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ARE YOUR POLICIES AND PRACTICE UP TO DATE?

by: Laura Sitar, Esq.

Regularly auditing employment policies and practices to stay on top of changes in state and federal laws can be a daunting task. Take for example regulations published by the U.S. Equal Employment Opportunity Commission which went into effect early this year regarding GINA. Have you updated your policies and practices to include the new GINA requirements? Do you even have GINA on your radar screen?

The Genetic Information Nondiscrimination Act ("GINA") was signed into law in 2008. Title II of the act prohibits an employer from discrimination in employment based on genetic information and restricts an employer from acquiring and disclosing such information.

Genetic information covered by the act includes:

- Information about an individual's genetic tests;
- Genetic tests of that individual's family members (out to fourth degree relatives);
- The manifestation of disease or disorder in family members of the individual (family medical histories);
- An individual or family member's request for or receipt of genetic services, including clinical research that includes genetic services; and
- Genetic information regarding a fetus of an individual or family member or genetic information of an embryo of an individual or family member using assisted reproductive technology.

Simply put, an employer **may not** obtain genetic information regarding applicants and employees or the family members of those individuals. The prohibition may seem straight forward and easy to follow, until an employer takes into consideration medical information needed for determine an appropriate accommodation pursuant to the Americans with Disabilities Act or to evaluate certification of a leave of absence under the Family Medical Leave Act. Then things get more complicated.

Fortunately, GINA's prohibition against acquiring genetic information does not apply to information that is "**inadvertently**" acquired by the employer, for example, in discussions with an employee regarding a reasonable accommodation or regarding a request for FMLA leave. However, in order for an employer to take advantage of the "inadvertence" provision, an employer requesting medical information from an employee or healthcare provider must affirmatively advise the employee or healthcare provider not to disclose genetic information. The regulations provide the following suggested disclosure language:

“The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. “Genetic Information” as defined by GINA includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.”

The regulations also provide guidance regarding acquiring genetic information through social media and casual conversation. Active listening to a third party conversation or active internet research would not be considered "inadvertent." On the other hand, voluntary disclosure by an employee would be considered "inadvertent," but following up with additional questions or seeking specifics may constitute a violation. For example, the inadvertent exception applies when a supervisor receives family medical history directly from an employee following a general health inquiry (e.g., “How are you?” asked of an employee who was just diagnosed with cancer). Similarly, a casual question between colleagues, or between a supervisor and subordinate, concerning the general well-being of a parent or child would not violate GINA (e.g., “How’s your son feeling today?” asked of an employee whose family member was just diagnosed with cancer, or “Will your daughter be OK?”). However, the exception does not apply where an employer follows up a question concerning a family member’s general health with questions that are probing in nature, such as whether other family members have the condition, or whether the individual has been tested for the condition, because the supervisor should know that these questions are likely to result in the acquisition of genetic information.

Compensatory and punitive damages are available for a plaintiff who pleads and proves he or she suffered discrimination as a result of an employer’s violation of GINA. Attorneys fees are also available.

It is important to audit your policies and practices to assure they are in compliance with GINA.

- Review post offer health questionnaires and remove questions regarding family medical history. Require health providers who perform medical examinations of your staff to do the same.
- Update FMLA medical certification forms to include the disclosure language above.
- Include disclosure language on all other requests for medical information, including those related to requests for accommodations and worker’s compensation claims.
- Educate all managers and supervisors on appropriate inquiries regarding medical information which may result in the disclosure of genetic information.

All employers benefit from periodic review of their employment policies and practices to assure compliance with ever changing state and federal employment laws. New regulations related to the Genetic Information Nondisclosure Act are just one example of the many changes employers face on an ongoing basis and the frequent need to adjust numerous policies based on a single change. At Wroten & Associates, we are available to perform employment related risk management audits to help employers spot troublesome policies and practices and to recommend appropriate changes to reduce potential liability.