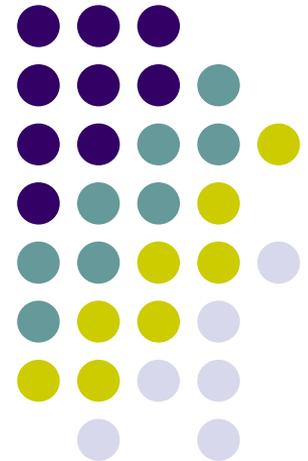
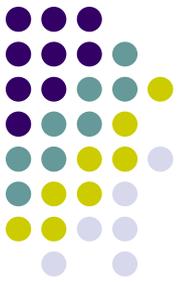


# Genetic Information Nondiscrimination Act of 2008 and EEOC's Proposed Regulation

Equal Employment Opportunity Commission  
Office of Legal Counsel



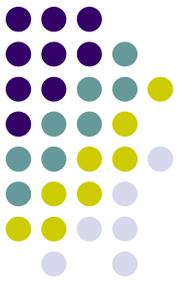
# Basic Rules Related to Employment



- **Prohibits use of genetic information to discriminate in employment**
- **Restricts the acquisition of genetic information by employers and other entities covered by GINA**
- **Requires that covered entities keep genetic information confidential, subject to limited exceptions**

# What is Genetic information?

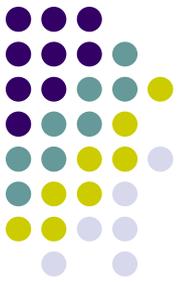
## Part 1



- Genetic Information means information about:
  1. An individual's **genetic tests (1635.3(f))**
  2. Genetic tests of **family members (1635.3(a))**
  3. The manifestation of a disease or disorder in family members (**family medical history – 1635.3(b)**)

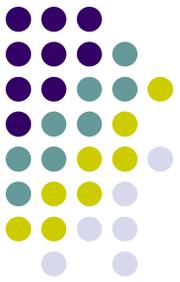
# What is Genetic Information?

## Part 2



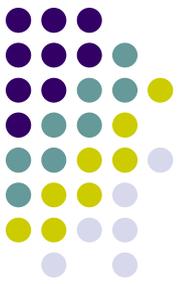
- Genetic information includes:
  4. **Request for or receipt of genetic services by an individual or family member**
    - **Meaning: genetic test, counseling, education**
  5. **Genetic information of a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using an assisted reproductive technology.**

# Acquisition of Genetic Information Prohibited



- **General Rule – 1635.8(a)**
  - **Covered entities shall not request, require, or purchase genetic information of an applicant or employee**
  - **There are six narrow exceptions to this prohibition.**

# 1. No Liability for Inadvertent Acquisition – 1635.8(b)(1)



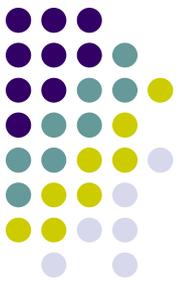
- Protects covered entity that unwittingly receives otherwise prohibited genetic information
- Examples of inadvertent acquisition – 1635.8(b)(1)(ii):
  - **receipt of unsolicited email message that includes genetic information about an employee;**
  - **during a casual conversation or in response to a general inquiry, e.g., “How are you?”**
  - **documentation to support a request for reasonable accommodation**



# Inadvertent Acquisition Exception and Lawful Medical Inquiries/Exams

- ADA: Employers may conduct post-offer medical examinations/inquiries or fitness-for-duty examinations consistent with ADA requirements
- GINA:
  - **Employer that asks for genetic information as part of an inquiry/medical exam will NOT be considered to have acquired the information inadvertently**
  - **Covered entities are prohibited from obtaining genetic information through any type of medical exam required of employees (i.e. post-offer and fitness for duty exams)**

## 2. Permissible to Acquire Genetic Information Through Employer-Sponsored Health Services – 1635.8(b)(2)

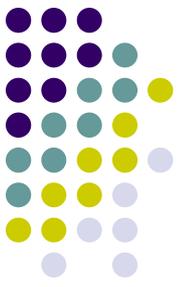


- **Employer may request genetic information as part of health or genetic services, such as a wellness program, that meets specific requirements:**
  - **Voluntary: employer must not require participation nor penalize employees who do not participate**
  - **Written request and knowing authorization**
  - **Information goes only to individual and health care provider**
  - **Employer gets information only in aggregate form**

### 3. Permissible to Acquire Family Medical History under FMLA – 1635.8(b)(3)



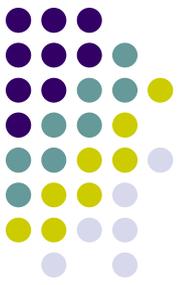
- Individual requesting leave under FMLA or other similar local or State laws to care for family member with serious health condition will be required to provide family medical history
- Covered entity who receives this information does not violate GINA, but must keep it in separate medical file and treat it as a confidential medical record



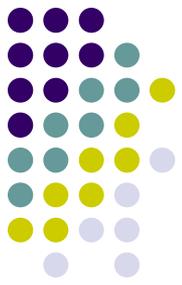
## **4. Permissible to Acquire Genetic Information Through Commercially & Publicly Available Documents – 1635.8(b)(4)**

- **Newspapers, periodicals, magazines, books**
- **Information obtained through electronic media such as television, movies, or the Internet**
- **Exception does not apply to medical databases, court records, or research databases available to scientists on a restricted basis.**

# 5. Permissible to Acquire Genetic Information Through Genetic Monitoring – 1635.8(b)(5)

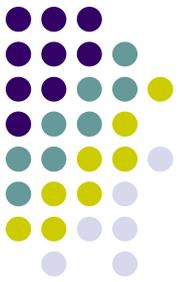


- **Must meet certain requirements:**
  - **Written notice and knowing, voluntary authorization (unless required by law or regulation)**
  - **Information goes only to individual and health care provider or certified genetic counselor involved in monitoring program**
  - **Covered entity gets information only in the aggregate**



## **6. Permissible to Acquire for DNA Testing – 1635.8(b)(6)**

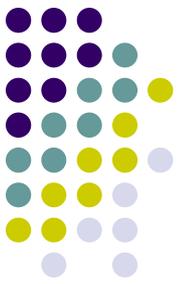
- **Applies only to employers that engage in DNA testing for law enforcement purposes as a forensic laboratory or for purposes of human remains identification**
- **These employers may require genetic information from employees only to the extent that such genetic information is used for analysis of DNA markers for quality control to detect sample contamination**



# Confidentiality - 1635.9

- Beginning Nov. 21, 2009, and thereafter, genetic information that an employer has must be kept confidential and placed in a separate medical file (ADA file is OK)
- Limited disclosure rules, some similar to ADA's rules, others unique to GINA – see 1635.9(b)

# The Firewall – 1635.11(b) & (c)



- Specific section addresses relationship between GINA Titles I (health insurance) & II (employment)
- Basic point: to ensure that health plan or issuer provisions or actions are addressed and remedied through ERISA, the Public Health Service Act, or the Internal Revenue Code, while actions taken by employer and other GINA Title II entities are remedied through GINA Title II.