

Avoid Employer Liability with Safe Harbor Provisions under GINA

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Employers should take note of the recently-enacted federal Genetic Information Non-Discrimination Act of 2008, otherwise known as "GINA". Effective January 10, 2011, Congress added yet another acronym to the long list of federal laws impacting today's employers (OSHA, ADA, FMLA, ADEA, etc). This new law prohibits an employer from requesting an employee's genetic information and that of his/her family. The Act applies to requests for medical records, independent medical examinations, and pre-employment health screenings.

An employer may not request information about an employee's health status in a way that is likely to result in exposure of genetic information of the employee and his/her family (which includes relatives up to the fourth degree). "Genetic information" is classified as genetic tests, the manifestation of a disease or disorder, and participation in genetic testing (i.e. studies by market-research firms sampling medications). Clarifications regarding sex, age, and race are not considered genetic information.

Family history is considered genetic.

Fortunately, GINA provides safe-harbor language which is designed to protect employers. Inclusion of the safe-harbor language (which is contained within the statute itself) is important in medical records requests and in communicating with physicians who are doing independent examinations. This safe-harbor language will render receipt of the genetic information inadvertent, and therefore allow the employer to avoid liability under GINA.

If the safe-harbor language is given to a health care provider and genetic information is provided, the employer must "take additional reasonable measures within its control" to make sure that the violation is not repeated by the same health care provider. However, such measures are not defined in the act.

To inquire about the safe-harbor language and other exposures of genetic information which subject the employer to liability, please feel free to contact us for further explanation.