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## What Employers Need to Know - Requests for Medical Information and the Genetic Information Nondiscrimination Act: Avoiding a Hidden Pitfall [Ober|Kaler]

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**The Genetic Information Non-discrimination Act took effect in November 2009. It should also be noted that many States, including Maryland, have separate statutes prohibiting the acquisition of genetic information and discrimination against individuals on the basis of their genetic background.**

According to the United States Equal Employment Opportunity Commission ("EEOC"), "genetic information" includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history).

What many employers fail to realize is how the Act might affect routine requests for medical information. To that point, it is not unusual for employers to request medical disclosures from employees. Such information might be sought during the hiring process (i.e, drug screening). Similarly, medical information might be requested when an employer attempts to determine an employee's physical limitations in the context of a disability-related request for an accommodation. Employers should approach either scenario with some caution.

Under federal law, an employer may not "request, require, or purchase genetic information of an individual or family member of the individual." The term "request," includes "conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in [an employer] obtaining genetic information." These statutory instructions cover a lot of ground, and given the breadth of these instructions, it doesn't take much effort to imagine the multiple ways that an employer could innocently violate the Act.

Fortunately, there are a number of exceptions and a general safe harbor for employers who inadvertently acquire genetic information. In fact, what many employers may not know is that the Act actually provides recommended language for employers to use in conjunction with requesting an employee's medical information. Use of that language would serve to insulate an employer against liability for violating the Act. Does your company make use of this recommended language contained in the Act in all of its requests for medical disclosures from employees, or an employee's treating physician? The truth is that given the fact that the regulations are fairly new, many employers are very much unaware of the existence of the safe harbor language contained in the Act.

With the current news cycle and social media dominated by reports of possible global pandemic, the issue of personal medical disclosure has taken center stage. Moreover, this is an important and trending issue with the EEOC. In September 2014, the EEOC announced its filing of a lawsuit against a home care agency that required job applicants and other employees to complete a health assessment form that asked for family

medical history. This represents an ideal opportunity for employers to re-assess their policies and practices as it relates to the disclosure of employee medical information.