



November 24, 2009

THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008 IS NOW IN EFFECT

EMPLOYMENT LAW ALERT

The employment law provisions of the Genetic Information Nondiscrimination Act of 2008 (“GINA”) are now in effect. As of November 21, 2009, covered employers are prohibited from using genetic information in employment-related decisions, classifying employees based on genetic information or requesting genetic information from an employee. Covered employers also must maintain the confidentiality of genetic information.

The basics of the employment law aspects of GINA are summarized below:

- **Definitions**

- “Genetic information:” information about an individual’s “genetic tests, the genetic tests of family members of such individual, and the manifestation of a disease or disorder in the family members of such individual.” Information regarding an individual’s sex or age is not genetic information.
- “Genetic test:” an analysis of DNA, RNA, chromosomes, proteins and metabolites that detects genotypes, mutations or chromosomal changes.

- **Who Is Covered?**

- Employers who are covered by Title VII, i.e., with 15 or more employees for 20 or more weeks in the current or preceding year, and are engaged in an industry affecting interstate commerce.

- **Prohibition on Discrimination Based on Genetic Information**

Employers may not:

- “fail or refuse to hire, or to discharge, any employee or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee.”
- “limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.”

- **Prohibition on Acquisition of Genetic Information**

Employers may not “request, require, or purchase genetic information with respect to an employee or a family member of the employee.”

Exceptions: When an employer

- “inadvertently requests or requires family medical history of the employee or family member of the employee”;
- offers health or genetic services, such as services provided as part of a wellness program;
- complies with the Family and Medical Leave Act;
- purchases documents that are commercial and publicly available that include family medical history;

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- uses the information to monitor the biological effects of toxic substances in the workplace; or
- conducts DNA analysis, and needs genetic information for quality control purposes.

- **Confidentiality Requirements**

Employers must maintain genetic information in separate medical files and treat it as a confidential medical record pursuant to the confidential record requirements of the Americans with Disabilities Act.

Exceptions to confidentiality requirement. Disclosure is permissible:

- to the employee at his/her request;
- to a researcher under certain guidelines;
- in response to a court order, if the employee is notified;
- to government investigators ensuring compliance with the Act;
- to comply with the Family and Medical Leave Act; or
- to public health agencies, if the information concerns a contagious disease that presents imminent hazard and the employee is notified.

- **Remedies**

- Like Title VII of the Civil Rights Act (first file with EEOC or state agency; compensatory damages, punitive damages, costs and attorneys' fees)
- No claims based on disparate impact. Six years after enactment (May 21, 2014), the law requires the formation of a Genetic Nondiscrimination Study Commission to make recommendations to Congress about whether to provide a disparate impact cause of action under the Act.

On March 2, 2009, the Equal Employment Opportunity Commission issued proposed regulations to implement the employment law provisions of GINA. <http://edocket.access.gpo.gov/2009/E9-4221.htm>. The final regulations are currently under review by the Office of Management and Budget and will be issued when that review is completed.

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