

§ 1635.9

purchases information about a manifested disease, disorder, or pathological condition of an employee, member, or apprenticeship program participant whose family member is an employee for the same employer, a member of the same labor organization, or a participant in the same apprenticeship program. For example, an employer will not violate this section by asking someone whose sister also works for the employer to take a post-offer medical examination that does not include requests for genetic information.

(2) A covered entity does not violate this section when it requests, requires, or purchases genetic information or information about the manifestation of a disease, disorder, or pathological condition of an individual's family member who is receiving health or genetic services on a voluntary basis, as long as the requirements of paragraph (b)(2) of this section, including those concerning authorization and inducements, are met. For example, an employer does not unlawfully acquire genetic information about an employee when it asks the employee's family member who is receiving health services from the employer if her diabetes is under control. Nor does an employer unlawfully acquire genetic information about an employee when it seeks information—through a medical questionnaire, a medical examination, or both—about the manifestation of disease, disorder, or pathological condition of the employee's family member who is completing a health risk assessment on a voluntary basis in connection with the family member's receipt of health or genetic services (including health or genetic services provided as part of an employer-sponsored wellness program) offered by the employer in compliance with paragraph (b)(2) of this section.

(d) *Medical examinations related to employment.* The prohibition on acquisition of genetic information, including family medical history, applies to medical examinations related to employment. A covered entity must tell health care providers not to collect genetic information, including family medical history, as part of a medical examination intended to determine the ability to perform a job, and must take additional reasonable measures within

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its control if it learns that genetic information is being requested or required. Such reasonable measures may depend on the facts and circumstances under which a request for genetic information was made, and may include no longer using the services of a health care professional who continues to request or require genetic information during medical examinations after being informed not to do so.

(e) A covered entity may not use genetic information obtained pursuant to subparagraphs (b) or (c) of this section to discriminate, as defined by §§ 1635.4, 1635.5, or 1635.6, and must keep such information confidential as required by § 1635.9.

[75 FR 68932, Nov. 9, 2010, as amended at 81 FR 31157, May 17, 2016; 83 FR 65297, Dec. 20, 2018]

§ 1635.9 Confidentiality.

(a) *Treatment of genetic information.* (1) A covered entity that possesses genetic information in writing about an employee or member must maintain such information on forms and in medical files (including where the information exists in electronic forms and files) that are separate from personnel files and treat such information as a confidential medical record.

(2) A covered entity may maintain genetic information about an employee or member in the same file in which it maintains confidential medical information subject to section 102(d)(3)(B) of the Americans with Disabilities Act, 42 U.S.C. 12112(d)(3)(B).

(3) Genetic information that a covered entity receives orally need not be reduced to writing, but may not be disclosed, except as permitted by this part.

(4) Genetic information that a covered entity acquires through sources that are commercially and publicly available, as provided by, and subject to the limitations in, 1635.8(b)(4) of this part, is not considered confidential genetic information, but may not be used to discriminate against an individual as described in §§ 1635.4, 1635.5, or 1635.6 of this part.

(5) Genetic information placed in personnel files prior to November 21, 2009 need not be removed and a covered entity will not be liable under this part

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for the mere existence of the information in the file. However, the prohibitions on use and disclosure of genetic information apply to all genetic information that meets the statutory definition, including genetic information requested, required, or purchased prior to November 21, 2009.

(b) *Exceptions to limitations on disclosure.* A covered entity that possesses any genetic information, regardless of how the entity obtained the information (except for genetic information acquired through commercially and publicly available sources), may not disclose it except:

(1) To the employee or member (or family member if the family member is receiving the genetic services) about whom the information pertains upon receipt of the employee's or member's written request;

(2) To an occupational or other health researcher if the research is conducted in compliance with the regulations and protections provided for under 45 CFR part 46;

(3) In response to an order of a court, except that the covered entity may disclose only the genetic information expressly authorized by such order; and if the court order was secured without the knowledge of the employee or member to whom the information refers, the covered entity shall inform the employee or member of the court order and any genetic information that was disclosed pursuant to such order;

(4) To government officials investigating compliance with this title if the information is relevant to the investigation;

(5) To the extent that such disclosure is made in support of an employee's compliance with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws; or

(6) To a Federal, State, or local public health agency only with regard to information about the manifestation of a disease or disorder that concerns a contagious disease that presents an imminent hazard of death or life-threatening illness, provided that the individual whose family member is the subject of the disclosure is notified of such disclosure.

(c) *Relationship to HIPAA Privacy Regulations.* Pursuant to § 1635.11(d) of this part, nothing in this section shall be construed as applying to the use or disclosure of genetic information that is protected health information subject to the regulations issued pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996.

§ 1635.10 Enforcement and remedies.

(a) *Powers and procedures:* The following powers and procedures shall apply to allegations that Title II of GINA has been violated:

(1) The powers and procedures provided to the Commission, the Attorney General, or any person by sections 705 through 707 and 709 through 711 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-4 through 2000e-6 and 2000e-8 through 2000e-10, where the alleged discrimination is against an employee defined in 1635.2(c)(1) of this part or against a member of a labor organization;

(2) The powers and procedures provided to the Commission and any person by sections 302 and 304 of the Government Employees Rights Act, 42 U.S.C. 2000e-16b and 2000e-16c, and in regulations at 29 CFR part 1603, where the alleged discrimination is against an employee as defined in § 1635.2(c)(2) of this part;

(3) The powers and procedures provided to the Board of Directors of the Office of Compliance and to any person under the Congressional Accountability Act, 2 U.S.C. 1301 *et seq.* (including the provisions of Title 3 of that act, 2 U.S.C. 1381 *et seq.*), where the alleged discrimination is against an employee defined in § 1635.2(c)(3) of this part;

(4) The powers and procedures provided in 3 U.S.C. 451 *et seq.*, to the President, the Commission, or any person in connection with an alleged violation of section 3 U.S.C. 411(a)(1), where the alleged discrimination is against an employee defined in § 1635.2(c)(4) of this part;

(5) The powers and procedures provided to the Commission, the Librarian of Congress, and any person by section 717 of the Civil Rights Act, 42 U.S.C. 2000e-16, where the alleged discrimination is against an employee defined in § 1635.2(c)(5) of this part.