

GINA SAYS: Nice to Meet You (But Don't Tell Me Anything)

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The Genetic Information Nondiscrimination Act of 2008 ("GINA") was enacted "to prohibit discrimination on the basis of genetic information with respect to health insurance and employment." Title II of GINA, the employment provisions codified at 42 U.S.C. §2000ff, *et seq.*, went into effect as of November 21, 2009, and adds another potential landmine for an employer to circumnavigate. In addition to restricting the acquisition of genetic information and limiting its disclosure, GINA precludes an employer from discriminating against an employee or applicant because the employer believes, based on genetic information, that the person has an increased risk for developing a medical condition in the future. The regulations drafted by the Equal Employment Opportunity Commission implementing Title II of GINA became effective on January 10, 2011.

How Genetic Information Is Defined

So what is genetic information? GINA defines genetic information to include an individual's genetic tests, the genetic tests of family members of such individual, as well as the manifestation of a disease or disorder in family members of such individual. A family member is broadly defined as person who is a first-degree, second-degree, third-degree or fourth-degree relative and dependent as the result of marriage, birth, adoption, or placement for adoption. For the genealogy-challenged, the regulations explain that a fourth-degree relative includes your great-great-grandmother and first cousins once-removed (i.e., the children of your first cousins).

Because of the broad definition of "family member" and the fact that genetic information includes genetic tests as well as familial diseases and disorders, genetic information will likely be circulating in every workplace. Employees regularly discuss major events in their lives such as a pregnancy or birth of a child, or a screening for, or diagnosis of, cancer. Employees, or their family members, expecting a child may talk about being screened as carriers for cystic fibrosis, sickle cell anemia and other genetic abnormalities. A newborn's parent or grandparent may discuss screening for PKU. It is a common occurrence to hear a co-worker extol the virtues of yoga for controlling his high blood pressure, or a runner may swear that her five miles a day has kept her heart disease at bay. A diabetic may talk about her new diet. All of these types of disclosures and conversations implicate GINA.

Prohibition Against Discrimination

GINA prohibits employers from discriminating against employees or applicants based on genetic information, whether it is with regard to hiring, discharge, compensation, terms, conditions, or privileges of employment. Likewise, the employer may not limit, segregate, or classify an employee in any way that would deprive or tend to deprive him of employment opportunities because of his genetic information. Furthermore, an employer may not retaliate

against an employee for opposing any act or practice prohibited by GINA, or for making a charge, testifying, assisting, or participating in any manner, in an investigation, proceeding, or hearing under GINA. The enforcement mechanism applicable, and remedies available, to employees and others covered by Title VII of the Civil Rights Act of 1964 apply to GINA as well. Thus, an individual may seek reinstatement, hiring, promotion, back pay, injunctive relief, monetary damages (including compensatory and punitive damages), and attorneys' fees and costs. The cap on combined compensatory and punitive damages (excluding past monetary losses) ranges from \$50,000 for employers with 15-100 employees, to \$300,000 for employers with more than 500 employees.

Prohibition Against Acquisition

GINA also restricts an employers' ability to request, require or purchase genetic information and strictly limits the disclosure of genetic information which an employer acquires. The requirements of GINA do not apply where an employer inadvertently requests, requires or acquires genetic information. Because employers will necessarily seek medical information when an employee requests a reasonable accommodation under the ADA or leave under the FMLA, care must be taken to avoid violating GINA in those situations. For instance, an employer may require an employee to provide health-related information to fashion a reasonable accommodation for a broken wrist under the ADA but in the process the employee provides genetic information in addition to the requested health-related information. Or, an employer may also request an employee to provide medical information to substantiate the need for the employee's FMLA leave request for his own serious health condition. In those situations, the employer should make sure that its request for medical information includes a notice, in compliance with the federal regulations, that specifies that genetic information is not being requested. By doing so, the employer will be able to claim that the acquisition of genetic information was "inadvertent" and not in violation of GINA. On the other hand, the regulations make clear that GINA's acquisition prohibitions do not apply when an employer seeks family medical history to comply with the certification provisions of FMLA that permits the use of leave to care for a sick family member and that requires all employees to provide information about the health condition of the family member to substantiate the need for leave.

Implementing GINA Safeguards

Some steps employers should take to implement GINA include the following:

1. Update nondiscrimination policies to include GINA prohibitions and restrictions.
2. Make sure waivers or arbitration agreements now include GINA claims.
3. Post the new Equal Employment Opportunity poster referencing GINA. The new poster can be found at <http://www1.eeoc.gov/employers/poster.cfm>.

4. Add language to a request for medical information that complies with 29 CFR §1635.8(b)(1)(i)(B) so that any receipt of genetic information in response to the request for medical information will be deemed inadvertent.

5. Update FMLA forms to focus on pertinent and narrowly framed questions when leave is requested to care for family members with serious health conditions.

6. Train HR, management and supervisors to limit questions during the interactive process with employees for identifying an ADA accommodation to those directly related to the condition for which accommodation is sought.

7. Train HR and management to treat any genetic information, whether intentionally or inadvertently acquired, as confidential and under lock and key.

8. Train supervisors and managers to avoid acquiring information about an individual's family medical history inadvertently or purposefully. This may be the most difficult step because it is natural to ask follow-up questions when one learns of a medical issue such as cancer. While GINA does not prohibit general health questions such as "How are you?" or "Did they catch it early", it may prohibit probing questions such as "does it run in your family?" or "have you/your sister/your mother been tested?" Rather than have your supervisors and managers attempt to distinguish what would be acceptable or prohibited by GINA, it is a better practice to train them not to ask any questions at all.

If you wish to discuss Genetic Information Nondiscrimination Act, please contact any attorney in our Employment Law group at (410) 727-6600 or by e-mail at:

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