

First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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GINA – A New Employment Law Based on Discrimination in Genetics

In addition to sex, race and a dozen other categories, employers must now comply with another equal opportunity law; GINA, short for Genetic Information Non-Discrimination Act of 2008. On May 21, 2008, President Bush signed GINA. All employers with at least 15 employees must comply with GINA beginning November 21, 2009. This bulletin will give a quick overview of GINA. Further details can be found on the EEOC website, including a new mandatory poster (www.eeoc.gov).

At first blush, GINA has a “futuristic” and limited sense about it. After all, how many employers are out there gathering genetic information? But the law was passed due to quick-moving advances in the field of genetics, and the development of genomic medicine, which could lead to insurability problems and job discrimination against people based on the availability of their genetic information and family histories. Congress found that GINA was necessary to “establish a national and uniform basic standard...to fully protect the public from discrimination and allay their concerns about the potential for discrimination, thereby allowing individuals to take advantage of genetic testing, technologies, research, and new therapies.”

So, as we learn more about advanced techniques and possibilities in genetics and personalized medicine, and the specific personal information becomes available, federal law makers chose to protect the many people who will utilize these techniques from discrimination and retaliation on the job based on their “genetic information.”

GINA has two parts. Title I deals with the use of genetic information in health insurance, and amends portions of the Employee Retirement Income Security Act (ERISA), the Public Health Service Act, and the Internal Revenue Code. More relevant to employers is Title II, which prohibits the use of genetic information in employment decisions, prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements.

Who is Covered?

Title II of GINA applies to private and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs. It also covers Congress and Federal executive branch agencies.

What is “Genetic Information?”

GINA contains a broad definition of “genetic information,” which includes information about an individual’s genetic tests, genetic tests of a family member, and family medical histories. The term “family member” is broadly defined to include the employee’s dependents and also relatives of the employee, or of the employee’s dependents, from the first to the fourth degree. The reason for including so many family members is to prevent employers from inferring that an employee is predisposed to a similar disease or disorder as a family member.

Genetic information does not include tests for alcohol or drug use. Also not included within the definition of “genetic information” is data about the sex or age of an individual or the individual’s family members, or information that an individual currently has a disease or disorder. (However, GINA does not displace other state and federal anti-discrimination laws, such as the ADA and Title VII and FEHA generally, which may restrict employment decisions based on consideration of these issues.)

What Activities are Prohibited?

Prohibited employment practices include: (1) the use of genetic information to make decisions relating to any terms, conditions or privileges of employment; (2) intentional acquisition of genetic information; (3) violation of strict confidentiality requirements spelled out in GINA; and (4) retaliation against an employee who opposes genetic discrimination.

Contrasting point (1) and point (2), the prohibition against using genetic information to make employment decisions is absolute, the restriction against acquiring genetic information has some exceptions.

The general rule is that employers cannot request, require or purchase genetic information concerning any employee or applicant, or family member of an employee or applicant. One exception, known as the “water cooler” exception, applies to the inadvertent acquisition of genetic information. This may occur when a supervisor overhears conversation between co-workers in which genetic information is discussed. An employer may also innocently receive genetic information from an employee in response to a question about the general health of an employee or employee’s family member, or when an employer receives genetic information as part of documentation for a request for reasonable accommodation under the Americans with Disabilities Act (ADA) or other similar law. An employer

may also require a family member’s genetic information if necessary to comply with the Family and Medical Leave Act (FMLA) or other similar state laws. Some other narrow exceptions are found in GINA.

Confidentiality

GINA includes strict rules on maintaining confidentiality of any genetic information that may come into the employer’s possession. The information must be treated in the same way employers treat medical information generally, keeping it confidential and separate from other personnel information, in separate medical files.

Disclosures are only allowed in limited circumstances, including: (1) as necessary to comply with Federal or state medical leave laws, (2) to government agencies investigating compliance with GINA, and (3) in response to a court order provided the employer gives the employee advance notice of the order and potential disclosure. Employers can also make certain disclosures to public health agencies in cases where a contagious disease has manifested, where the disease presents an imminent threat of death or life-threatening illness, provided the employee is given advance notice.

Remedies

The remedies available for GINA violations are the same remedies under Title VII generally. These may include reinstatement, hiring, promotion, back pay, injunctive relief, monetary damages (including punitive damages), and attorneys’ fees and costs. Title VII’s cap on combined compensatory and punitive damages also applies to violations of GINA. These are capped at ranges from \$50,000 for employers with 15-100 employees to \$300,000 for employers with over 500 employees.

What Should Employers Do Now?

1. Post the EEOC’s new “EEO is the Law” poster in the appropriate area in the workplace;
2. Revise equal employment opportunity (EEO) statements in employee handbooks, to include a policy of non-discrimination on the basis of genetic information;
3. Do not request that applicants and employees provide family medical histories;
4. Do not request information about disorders or diseases of an employee’s family members to process leave requests unless directly related to a FMLA or CFRA request;

5. Consider whether any changes are necessary in connection with the administration of employer or sponsored health benefit plans;
6. Abide by GINA's confidentiality rules and separately file all medical information; and
7. Enact service-of-process intake policies to prevent the inadvertent disclosure of genetic information in response to a civil discovery request (such as a subpoena or request for production of documents) that is not accompanied by a court order compelling production.

GINA was enacted based on recognition of developments in the field of genetics, the decoding of the human genome, and advances in genomic medicine. Genetic tests now exist that can inform people whether they may be at risk for developing a specific disease or disorder. But as the number of genetic tests and availability of data increase, so do concerns about whether people may be at risk of losing health coverage or job opportunities if insurers and employers can access their genetic information. Given the scientific advances, it is likely that GINA will become increasingly important in the years ahead.

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