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Four Things You May Not Know About …. The Genetic Information Nondiscrimination Act

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Genetic information may not be the first thing that comes to mind when employers think about workplace discrimination. However, federal law provides protections for employees based on their genetic information and that of their family members.

In this third of a series of blogs[1] examining overlooked or misunderstood provisions of employment laws, we are discussing four things employers may not know about the Genetic Information Nondiscrimination Act of 2008, commonly referred to as GINA.

Under GINA, which applies to employers with 15 or more employees, it is unlawful to discriminate against applicants or employees based on "genetic information" or to rely upon such information in making employment decisions. Employers are also restricted from requesting, requiring, acquiring or disclosing genetic information, with only a few narrow exceptions. Like many other federal antidiscrimination laws, GINA is enforced by the U.S. Equal Employment Opportunity Commission ("EEOC"). This includes a requirement that for an employee to pursue a legal claim under GINA, they must first file a formal charge of discrimination with the EEOC.

Here are four aspects of GINA that employers may overlook, giving rise to potential legal risk.

1. "Genetic Information" Covers More Than Just Genetic Test Results

Employers may be inclined to think that "genetic information" only covers the results of genetic testing. However, GINA defines the term to include not only information about an employee's genetic tests, but also the genetic tests of an employee's family members, as well as information about the manifestation of a disease or disorder in an employee's family members (*i.e.*, family medical history). As stated by the EEOC in its guidance on GINA, "[f]amily medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future."

In addition, genetic information under GINA includes:

- an employee's request for, or receipt of, genetic services, or participation in clinical research that includes genetic services by the employee or a family member; and
- the genetic information of a fetus carried by an employee or by a pregnant woman who is a family member of the employee or of an embryo legally held by the employee or family member using an assisted reproductive technology.

Employers should therefore be aware that requesting, receiving or basing employment decisions upon any of the above information may put the employer at risk of running afoul of GINA's prohibitions.

2. Indirect or Unintentional Receipt of Genetic Information Can Still Create Risk

It is generally unlawful under GINA for an employer to request, require or obtain genetic information about an applicant or employee. But even if an employer never directly asks an applicant or employee for genetic information, the employer can still run into problems under GINA if it purposefully acquires such information through other methods, such as requesting it from a medical provider or undertaking online or social media searches for the purposes of learning about an individual's genetic information.

While unintentional acquisition of genetic information – such as overhearing an employee talking about their own genetic testing or a family member's medical history – generally does not violate GINA, any subsequent *use* of such information by an employer to make employment decisions or otherwise discriminate against an applicant or employee could give rise to a GINA claim.

There are some limited exceptions under GINA for employers to obtain genetic information, including:

- acquiring family medical history as part of the certification process for leave under the Family and Medical Leave Act (FMLA) or similar state or local laws or pursuant to an employer leave policy, where an employee is requesting leave to care for a family member with a serious health condition; and
- obtaining genetic information as part of an employer-provided wellness program, so long as certain specific requirements are met (see next section for more information).

Outside of the covered exceptions, however, the EEOC's GINA guidance advises that when an employer asks for information about an applicant's or employee's health status (for example, to support a request for reasonable accommodation under the Americans with Disabilities Act ("ADA") or a request for sick leave), the employer "should warn the employee and/or the employee's health care provider from whom it is requesting the information not to provide genetic information." The GINA regulations provide model language for advising employees and their health care providers not to provide genetic information in violation of the law.

The EEOC guidance further states that if an employer is requiring an applicant or employee undertake a medical examination, the employer "*must* tell its own health care providers not to collect genetic information as part of employment-related medical exams."

3. Caution Should Be Exercised When Structuring Employer Wellness Programs

Employers who offer employee wellness programs where genetic information may be captured must take care to ensure that their programs are structured in accordance with GINA (as well as other laws, including the ADA). Common aspects of wellness programs may involve requesting or collecting genetic information, such health risk assessments that inquire about family medical history.

GINA permits the collection of genetic information in the context of an employer-provided wellness program so long as all of the following elements are satisfied:

- the program isreasonably designed to promote health or prevent disease and is not a subterfuge for violating GINA or other employment discrimination laws;
- participation in the program, and provision of the genetic information, is voluntary;
- employees provide prior, knowing, written, and voluntary authorization for the employer to collect genetic information;

- any genetic information collected is kept appropriately confidential; and
- any incentives offered related to participation in the program do not depend on disclosing the employee's genetic information.

4. GINA Also Prohibits Genetic Information-Related Harassment

GINA not only prohibits discriminatory employment decisions based on genetic information, but also recognizes genetic information–based harassment as unlawful if it rises to the level of creating a hostile work environment.

As stated in the EEOC's GINA guidance, "[h]arassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee" where such conduct is "so severe or pervasive that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted)."

Employers should therefore ensure that their workplace anti-harassment policies appropriately include genetic information within the scope of protected characteristics.

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Employers are also reminded that state and/or local anti-discrimination laws may provide for protections related to genetic information or predisposing genetic characteristics. Employers should consult local laws to ensure full compliance with workplace anti-discrimination requirements.

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[1] Prior blogs in this series include Four Things You May Not Know About the Family and Medical Leave Act (FMLA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Related Professionals

- **Arielle E. Kobetz**
  Associate
- **Evandro C. Gigante**
  Partner

- **Jurate Schwartz**
  Senior Counsel
- **Laura M. Fant**
  Special Employment Law Counsel