

Client Advisory | *December 2009*

Have You Taken Steps to Comply with GINA Yet?

On November 21, 2009, the Genetic Information Nondiscrimination Act (GINA), which prohibits genetic information discrimination in health coverage and employment, took effect.



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GINA has a significant impact on employers, in that it does the following: (1) prohibits employers from discriminating against an employee based upon genetic information; (2) places broad restrictions on an employer's deliberate acquisition of genetic information; (3) mandates confidentiality for genetic information that employers lawfully collect; and (4) prohibits retaliation against employees who complain about genetic discrimination. Given the foregoing, it is essential that employers become familiar with GINA and take steps to ensure compliance with the new law.

Employers Affected by GINA

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.

Definition of "Genetic Information"

Genetic information under GINA includes information about an individual's genetic tests, genetic tests of a family member, and family medical history. It does not include information 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. Genetic information also does not include tests for alcohol or drug use.

Prohibited Activities

Discrimination

GINA makes it illegal for employers to ask workers or applicants about their genetic information or to use such information to make any decisions regarding hiring, firing, pay, layoffs, promotions, job assignments

or any other term or condition of employment. It also prohibits use of existing or voluntarily disclosed genetic or family medical history information to make such decisions. Only narrow exceptions to these prohibitions exist, which generally involve inadvertent acquisition of genetic information, as in the case of acquisition through commercially available documents like newspapers, so long as the employer was not searching such documents with the intent of finding genetic information.

Harassment

Under GINA, it is illegal to harass a person because of his or her genetic information. Harassment can include making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee. The harasser can be the victim's supervisor, co-worker or someone who is not an employee, such as a client or customer. The harassment must be so severe or pervasive that it creates a hostile or offensive work environment or it must result in an adverse employment decision, such as a firing or demotion; simple teasing or isolated comments or incidents that are not serious will not constitute a violation of GINA.

Retaliation

GINA provides protection from retaliation for applicants or employees who file a charge of discrimination, participate in a discrimination proceeding, or otherwise oppose an act or practice prohibited under GINA.

Confidentiality

It is also unlawful for an employer to disclose genetic information about applicants and employees. Genetic information must

be kept in a separate medical file, such as the file in which other medical information is kept in compliance with the Americans with Disabilities Act. GINA provides for limited exceptions to this non-disclosure rule.

Remedies

An aggrieved individual under Title II of GINA is entitled to the same remedies available under Title VII, including reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-pecuniary damages – including compensatory and punitive damages – and attorneys’ fees and costs. Punitive damages, however, are not available against federal, state, or local government employers.

Steps Employers Can Take to Prepare for GINA

GINA rules have now been in effect for over a month; consequently, it is important to make certain that supervisory and management staff have been trained on the new genetic nondiscrimination requirements. The following are a number of steps employers can take to comply with GINA:

- Train human resources departments, managers and recruiters – and especially those who handle FMLA and ADA relat-

ed matters – about GINA’s prohibitions and requirements, especially those provisions generally prohibiting deliberate acquisition of genetic information;

- Post the new EEO nondiscrimination poster prohibiting discrimination based on genetic information;
- Become familiar with Title II of GINA. The text and congressional summary of GINA are available at <http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.493.EAS;>
- Update employment policies including EEO statements to include “genetic information” as a protected class;
- Review employee files for documents that contain genetic information about an employee, and store those records in a confidential medical file; and
- Review all policies and practices concerning medical inquiries of employees and applicants, including FMLA and ADA related inquiries. Modify those policies as necessary to reflect all GINA requirements. For example, whenever requesting an employee to have medical professionals provide documentation in connection with a fitness-for-duty exam, make clear that family medical history and other genetic information should not be provided.

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