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Employees: Comfortable in their own Genes?



By Stephanie K. Rawitt, Esq.

Key Points:

GINA protects the privacy of genetic testing results. Employers are prohibited from acting in a discriminatory manner through the improper collection and/or use of genetic information.



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Employers should comply with GINA's requirements now in order to shield themselves from liability exposure.



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COMMENTS

The Genetic Information Nondiscrimination Act of 2008 (GINA) (P.L. 110-233, 122 Stat. 881) may have entered the employment litigation arena with only a whisper when it took effect on November 21, 2009, but the newest law banning discrimination has been labeled by some as "the most sweeping federal anti-discrimination law in nearly 20 years." *New Law Bans Genetic Discrimination*, by Joe Markman, Los Angeles Times, November 21, 2009. GINA protects the privacy of genetic testing results and prohibits health insurance providers and employers from acting in a discriminatory manner through the improper collection and/or use of genetic information.

Under Title II of GINA, it is illegal for an employer to actively seek out or use genetic information to discriminate against employees or applicants. Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual or the individual's family members. Family medical history is also included in the definition of genetic information because it is often used to determine if someone has an increased risk of developing a disease, disorder or condition in the future. Genetic information does not include information such as age, gender, race or ethnicity.

In enacting GINA, Congress recognized that with advancements in genetic, genomic and reproductive technologies, we have the ability to develop better knowledge of disease and in turn more effective treatments to combat disease. With scientific advancement it is possible to catch disease at its onset (if not before) and perhaps offer preventative or curative therapies in the not too distant future. However, many have concern about the privacy and protectability of genetic testing and, thus, do not submit to genetic screening for fear that this sensitive information could be released and interfere with their health insurance and employment. An employee who is at a greater risk of developing cancer could be more expensive to an employer both from a productivity perspective as well as a health insurance perspective, and, thus, an employer might view this employee as less desirable. GINA was enacted to protect those who want to know whether their genetic makeup makes them more vulnerable to certain diseases, like Alzheimer's Disease, without risking potential repercussions from employers or health insurers who could gain access to such data.

Privacy Rights

According to the EEOC regulations, an employer violates GINA by requesting or seeking genetic information. Thus, not only is an employer prohibited from asking an employee for genetic information, he also cannot conduct internet searches that could lead to the discovery of genetic information (i.e. employer cannot search an employee's name and heart disease), actively listen to third party conversations or ask an employee about his health with the intent of eliciting genetic health information. While an employer can ask an employee how her mother's cancer treatment is going, the employer may not follow up with questions about whether anyone else in the family has been diagnosed with cancer or had cancer screenings.

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There is an exception for "water cooler" conversations, protecting an employer from the discovery of genetic testing or information during casual conversation or through a Facebook status update where the employer is a "friend" of the employee. The regulations provide a number of other exceptions to the rule as well, understanding that there are many innocent ways that an employer can acquire genetic information. Employers just need to be able to establish that they came across the information by chance and not because of a deliberate search.

The regulations also provide a safe harbor for an employer's inadvertent receipt of genetic information. Employers, for example, have the ability to request an employee's medical documentation when an employee requests Family Medical Leave or seeks an accommodation under the Americans with Disabilities Act. GINA does not affect the employer's right to request medical information under these statutes. The employer should, however, warn individuals and health care providers when seeking medical information under the FMLA or ADA (or for another legitimate reason) that genetic information should not be provided. If, despite such a warning, genetic information is provided, the employer will not be in violation of GINA.

GINA also places limitations on an employer's ability to disclose an employee's genetic information. GINA requires an employer that possesses any genetic information about an employee to maintain such information in separate files and treat such information as a confidential medical record. Employers are prohibited from disclosing such genetic information except: (1) to the employee upon request; (2) to an occupational or other health researcher; (3) in response to a court order; (4) to a government official investigating compliance with GINA if the information is relevant to the investigation; (5) in connection with the employee's compliance with the certification provision of the FMLA or such requirements under state family and medical leave laws; or (6) to a public health agency.

Discrimination

GINA also prohibits discrimination on the basis of genetic information in any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits or any other term or condition of employment. Thus, if an employer becomes aware of an employee's genetic information, that information cannot be used in making employment decisions concerning that employee. For example, an employer cannot make employment decisions because Joe Employee has a family history of Parkinson's Disease or Sally Employee's family has the breast cancer gene. The rationale behind the law is that no one should be denied a job or fair treatment in the workplace based upon the concern that he or she may develop a medical condition at some point in the future.

Applicability

Title II of GINA applies to employers with 15 more employees and is enforceable through the procedures and remedies of Title VII of the Civil Rights Act of 1964.

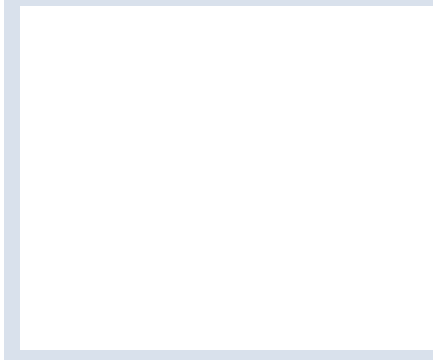
GINA Litigation and Implementation

GINA litigation has been slow to commence. There were no EEOC GINA claims filed in 2009 (not surprising as the law did not take effect until November 21, 2009). In 2010, there were 201 GINA claims filed with the EEOC, accounting for .02% of the EEOC charges filed last year. As of September 2011, the only mention of GINA in published court opinions is where GINA was inappropriately included by plaintiffs in multi-count employment actions and, accordingly, summarily dismissed.

GINA's slow start should not fool employers into thinking that this statute won't lead to litigation in the future. Using genetic health information in making employment decisions is not of great concern to many individuals at the present time because the information that GINA was designed to protect is not, for the most part, out there at present. Our population has not begun to take full advantage of the information that can be obtained through genetic testing. However, as science continues to advance, it is likely that more will seek genetic testing. For example, within the past decade, the discovery of the breast cancer gene has led many women who have a family history of the disease to submit to testing to determine if they are at risk for that particular type of cancer. It is hoped that GINA will make people feel comfortable using genetic testing to obtain this important information.

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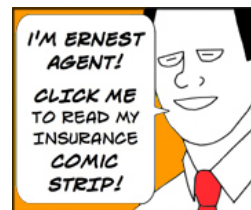
It is also likely that the plaintiff's bar has not truly grasped onto this new statute, perhaps because experienced litigators are aware of the challenges in establishing that an employment decision was made based upon genetic information. Nonetheless, the litigation will come. Mary Employee will take FMLA leave to care for a family member with Huntington's Disease and subsequently will face a layoff or staff reduction. John Employee will share his family history of diabetes and then receive unwanted discipline. Jane Employee may oppose a job assignment, claiming that she was assigned to a lower stress but less desirable position because she has a family history of heart disease. Even where such tangible employment decisions are indeed based upon legitimate business reasons, GINA claims will be filed.

The trend around the country favors protecting genetic information. Most recently, on September 7, 2011, California Governor Gerry Brown signed the California Genetic Information and Nondiscrimination Act (CalGINA) into law. The California law is even more encompassing than GINA in that, in addition to codifying the many protections of the federal law, it incorporates genetic information into the state's civil rights codes. Other states have codified some form of genetic protection laws, but California's is the most encompassing. It is expected that more states will enact their own versions of GINA in the not too distant future.

Employer Action

Therefore, now is the time for employers to learn about GINA and their obligations under this statute. Compliance with GINA is the best means by which employers can shield themselves from liability exposure. What can employers do now? GINA language should be included on FMLA and ADA paperwork. Employers should also modify employee handbooks to include GINA, and staff should be educated about GINA as well. Attorneys in our employment practice group are available to assist clients as they learn about the statute and begin to incorporate its standards into their operations. We are available to conduct seminars, draft policies and modify employee handbooks to ensure that employers are in compliance with GINA.

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