

Northeast Ohio HR Planning Society

Labor & Employment Law Update

**The Genetic Information Non-Discrimination Act:
Six Things You Need To Know Now**

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The Genetic Information Non-Discrimination Act: Six Things You Need to Know Now

In May of 2008, then-President Bush signed the Genetic Information Nondiscrimination Act (GINA) into law. GINA adds “genetic information” to the list of classes of employees protected by the federal employment discrimination laws. “Genetic information” means, with respect to any individual, information about such individual’s genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in family members of such individual.

On November 9, 2010, the EEOC published the long-awaited regulations interpreting GINA’s employment provisions. According to the EEOC, GINA has four stated purposes:

1. To prohibit the use of genetic information in employment decisions;
2. To restrict employers and others from requesting, requiring, or purchasing genetic information;
3. To require that employers maintain genetic information as a confidential medical record, with strict limits on disclosure; and
4. To provide remedies for individuals whose genetic information is acquired, used, or disclosed in violation of the Act.

Additionally, the regulations contain six key provisions that all employers should understand and incorporate into existing employment policies and practices.

1. GINA does not just cover employees’ genetic information. It also covers the genetic information of relations as attenuated as great-great-grandparents, great-great-grandchildren, and first cousins once-removed (the children of first cousins).
2. GINA is a broad anti-discrimination statute. It not only prohibits discrimination against employees on the basis of genetic information in hiring, firing, compensation, terms, conditions, or privileges of employment, but also harassment on the basis of genetic information, and retaliation where an individual opposes any act made unlawful by GINA, files a charge of discrimination or assists another in doing so, or gives testimony in connection with a charge.
3. GINA’s prohibition against the request of genetic information about an employee or family member includes Internet searches in a way that is likely to result in obtaining genetic information, even if the information is publicly available. However, if an employer “inadvertently learns genetic information from a social media platform which he or she was given permission to access

by the creator of the profile at issue” (such as an employee who posts family medical history on his Facebook wall, and his supervisor, with whom he is a Facebook friend, sees it), GINA has not been violated. Employers receive similar protection for genetic information employees inadvertently disclose during casual “water cooler” conversations.

4. GINA permits employers to obtain genetic information as part of employer-provided health or genetic services, such as voluntary wellness programs. While the regulations do not define “voluntary,” they do provide that employers can offer certain financial incentives to employees without stripping the wellness program of its voluntariness.
5. GINA requires that employers keep all genetic information confidential, stored in separately maintained confidential medical files, consistent with the medical information storage obligations of the ADA. There is, however, a grandfather provision for genetic information obtained before November 21, 2009. Employers need not strip that information from non-confidential files.
6. GINA provides a safe harbor for employers who inadvertently receive genetic information as part of a request for medical information (such as in a request for a return to work or fitness for duty certification (such as in a request for a return to work or fitness for duty certification, a reasonable accommodation request, or an FMLA medical certification request), *if* the request contains a warning about the disclosure of genetic information. The EEOC suggests the following 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 employees or their family members. In order to comply with this law, we are asking that you not provide any genetic 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.”

In the face of these regulations, expect to see genetic discrimination claims as a growing trend in 2011.

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