



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
Legal Counsel

November 10, 2014

TRANSMITTED VIA EMAIL:
WHDPRAComments@dol.gov

Division of Regulations, Legislation, and Interpretation
Wage and Hour Division
U.S. Department of Labor
Room S-3502
200 Constitution Avenue, N.W.
Washington, D.C. 20210

Re: Wage Hour Division (WHD) optional use forms - WHD Publication 1420, WH-380-E, WH-380-F, WH-381, WH-382, WH-384, WH-385, and WH-385-V;
OMB Control Number 1235-0003

To Whom It May Concern:

The Equal Employment Opportunity Commission (EEOC) submits these comments in response to the Department of Labor's (DOL) request for comments concerning the renewal of the information collection referenced above. *See* 79 FR 54299 (September 11, 2014). This collection contains optional use forms created by the Wage and Hour Division (WHD) to assist employers and employees in meeting their third-party notification obligations under the Family and Medical Leave Act (FMLA). Two of the forms, WH-380-E (Certification of Health Care Provider for Employee's Serious Health Condition) and WH-380-F (Certification of Health Care Provider for Family Member's Serious Health Condition) implicate Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA). To avoid potential conflicts with GINA, we recommend that WHD revise form WH-380-E by adding model language from the EEOC's regulations. We further recommend that WHD revise both forms WH-380-E and WH-380-F by adding a citation to the regulation implementing GINA's confidentiality and disclosure provisions. Both recommendations are described in detail below.

Background on Title II of GINA

As you know, the EEOC enforces the federal laws that prohibit employment discrimination on the basis of an individual's race, color, religion, sex, national origin, age, and disability, as well as retaliation for protected activity. On May 21, 2008, when GINA was signed into law, the EEOC was given authority to enforce an additional prohibition on employment discrimination -- discrimination on the basis of genetic information. *See* 42 U.S.C. § 2000ff *et seq.* GINA became effective on November 21, 2009. The EEOC published a final rule implementing the statute on November 9, 2010. *See* 29 C.F.R. part 1635 (2011).

GINA prohibits employers from using the genetic information of applicants or employees to make employment decisions; from requesting, requiring, or purchasing genetic information of applicants or employees, except in six narrow circumstances; and from disclosing genetic information, except where specifically authorized. *See* 42 U.S.C. §§ 2000ff-1(a)–(b), 2000ff-5. The statute defines genetic information to include not only genetic tests of individuals and their family members, but also the manifestation of disease or disorder in family members, *i.e.*, family medical history. *See* 42 U.S.C. § 2000ff (4).

Addition of Model Language to Form WH-380-E

Employers who use Form WH-380-E will be making a lawful request for medical information from an employee and/or her doctor. However, there is a risk that Form WH-380-E could elicit genetic information. Under Title II of GINA, if an employer acquires genetic information in response to a lawful request for medical information, GINA’s prohibition on requesting, requiring, or purchasing genetic information is implicated. Although there are six exceptions to the general rule prohibiting employers from requesting, requiring, or purchasing genetic information, none of these exceptions apply to Form WH-380-E, unless a revision is made.

The exception for inadvertent acquisition of genetic information is the only one that arguably applies to the acquisition of genetic information through the use of Form WH-380-E. However, as set forth in the regulations implementing GINA at 29 CFR § 1635.8(b)(1)(i)(A), if an employer acquires genetic information in response to a lawful request for medical information, that acquisition will *not* generally be considered inadvertent unless the employer directs the individual and/or health care provider from whom it requested medical information not to provide genetic information. This can be done through the use of model language provided in the regulations at 29 CFR § 1635.8(b)(1)(i)(B). For your convenience, we have reproduced the model language below:

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 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 individual’s family member or an embryo lawfully held be an individual or family member receiving assistive reproductive services.

The regulations provide that failure to give this type of notice when making a lawful request for medical information will not result in liability even if genetic information is received where an employer can show that its request for medical information was not likely to result in the receipt of genetic information. However, broad questions on Form WH-380-E might make this showing difficult. Question 4, for example, asks for a description of “other relevant medical facts, if any,

related to the condition for which the employee seeks leave (such medical facts may include symptoms, diagnosis, or any regimen of continuing treatment such as the use of specialized equipment)” and the form ends with a general request for “additional information” related to any of the previous questions. Moreover, the EEOC has received questions from employers about whether using the form without attaching the model language could result in liability if they receive genetic information. We therefore suggest that the model language (or similar language) be added to Form WH-380-E to avoid any potential GINA conflicts.

Addition of Citation to Confidentiality & Disclosure Rules to Forms WH-380- E and WH-380-F

Forms WH-380-E and WH-380-F note that employers must generally maintain records and documents relating to medical certifications, recertifications, or medical histories of employees (WH-380-E) and employees’ family members (WH-380-F) created for FMLA purposes as confidential medical records in separate files/records from the usual personnel files and in accordance with 29 CFR § 1630.14(c)(1), if the Americans with Disabilities Act applies. However, since the use of these forms may result (and, in the case of WH-380-F definitely will result) in the acquisition of genetic information, a citation to the regulation implementing GINA’s confidentiality and disclosure provisions should be inserted in the last sentence of the paragraph in each form labeled “Instructions to the Employer” in Section 1. We suggest that the following italicized language be added:

For WH-380-E (the use of which may or may not result in the acquisition of genetic information):

“ . . . in accordance with 29 CFR § 1630.14(c)(1), if the Americans with Disabilities Act applies, *and in accordance with 29 CFR § 1635.9, if the Genetic Information Nondiscrimination Act applies.*”

For WH-380-F (the use of which will definitely result in the acquisition of genetic information):

“ . . . *in accordance with 29 CFR § 1635.9 (regulations implementing Title II of the Genetic Information Nondiscrimination Act), and in accordance with 29 CFR § 1630.14(c)(1), if the Americans with Disabilities Act applies.*”

Thank you for the opportunity to provide these comments in response to the proposed information collection. Please feel free to contact me at (202) 663-4516 if you have any questions.

Sincerely,

/s/

Kerry Leibig
Senior Attorney Advisor