

Stephen Llewellyn
Executive Officer
Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE., Suite 6NE03F
Washington, DC 20507

Re: RIN 3046-AA84

Dear Mr. Llewellyn,

I am writing on behalf of the International Public Management Association for Human Resources (IPMA-HR), the League of Minnesota Cities and the International Municipal Lawyers Association (IMLA) in response to the Notice of Proposed Rulemaking under the Genetic Nondiscrimination Act of 2008.

IPMA-HR is an association representing the interests of federal, state and local government human resources professionals. The association's members are often the ones with direct responsibility for handling health-related information and for making employment decisions.

The League of Minnesota Cities is a membership organization dedicated to promoting excellence in local government. The League represents more than 800 member cities.

IMLA is a professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA serves more than 2,500 member municipalities and local government entities in the United States and Canada, and is the only international organization devoted exclusively to addressing the needs of local government lawyers.

The Equal Employment Opportunity Commission (EEOC)'s rulemaking in this area is of particular importance to our associations' members.

One area where human resources professionals are likely to encounter significant difficulty is with Section 1635.8: Acquisition of genetic information. As the EEOC recognizes in the notice of proposed rulemaking, there are many instances where an employer's request for medical information related to the need for leave may run afoul of

the genetic nondiscrimination act. In preparing the final regulations we request that the commission provide as much detail and as many examples as possible, including possibly sample forms, to limit the liability of well-meaning employers.

Section 1635.8(2) addresses the acquisition of genetic information as part of voluntary wellness programs. This provision is particularly important to our members because approximately two-thirds of public employers offer disease management and/or wellness programs. According to the *Health Care Cost Control: Industry Approaches and Attitudes* survey published by the International Foundation of Employee Benefit Plans in January 2009, public employers who responded to the survey indicate they have implemented a disease management (69%) or a wellness program (65%).

These efforts to improve the health of employees should be encouraged and the EEOC should be mindful to limit the impact of the genetic nondiscrimination regulations on these programs. The purpose of the programs is to lower healthcare costs and to improve the health of employees, not to discriminate based on genetic information.

Therefore we encourage the commission to define "voluntary" broadly and in a way that does not interfere with the programs. The Health Insurance Portability and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA) already define voluntary programs and provide adequate protection to employees so we ask the commission to simply adopt the definition in the existing laws.

In addition, the summary to the notice of proposed rulemaking states that, "[A]lthough not stated in the proposed regulation, a covered entity that receives 'aggregate' information may still violate GINA where the small number of participants, alone or in conjunction with other factors, makes an individual's genetic information readily identifiable."

We would respectfully request that the commission drop this language. Unless an employer actually discriminates against an employee in this situation, an employer should not be liable simply for being able to identify an employee through aggregate information. Many employers are small enough that information could possibly identify an

individual employee. Creating liability in this situation may have a chilling effect on wellness programs.

Another area of particular concern for our members is the impact of GINA on post-offer medical exams discussed in the summary to the notice of proposed rulemaking:

"Thus, even though the ADA allows an employer to require a medical examination of all employees to whom it has offered a particular job, for example, to determine whether they have heart disease that would affect their ability to perform a physically demanding job, GINA would prohibit inquiries about family medical history of heart disease as part of such an examination. Such a limitation will not affect an employer's ability to use a post-offer medical examination for the limited purpose of determining an applicant's current ability to perform a job."

Many of our members have responsibility for hiring public safety officers and a post-offer medical exam is frequently, if not always, part of the application process.

The League of Minnesota Cities states their best practice:

As a general rule, the city should not ask for any more information than it absolutely needs or share information with anyone who does not have a clear business reason for knowing the information. For example, some cities conduct post-offer, pre-employment physical examinations on job candidates. ***The best practice for such examinations is to provide the doctor or clinic with a list of the essential functions of the position and ask them to state only whether or not the candidate can perform those functions.*** Additional medical information is only needed if the city must attempt to provide reasonable accommodation or determine whether an applicant would be a direct threat of safety to themselves or others.

Generally cities do not dictate to the medical practitioner how to conduct their exam of the patient to determine fitness for duty. This is a decision made by the licensed, medical provider, who may use family history inquiry as a standard procedure for medical evaluation. Cities generally

do not have access to their medical provider's forms and procedures related to conducting exams.

Some cities may not even be aware that their medical provider is asking family medical history questions - but will still be subject to liability if they do. The regulation places non-medically trained employers in the awkward (and perhaps untenable position) of explaining/educating medical professionals on how to best conduct an exam of a patient presented to them. Our suggestion to remedy this would be to allow the medical provider under the regulations to ask these questions, so long as this family history information is not transmitted to the employer.

Thank you for considering our comments. If you have any questions or would like additional information we may be reached at (703) 549-7100.

Sincerely,

Neil E. Reichenberg
Executive Director
International Public Management Association for Human
Resources

Thomas Grundhoefer
General Counsel
League of Minnesota Cities

Charles W. Thompson, Jr.
General Counsel and Executive Director
International Municipal Lawyers Association