provided Health or Genetic Services (Section 1635.8(b)(2))

The second GINA exception pertains to employer-provided health or genetic services that are provided as part of a voluntary employee wellness program. Proposed Section 1635.8(b)(2) restates the statutory language, placing particular emphasis on the fact that any such wellness program must be voluntary and, as is the case under the ADA,

will only be considered voluntary “as long as an employer neither requires participation nor penalizes employees who do not participate.”

There is a trend among many companies with wellness programs to encourage participation by offering employees financial inducements such as, for instance, a “credit” or “discount” towards health insurance benefits or a “cash bonus” upon completion of a smoking cessation program.

Our members believe that there are strong public policy reasons for offering financial inducements to participate in corporate wellness programs, and it simply cannot be said that any amount of financial incentive – regardless of the level – necessarily will result in a “takeaway” or financial “penalty” against those who elect not to participate. At the same time, we recognize that some financial incentives might be so generous as to place an inordinate amount of pressure on an employee to participate, thus casting doubt as to whether or not the program truly is voluntary.

Because the Commission has not taken a formal position on what level of financial inducement may be offered as part of a voluntary corporate wellness program, employers are uncertain as to whether, and to what extent, their wellness programs will fall within the Proposed Section 1635.8(b)(2) exception. We therefore respectfully request that the Commission clarify the issue in its Final Rule, noting in particular that simply offering a financial inducement does not automatically render a wellness program “involuntary” and outside the scope of the voluntary wellness program exception.

FMLA Leave Requests (Proposed Section 1635.8(b)(3))

The Proposed Rule restates the statutory exception for requests for family medical history needed to comply with leave certification requirements under the federal Family and Medical Leave Act or similar state law. The Preamble points out that the receipt of family medical history under those circumstances would not amount to a violation, but that the information still would be subject to GINA’s confidentiality provisions and thus would have to be kept in a separate medical file and treated as confidential. EEAC and HR Policy support the Commission’s Proposed Section 1635.8(b)(3) as consistent with the plain language of the statute.

Commercially and Publicly Available Information (Proposed Section 1635.8(b)(4))

Proposed Section 1635.8(b)(4) is consistent with the statutory exception for regarding commercially and publicly available information. It provides that employers that acquire genetic information from “documents that are commercially and publicly available for review or purchase including newspapers, magazines, periodicals or books, or through electronic media, such as information communicated through television, movies or the Internet” will not violate GINA.

EEAC and HR Policy agree with Proposed Section 1635.8(b)(4), but would add that personal web pages and social networking sites also should fall squarely within this exception, as they, too, are publicly available for review. Indeed, social networking is fast becoming the communication mode of choice among growing numbers of individuals.

Proposed Section 1635.9 – Confidentiality

Proposed Section 1635.9 seeks to implement the statute's strict requirements regarding the treatment and disclosure of genetic information. Among other things, it provides that employers must treat genetic information as confidential medical records, as they do under the ADA, and must segregate such information, if in writing, from other personnel records. For genetic information that is provided to the employer verbally, the Proposed Rule provides that the employer is not required to reduce the information to writing, but must ensure the information is kept confidential.

Importantly, Proposed Section 1635.9 makes clear that genetic information may be kept in the same file as confidential ADA medical documentation, which EEAC and HR Policy fully support. To that point, we urge the Commission to explicitly provide that employers whose existing employee medical records contain genetic information, such as family medical history, will *not* be subject to liability for deliberate acquisition of genetic information and will *not* be required to go back and remove from existing files genetic information obtained long ago.

With regard to disclosure of genetic information in response to a court order, the Preamble emphasizes that the employer's response containing the genetic information must be "carefully tailored" to comply with the order and points out that this exception does not apply to other aspects of litigation, such as "in response to discovery requests that are not governed by an order specifying the genetic information that must be disclosed." We recommend that the Final Rule also clarify that an employer that fails to provide genetic information in response to a general discovery request – and in the absence of a specific order relating directly to such information – should not be subject to court sanctions or penalties.

Proposed Section 1635.10 – Enforcement and Remedies

Proposed Section 1635.10 provide for the same enforcement mechanisms and remedies for GINA violations that currently are available under Title VII. In addition, although not specifically required by the statute itself, the Preamble to the Proposed Rule provides that employers will be required to post notices in conspicuous places informing employees and applicants of their GINA rights, and that the Commission will publish in the *Federal Register* "appropriate language" to be used in such notices prior to the effective date of GINA's employment provisions. If this posting requirement will consist of more than simply modifying the existing EEO poster to include reference to GINA, we

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urge the Commission to provide in the Final Rule specific language to be used by employers in order to satisfy this requirement.

Conclusion

EEAC and HR Policy appreciate the opportunity to comment on the Commission's Proposed Rule, and respectfully ask that it revise the proposal as discussed above.