

§ 1635.11

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.

(b) *Remedies.* The following remedies are available for violations of GINA sections 202, 203, 204, 205, 206, and 207(f):

(1) Compensatory and punitive damages as provided for, and limited by, 42 U.S.C. 1981a(a)(1) and (b);

(2) Reasonable attorney's fees, including expert fees, as provided for, and limited by, 42 U.S.C. 1988(b) and (c); and

(3) Injunctive relief, including reinstatement and hiring, back pay, and other equitable remedies as provided for, and limited by, 42 U.S.C. 2000e-5(g).

(c) *Posting of Notices.* (1) Every covered entity shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this regulation and information pertinent to the filing of a complaint.

(2) A willful violation of this requirement shall be punishable by a fine of not more than \$100 for each separate offense.

§ 1635.11 Construction.

(a) *Relationship to other laws, generally.* This part does not—

(1) Limit the rights or protections of an individual under any other Federal, State, or local law that provides equal or greater protection to an individual than the rights or protections provided for under this part, including the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*), the Rehabilitation Act of 1973 (29 U.S.C. 701 *et seq.*), and State and local laws prohibiting

29 CFR Ch. XIV (7-1-11 Edition)

genetic discrimination or discrimination on the basis of disability;

(2) Apply to the Armed Forces Repository of Specimen Samples for the Identification of Remains;

(3) Limit or expand the protections, rights, or obligations of employees or employers under applicable workers' compensation laws;

(4) Limit the authority of a Federal department or agency to conduct or sponsor occupational or other health research in compliance with the regulations and protections provided for under 45 CFR part 46;

(5) Limit the statutory or regulatory authority of the Occupational Safety and Health Administration or the Mine Safety and Health Administration to promulgate or enforce workplace safety and health laws and regulations; or

(6) Require any specific benefit for an employee or member or a family member of an employee or member (such as additional coverage for a particular health condition that may have a genetic basis) under any group health plan or health insurance issuer offering group health insurance coverage in connection with a group health plan.

(b) *Relation to certain Federal laws governing health coverage.* (1) *General:* Nothing in GINA Title II provides for enforcement of, or penalties for, violation of any requirement or prohibition of a covered entity subject to enforcement under:

(i) Amendments made by Title I of GINA.

(ii) Section 701(a) of the Employee Retirement Income Security Act (29 U.S.C. 1181) (ERISA), section 2704(a) of the Public Health Service Act, and section 9801(a) of the Internal Revenue Code (26 U.S.C. 9801(a)), as such sections apply with respect to genetic information pursuant to section 701(b)(1)(B) of ERISA, section 2704(b)(1)(B) of the Public Health Service Act, and section 9801(b)(1)(B) of the Internal Revenue Code, respectively, of such sections, which prohibit a group health plan or a health insurance issuer in the group market from imposing a preexisting condition exclusion based solely on genetic information, in the absence of a diagnosis of a condition;

(iii) Section 702(a)(1)(F) of ERISA (29 U.S.C. 1182(a)(1)(F)), section 2705(a)(6) of the Public Health Service Act, and section 9802(a)(1)(F) of the Internal Revenue Code (26 U.S.C. 9802(a)(1)(F)), which prohibit a group health plan or a health insurance issuer in the group market from discriminating against individuals in eligibility and continued eligibility for benefits based on genetic information; or

(iv) Section 702(b)(1) of ERISA (29 U.S.C. 1182(b)(1)), section 2705(b)(1) of the Public Health Service Act, and section 9802(b)(1) of the Internal Revenue Code (26 U.S.C. 9802(b)(1)), as such sections apply with respect to genetic information as a health status-related factor, which prohibit a group health plan or a health insurance issuer in the group market from discriminating against individuals in premium or contribution rates under the plan or coverage based on genetic information.

(2) *Application.* The application of paragraph (b)(1) of this section is intended to prevent Title II causes of action from being asserted regarding matters subject to enforcement under Title I or the other genetics provisions for group coverage in ERISA, the Public Health Service Act, and the Internal Revenue Code. The firewall seeks 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 employers and other GINA Title II covered entities are remedied through GINA Title II. Employers and other GINA Title II covered entities would remain liable for any of their actions that violate Title II, even where those actions involve access to health benefits, because such benefits are within the definition of compensation, terms, conditions, or privileges of employment. For example, an employer that fires an employee because of anticipated high health claims based on genetic information remains subject to liability under Title II. On the other hand, health plan or issuer provisions or actions related to the imposition of a preexisting condition exclusion; a health plan's or issuer's discrimination in health plan eligibility, benefits, or premiums based on genetic informa-

tion; a health plan's or issuer's request that an individual undergo a genetic test; and/or a health plan's or issuer's collection of genetic information remain subject to enforcement under Title I exclusively. For example:

(i) If an employer contracts with a health insurance issuer to request genetic information, the employer has committed a Title II violation. In addition, the issuer may have violated Title I of GINA.

(ii) If an employer directs his employees to undergo mandatory genetic testing in order to be eligible for health benefits, the employer has committed a Title II violation.

(iii) If an employer or union amends a health plan to require an individual to undergo a genetic test, then the employer or union is liable for a violation of Title II. In addition, the health plan's implementation of the requirement may subject the health plan to liability under Title I.

(c) *Relationship to authorities under GINA Title I.* GINA Title II does not prohibit any group health plan or health insurance issuer offering group health insurance coverage in connection with a group health plan from engaging in any action that is authorized under any provision of law noted in §1635.11(b) of this part, including any implementing regulations noted in §1635.11(b).

(d) *Relationship to HIPAA Privacy Regulations.* This part does not apply to genetic information that is protected health information subject to the regulations issued by the Secretary of Health and Human Services pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996.

§ 1635.12 Medical information that is not genetic information.

(a) *Medical information about a manifested disease, disorder, or pathological condition.* (1) A covered entity shall not be considered to be in violation of this part based on the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, even if the disease, disorder,