

Employment Edge 107th Edition—New Genetic Nondiscrimination Law Could Trip Up Employers

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By: Judy Langevin

The Genetic Information Nondiscrimination Act of 2008 (GINA) took effect on November 21, 2009. It was enacted in response to concerns that, despite advances in genetic research, the results of genetic testing could be used by insurers and employers to discriminate against applicants and employees. Signed into law on May 21, 2008 by President Bush, GINA strictly limits the ability of health insurance providers and employers to collect, use, or disclose the results of genetic tests. It also limits the collection, use, and disclosure of information about the medical history of an applicant's or employee's family members. This article provides a summary of GINA and tips employers should follow to comply with the new law.

Collection of genetic information. GINA provides that it is an unlawful employment practice for an employer or other covered entity to "request, require, or purchase genetic information with respect to an employee or family member of the employee." Genetic information is defined under the Act as information regarding an individual's genetic tests, genetic tests of family members, or even the manifestation of a disease or disorder in family members. "Employee" as used in the statute includes applicants. There are six limited exceptions. These exceptions are inadvertent requests (often referred to as the "water cooler" exception), employer-provided genetic services that keep results confidential, requests related to FMLA leave, information in purchased public documents such as newspaper obituaries, information gained as a result of monitoring the effects of toxic substances in the workplace, and DNA analysis of employees who do forensic analysis that is done to ensure samples are not contaminated. Although it is not an unlawful employment practice to acquire genetic information through these exceptions, the genetic information acquired under these exceptions may not be used to discriminate against the employee.

Use of genetic information. Under GINA, it is an unlawful employment practice for an employer or other covered entity to discriminate in hiring, firing, or in the terms, conditions, or privileges of employment because of genetic information regarding an employee. The Act also prohibits retaliation against any individuals who oppose an act or practice prohibited by GINA or who make a charge, testify, assist, or participate in any manner in an investigation, proceeding, or hearing pursuant to GINA.

Disclosure. Employers and other covered entities must treat genetic information as part of a confidential medical record, and must maintain such information in separate forms and files. The confidential medical record required by GINA mirrors the requirements of employment entrance examination results under the Americans with Disabilities Act. In addition, employers and other covered entities are forbidden from disclosing genetic information concerning an employee unless an exception applies. The exceptions allow the employer to disclose the information to the employee upon a written request, to an occupational or other health researcher for research pursuant to the relevant regulations, in response to a court order, to government officials investigating compliance with GINA, in connection with the employee's compliance with the certification provisions of the FMLA or other state family or medical leave law, or to a public health agency if the information concerns a contagious disease and notification is provided.

Coverage of the law. GINA applies to all employers, employment agencies, and labor organizations covered by Title VII. In addition, GINA adopts Title VII's remedial scheme, with the exception that disparate impact actions are not available. Although a patchwork collection of state and federal laws already restrict the collection, use, and disclosure of genetic information, GINA represents the greatest expansion of employment nondiscrimination law since the Age Discrimination in Employment Act of 1990. Like Title VII, GINA does not preempt more restrictive state laws.

Practical Tips. Covered employers should consider updating their employment policies and practices to comply with the many technical requirements found in the new law. Some practical steps include:

- **Revise your nondiscrimination policies to include genetic information.** Though many state laws regulate genetic information, not every employer has adopted genetic information in its recital of protected classes. Employers covered by GINA will want to make sure their policies explicitly list nondiscrimination on the basis of genetic information.
- **Cease asking for genetic information, including family medical history, on employment applications or other materials.** Though few employers would ask for this information, GINA now makes clear that this practice is forbidden.
- **Avoid requesting genetic information in connection with leave.** Employers should tailor forms, policies, and procedures to ensure that the employer is not requiring the employee to disclose genetic information. The Department of Labor's FMLA certification forms do not request genetic information, but employers may want to instruct doctors to avoid disclosing genetic information in a cover letter accompanying the certification forms.
- **Implement confidentiality and disclosure policies.** To ensure compliance with GINA, employers should ensure that genetic information is stored in a confidential medical file. In addition, employers will need to adopt policies and procedures for disclosure in the event of covered exceptions, such as a court order.
- **Ensure that your health and wellness plans comply with GINA.** Section 202(b)(2) of the Act provides extensive regulations for employer-provided health or genetic services. Employers must ensure that the



entire process, from written authorization to communication of results, complies with GINA.

In addition, employers should post the EEOC's new poster, "Equal Employment Opportunity Is the Law," or the supplement to the previous poster. The EEOC is charged with enforcement of Title II of GINA, and final regulations are expected soon.

If you have any questions about GINA or other employment law issues, please contact Judy Langevin or another member of the Gray Plant Mooty Employment and Labor practice groups.

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