

Labor & Employment News Alert

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Labor Pains: GINA's Turning 6, and She's Learned How to Sue!

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One of your employees (we'll call her "Gina") seems depressed, so you ask her "Is everything okay?" Gina responds that she's doing fine, considering that her father has diabetes. Ready to provide compassion and support, you ask Gina about her father's prognosis, treatment, and whether diabetes runs in her family. The following week, the Equal Employment Opportunity Commission sues your company for "genetic discrimination," extracts a six-figure settlement, and brags about it on their website. Science fiction? No.

Unknown to many, in 2008, Congress created the Genetic Information Nondiscrimination Act (innocently referred to as "GINA"). At its core, GINA prohibits employers from requesting or requiring employees or job applicants to provide "genetic information." Because most employers do not conduct DNA testing on employees or applicants, they paid little attention to GINA. GINA, however, goes far beyond outlawing requests for employee DNA. It also – you know it's coming – prohibits employers from asking employees about their "family medical history."

It unfolds this way. GINA assumes that companies will terminate or deny employment to individuals with genetic predispositions to cancer, heart disease, or other medical conditions in order to reduce medical plan expenses or to avoid employee absenteeism. Because the possibility that someone may develop a disease in the future does not impact his current ability to perform a job, GINA prohibits companies from using an individual's propensity to contract a disease as a basis for making employment decisions. Because "family medical history" can influence whether someone has an increased risk of contracting a disease, asking an employee if cancer runs in her family is just like testing the employee's DNA to see if she has a genetic propensity to cancer. GINA prohibits both.

GINA also takes an expansive view of what it means for an employer to "request" an employee's family medical history. It includes conducting an Internet search on an individual in a way that might reveal family medical history (which often resides in Facebook or other web postings) or eavesdropping on conversations about an employee's health status. Although a mere request that an employee disclose family medical history can violate GINA, the risk of liability and monetary damages is compounded if the employee subsequently experiences a promotion denial, poor performance evaluation, or termination, and blames it on the disclosure. You can assume in such cases that your employee's recollection of the conversation that followed your polite inquiry, "How are you feeling?" will differ from yours.

There are narrow exceptions to the rule prohibiting an employer from requesting genetic information, such as when the information is received inadvertently or in connection with a certification under the Family and Medical Leave Act. Given the increased use of pre-hire medical examinations and employee accommodation requests under the Americans with Disabilities Act, understanding the complex parameters of GINA is critical to reduce the risk of employment litigation.

It is not my goal to purge the workplace of all conversations with employees who seek support or compassion when faced with unfortunate medical situations, but the threat is real. In a recent press release announcing a \$370,000 settlement under GINA, the federal government ominously warned "Employers should take heed of this settlement because there are real consequences to asking applicants or employees for their family medical history," and promised that it "will pursue these cases to the fullest extent of the law to ensure that such genetic inquiries are never made of applicants or employees."

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Todd Horn has over 25 years of courtroom experience in employment litigation and is the co-author of *Maryland Employment Law*, a book that courts and attorneys cite as a leading reference. Mr. Horn was selected as Maryland's "Lawyer of the Year" for employment law in 2011 by the publication Best Lawyers in America. Mr. Horn also ranks as a top "Band 1" employment lawyer by Chambers USA,

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