

Employer Recordkeeping Requirements Extended to GINA

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By Amy J. Traub, Anna A. Cohen, and Jennifer A. Goldman

Effective April 3, 2012, the Equal Employment Opportunity Commission (“EEOC”) extended its existing recordkeeping requirements under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act to employers covered by Title II of the Genetic Information Nondiscrimination Act of 2008 (“GINA”). The burden on employers to comply with the recordkeeping requirements under GINA will likely be minimal, as employers should already have recordkeeping policies in effect for personnel and other employment records pursuant to these and other employment laws with the same or more stringent requirements. This *Act Now* Advisory should serve as a reminder of those recordkeeping requirements, which now apply under GINA as well.

What Is GINA?

GINA applies to employers with 15 or more employees. Title II of GINA protects job applicants, current and former employees, labor union members, apprentices, and trainees from discrimination based on their genetic information (e.g., information about an individual’s genetic tests, genetic tests of a family member, or family medical history). GINA also restricts employers from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information.

How Long Must Records Be Maintained?

All personnel and employment records made or kept by employers, including, but not limited to, requests for reasonable accommodation, application forms, and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship, are subject to retention. Records must be preserved by the employer for one year from the date the record was made or the personnel action occurred, whichever occurs later. For employees who are involuntarily terminated, personnel records must be kept for one year from the date of termination. Employers maintaining a registered apprenticeship program are required to retain records relating to program applicants for two years.

The EEOC estimates that there will be approximately 200 new discrimination charges filed under GINA per year. When a charge of discrimination has been filed with the EEOC, which is a prerequisite to filing an action in court, an employer must preserve all personnel records relevant to the charge until “final disposition” of the charge. When a charge is not resolved after investigation and the charging party has received a notice of

right to sue, “final disposition” will be considered to be: (a) the date of expiration of the 90-day statutory period within which the applicant or employee may bring suit, or (b) if the applicant, employee, or the EEOC files a lawsuit, the date on which the litigation is terminated, including any appeals. Records subject to this requirement may include personnel or employment records, such as application forms or test papers, of the charging party and of all other employees or applicants holding positions similar to the one held or sought by the charging party.

What Employers Should Do Now

- Review your company’s current recordkeeping practices to ensure that all personnel and employment records are preserved in the appropriate manner and for the required period of time.
- If a charge is filed with the EEOC or in court alleging violations of GINA, make sure that relevant records are retained until at least 90 days after the issuance of a right-to-sue notice or the final disposition of the litigation.
- Before destroying any personnel or employment record, consult with employment counsel to determine whether other federal and state laws and regulations require records to be retained for a longer period of time.

For assistance with questions regarding recordkeeping requirements under GINA or any other law, or for more information about this Advisory, please contact:

Amy J. Traub
New York
212-351-4631
ajtraub@ebglaw.com

Anna A. Cohen
New York
212-351-4922
acohen@ebglaw.com

Jennifer A. Goldman
New York
212-351-4554
jgoldman@ebglaw.com

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