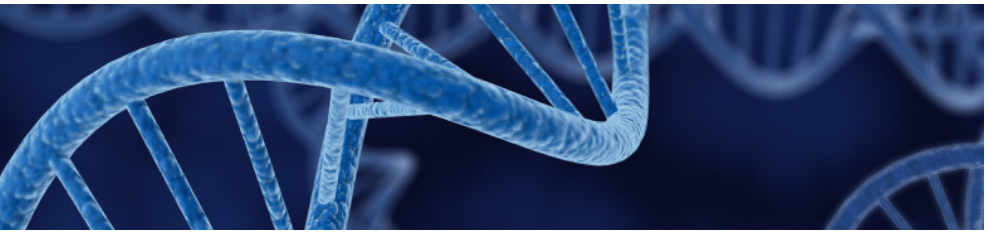

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Genetic Information Nondiscrimination Act (GINA)

Who, What, Why . . .

Who does it apply to: Any employer with 15 or more employees that obtain genetic information (including family history) about an employee.

Why should I keep reading – I don't use genetic information: It's true, most employers don't have a program to obtain genetic information about employees, but the law is broad enough that "genetic information" includes family histories of an employee's health, which employers are much more likely to come in contact with.

What does it require: Employers are not permitted to use an employee's genetic information in making employment decisions, retaliate against an employee for making a claim of discrimination based on genetic information, or permit an employee to be harassed based on that employee's genetic information.

What exceptions are there to the law: There are seven so called "exceptions" to the law, but most of them are really more like "get out of jail free cards" to avoid liability for a claim:

- Inadvertent requests: If an employer accidentally requests information regarding genetic information, or more probably, family medical history, this may be treated as an exception to the rule. Employers should use the government-approved "safe harbor" language in any forms requesting medical information.
- Requests associated with leave or accommodation: An employer is protected against violation for information received from an employee in connection with a request for leave under the Family Medical Leave Act or for accommodation under the Americans with Disabilities Act.
- Information received by accident: It is not a violation of the law to have normal, casual conversations. If an employee is talking about their family medical history, or, for instance, their mother's recent cancer diagnosis, it will not be a violation of the Act for the employer or an employee to receive that volunteered information. It would, however, be a violation to follow up with questions of a more probing inquiry.
- Wellness programs: If the employee provided the information as part of a wellness program that the employee voluntarily signed up for and the information is used only as to that program, the employer may see the information only as part of an overall assessment.
- Information that is commercially or publicly available: This includes information in newspapers or on the internet posted in easily located places, but the employer may not seek out this information for the purpose of using it to make employment decisions.
- Legally required monitoring: Monitoring as part of an occupational safety or health program required by law is excepted from violation, but the employee must be aware of the monitoring and federal guidelines that must be followed.
- Law enforcement and military: Employers may collect information to help law enforcement and the military with proper genetic identification.

When can I disclose information that I have: Given that you are not supposed to have any information, there should never really be an occasion that you need to disclose it. That said, information employers do have may be provided to: (1) the employee whose information it is; (2) in response to a court order for that specific type of information; (3) to the government in association with an audit; (4) in connection with a leave request; and (5) to government officials in connection with a disease or if imminent hazard of life or death exists.

Common Situations:

Pretesting to avoid CTS: A northern railroad company decided to attempt to head-off the growing number of carpal tunnel syndrome cases it was suffering under its worker's comp program by conducting genetic testing. Early in the program, the company determined an employee was predisposed and threatened termination if the employee would not accept a

different position that reduced the risk. Clearly this would violate GINA now, but the circumstances occurred before the law was passed and the EEOC scrambled to attempt to characterize the employer's actions as a violation of the ADA.

Passed down disease: An employee requests FMLA leave to take care of her father. As part of the employee's request for leave, she explains that her father has Huntington's disease and that she herself is scared because she has a greater than 50% chance of getting the disease. Reeling from other employee health claims and the skyrocketing premiums for health insurance, the employer finds the first opportunity to let the employee go after she returns from leave, despite excellent performance appraisals in the past 3 years. Clearly this is a violation, but reflects on an all-too-common conundrum for employers who are trying to find any way possible to cut down on the high cost of healthcare for their employees.

Does anybody else in your family have that: Tom comes back from bereavement leave and tells his employer that his mother passed due to cancer. His employer inquires, possibly innocently, whether anyone else in Tom's family has had to deal with cancer. Tom replies that he has lost 6 relatives to cancer over the last 10 years. Weeks later, Tom is passed over for a promotion to the company's controller. He files an EEOC claim based on genetic information discrimination. Is it a valid claim? We don't know the mind of Tom's boss, but it doesn't really matter, the employer will have to deal with an EEOC investigation and possibly a lawsuit costing thousands of dollars in legal fees just because he asked the one question too many and it was considered a "probing" question by the employee.

What should I do:

Good: Be careful of "family health histories". For most employers that is the only real way GINA will affect you. You need to avoid obtaining family health histories at all costs. Make sure your employee handbook prohibits discrimination based on genetic information and put up the required poster from the EEOC regarding genetic information discrimination.

Better: In addition to the items above, store any medical file information regarding employees in a separate locked cabinet and use the safe harbor language on any medical information forms to protect against inadvertent disclosure of protected information (including FMLA request forms).

Best: All of the above, and make sure that any pre-employment health screenings don't ask for a family medical history or require genetic testing unless you meet an exception.

Michael Kelsheimer is a Shareholder in the employment law section at Looper Reed & McGraw where he is joined by a number of employment law attorneys with experience in all areas of employment and labor law. Michael recognizes that the cost and expense of litigation makes resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@lrmlaw.com or by phone at 214.237.6346