

GINA: An Overview and Understanding Of GINA's Requirements for Employers

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Beginning November 21, 2009 hiring and employment decisions will become even more complex for employers. The Genetic Nondiscrimination Act (GINA), which was signed into law by President Bush on May 21, 2008, is intended to prevent employers, employment agencies, labor unions and health insurers from discriminating against individuals based on genetic tests and information. This article will focus on the effect GINA will have on employers and their hiring and employment decisions.

Who is Subject to GINA?

Similar to the well known anti-discrimination statute, Title VII of the Civil Rights Act of 1964, private employers with 15 or more employees are subject to GINA's requirements. Unlike Title VII, however, GINA also covers certain public sector employers, such as the United States Postal Service and the Library of Congress, to name a few. Employment agencies and labor organizations are also subject to GINA.

GINA is a federal statute that offers a baseline level of protection for employees against discrimination based on genetic information and authorizes states to enact laws granting additional protection.

What Is Genetic Information?

The Act broadly defines genetic information to include (1) an employee's genetic tests; (2) an employee's family members' genetic tests (3) the manifestation of a disease or disorder in the individual's family members; (4) genetic tests of any fetus of an individual or family member who is pregnant, and genetic tests of any embryo legally held by an individual or family member utilizing assisted reproductive technology. Employers should pay particular attention to number (3) as the term "family member" includes varying degrees of relatives, such as the employee's parents, siblings, children, first cousins, grand nephews and nieces and great-great grandparents, to name a few. For the purposes of GINA, genetic information does not include information about the sex or age of any individual.

Furthermore, genetic information includes any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling, or education) by an individual or family member. The statute further defines "genetic test" as an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. GINA does not protect routine tests that do not measure DNA, RNA, or chromosomal changes, such as complete blood counts, cholesterol tests, and liver function tests. Also, under GINA, genetic tests do not include the analysis of proteins or metabolites that are directly related to a manifested disease, disorder, or pathological condition

that could reasonably be detected by a health care professional with appropriate training and expertise in the field of medicine involved.

What Acts Are Prohibited Under Gina?

GINA, like Title VII, prohibits discrimination in hiring, termination, and decisions related to compensation, as well as other terms and conditions of employment. Specifically, it prohibits employers from requesting, requiring or purchasing genetic information on an employee or the employee's family members. There are, however, exceptions to this prohibition which an employer should be familiar with. Some limited examples of these exceptions include inadvertent requests or requirements for an employee's family medical history and family medical history information requested in compliance with Family and Medical Leave Act certification procedures.

Furthermore, when the exceptions, like the ones listed above, apply, the employer must keep the genetic information confidential. More specifically, when an employer maintains genetic information concerning an employee or family member, the employer must keep the information on separate forms and in separate files as a confidential medical record. These medical records can be disclosed under limited circumstances, such as at the employee's request, pursuant to court order, or to determine compliance with GINA and other non-discrimination statutes like the Family Medical Leave Act. Genetic information is also subject to HIPPA privacy requirements.

GINA also protects employees from retaliation for opposing or complaining about unlawful employment practices and it protects employees from retaliation for filing a GINA claim.

What are the Remedies Under GINA?

GINA's remedies are much like those in Title VII. An employee can recover compensatory damages, which are capped at \$300,000 for employers with 500 or more employees, and punitive damages, which have no cap. An employee can also be entitled to recover back pay, reinstatement and attorney's fees.

What Does GINA Mean For Employers?

Employers need to be familiar with the Act's requirements to ensure that their business is in compliance with GINA as well as any similar state laws, since it is possible the state law will afford an employee more protection than the federal law. Furthermore, employers will need to assess their compliance with GINA in relation to their obligations under other employment anti-discrimination laws such as ADA, FMLA and PDA.

Finally, GINA can mean more complicated hiring and firing decisions for employers.

Consider these examples:

1. An employee takes FMLA leave to care for a mother suffering from Alzheimer's disease. The employee uses all of his/her protected leave and returns to work so that there is no FMLA violation. Six months later the employee is terminated. Under GINA, the employee could sue the employer based on the fact the employer knew the employee's mother had a genetic disorder and the employer terminated the employee before she became afflicted with Alzheimer's disease as well.
2. An employee has decided to get the BRCA gene tests done to determine whether she is at a higher risk for developing breast or ovarian cancer. The employee requests time off from her job to attend the appointment and tells the employer the reason for needing the leave, which is that she is getting a BRCA gene test. The employer allows the employee to take the time off and the employee promptly returns to work. After the employee receives her results, she shares with some co-workers that the BRCA gene tests came back positive and she is at a higher risk for breast cancer. Six months later the employee is terminated. Under GINA the employee could sue based on the fact that the (1) the employer fired her because she is more susceptible to breast cancer or (2) the employer assumed she was more susceptible to breast cancer and that breast cancer ran in her family since she decided to have the elective genetic testing done.

As if the current anti-discrimination laws did not give employers enough to think about when hiring and/or firing employees, GINA will add a whole new level to this decision making process. As such, employers need to be informed regarding the requirements of this new law.

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