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Getting to Know “GINA”

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There’s a new kid on the block in the anti-discrimination arena, and her name is GINA. Employers should already be familiar with long-standing federal laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act (“ADEA”), and the Americans with Disabilities Act (“ADA”), which prohibit employment decisions made on account of applicants’ and employees’ race, color, national origin, religion, gender, age and disability. GINA, the Genetic Information Nondiscrimination Act of 2008, now extends these same protections to the “protected category” of genetic information.

Effective November 21, 2009, GINA prohibits most employers from using genetic information for decisions about employment and health insurance coverage, restricts the acquisition of genetic information, imposes strict confidentiality requirements, and prohibits retaliation against individuals who oppose unlawful practices. GINA also restricts an employer’s acquisition and disclosure of applicants’ and employees’ genetic information in several key ways discussed below. Finally, GINA sets forth separate rules and prohibitions relating to health insurance, which may be relevant to employers who sponsor group health plans and/or who operate employee wellness programs.

GINA’s History

Now, more than ever, science and technology help individuals better understand their susceptibility to disease or medical disorders based on their genetic makeup. But as genetic testing and counseling technology has

developed, so too has the potential for abuse of this information.

Certain states (including California) prohibit some forms of genetic discrimination in the workplace. To establish a national standard and ease concerns about discrimination that could prevent individuals from obtaining beneficial genetic testing, President Bush signed GINA into law in May 2008.

“Genetic Information” Defined Broadly

GINA defines the term “genetic information” broadly to include not only the results of genetic tests to determine whether someone is at increased risk of acquiring a condition in the future, but also requests for or receipt of other genetic services (such as genetic counseling or education). The term also includes any “manifestation of a disease or disorder” in the employee’s family members. Thus, information about an individual’s family’s medical history, frequently used to determine whether an individual is predisposed to developing a disease, disorder or medical condition (such as cancer or diabetes), is also protected under the law.

GINA defines “family” expansively, to include an individual’s dependents and up to fourth-degree relatives. Information about an individual’s or family member’s age or gender is expressly excluded from the definition of “genetic information” under the new law.

Prohibited Conduct

In describing the prohibited practices under GINA, Congress used language

similar to that used in Title VII and other equal employment laws, establishing its intent to foreclose a wide range of practices, including unlawful discrimination, harassment and retaliation. Like Title VII, GINA’s provisions apply to private and state and local government employers with 15 or more employees, as well as employment agencies and labor organizations.

Discrimination/Harassment/Retaliation

Title II of GINA outlaws the use of genetic information in making determinations as to the “terms, conditions, or privileges of employment.” In plain terms, this means employers cannot treat applicants or employees any differently because of their genetics, in the same way that decisions about hiring, firing, job assignments, promotions, pay, fringe benefits, or any other term of employment cannot be made based on the color of an employee’s skin or his or her expressed religion, for example.

GINA also makes it illegal to harass an employee because of his or her genetic information. Accordingly, employees may take legal action against employers for co-workers’ derogatory remarks or conduct targeting them on account of their genetic information, or the genetic information of a relative, should such conduct rise to the level of creating an abusive “hostile work environment.”

Finally, mirroring the language in other equal employment laws, GINA contains provisions expressly prohibiting retaliation against individuals who oppose any act made unlawful by its provisions. Thus, employers must ensure their employees are not fired,

demoted, harassed or otherwise treated differently in the terms and conditions of their employment for making a good-faith complaint of GINA-based discrimination or harassment, or for participating in an investigation of such claims by co-workers.

Obtaining Genetic Information

GINA restricts employers' acquisition of genetic information about applicants, employees or family members. It prohibits employers from intentionally acquiring this information, either by requesting or requiring genetic information from applicants, employees or other individuals, or by purchasing such information from outside sources.

However, there are narrow exceptions to this rule. Fundamentally, genetic information, including an employee's family medical history, may be obtained as part of the certification process for employee medical leave, including where an employee requests leave to care for a family member with a serious health condition. Also, under the so-called "water cooler" exception, employers will not be held in violation of GINA should they inadvertently learn of employees' genetic information—such as by overhearing an employee's conversation about their own, or a family member's, illness.

An employer also will not be penalized for accidentally learning of an employee's genetic information through commercially and publicly available documents such as newspapers or magazines, so long as the employer was not searching those sources with the intent of unearthing such information. Finally, employers will not violate GINA if they obtain applicants' or employees' genetic information as part of voluntary health or genetic services, including through employee wellness programs, so long as certain specific requirements are met.

Confidentiality Rules

If an employer does acquire genetic information, GINA mandates that affirmative steps be taken to safeguard it. As a practical matter, employers are

required to treat genetic information the same way they treat other medical information. With limited exception, employers must keep genetic information confidential and separate from other employee personnel information, in separate medical files. However, GINA does not require that genetic information be given its own file—it may be kept in the medical files.

GINA's Insurance Restrictions

A separate section of GINA also prohibits discrimination by health insurers on account of individuals' genetic information. Specifically, the law prohibits employer-sponsored group health plans from discriminating against individuals based on genetic information with respect to health plan eligibility, benefits or premiums.

Employer-sponsored group health plans may not adjust employee premiums or contribution amounts on the basis of employees' or their family members' genetic information. As with the provisions pertaining specifically to employers, GINA also adds to existing protections under the Health Insurance Portability and Accountability Act ("HIPAA"), governing the collection, use and disclosure of individuals' genetic information.

These provisions are particularly relevant for employers who sponsor so-called employee "wellness programs," intended to improve [employee health](#) and help thwart enormous increases in [health insurance](#) costs. A common element under these programs is to reduce employee insurance costs (e.g., through reduced premiums) as a reward for employee participation. However, under GINA's strict prohibition against adjusting employee premiums on the basis of genetic information, it is no longer permissible for employers to seek information regarding family medical history, a common requirement, as part of any employee wellness program that includes such premium reductions.

Remedies

Employers that violate GINA's prohibitions are subject to the same

enforcement mechanisms and potential liability as under existing federal anti-discrimination laws. Specifically, aggrieved individuals can seek to recover economic and non-economic damages (including back pay, front pay and emotional distress) as well as punitive damages against covered private employers. Injunctive relief, including reinstatement, is also a possible remedy. Moreover, GINA does not displace state or other federal laws that may provide greater protections.

Practical Implications

California employers already must comply with the Fair Employment and Housing Act's ("FEHA") prohibition on discriminating on the basis of a person's genetic characteristics. But, as outlined above, GINA contains additional restrictions not found in state law, including how employers acquire and treat genetic information, that California employers must follow.

The Equal Employment Opportunity Commission ("EEOC") is expected to revise and finalize regulations that will provide additional guidance on the practical implications of GINA. At present, employers may and should take the following steps to ensure compliance:

- Add "genetic information" as a protected category in equal employment opportunity statements, including those in employee handbooks;
- Obtain and post the EEOC's revised "Equal Employment Opportunity is the Law" poster, reflecting GINA. Posters in various languages can be ordered or printed directly from the EEOC's website at: <http://www1.eeoc.gov/employers/poster.cfm>.
- Train human resource personnel and managers on GINA's express prohibitions, specifically those restricting the unlawful acquisition of applicants' and employees' genetic information, including family medical history. While it appears that purely inadvertent acquisition may not violate the law (such as in response to simply

asking an employee “How are you?”), employers must be careful to avoid directly soliciting genetic information, except as GINA’s narrow exceptions permit (for example, in connection with leave requests under the FMLA/CFRA to care for a family member).

- In requesting employee medical documentation, for example to establish the employee’s “fitness for duty” or to support an employee’s requested disability accommodation, add a provision informing the employee’s

health care provider not to disclose the employee’s family medical history or other genetic information about the employee.

- Implement procedures to keep acquired genetic information in a separate, confidential medical file. As a practical matter, this may mean that certain documents relating to an employee’s leave to care for a family member may need to be kept apart from an employee’s personnel file.

- Do not disclose employees’ genetic information except in very limited circumstances, such as where required to do so to comply with a court’s order.

- Employers with wellness programs should review the applicable provisions to ensure GINA compliance, particularly with respect to GINA’s prohibition on adjusting employee premiums or contribution amounts on the basis of genetic information.

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