



75 Milford Drive, Suite 110, Hudson, Ohio 44236

Date: January 15, 2009

Re: Genetic Information Nondiscrimination Act

Overview:

The Genetic Information Nondiscrimination Act (“GINA”) of 2008 is designed to prohibit discrimination by employers and health insurers based on personal genetic information. GINA is effective as of November 2009. As discussed below, GINA has potentially broad implications for employers and, therefore, employers must take precautions not to run afoul of its restrictions.

What is “Genetic Information”?

Under GINA, genetic information is defined as (1) an individual’s own genetic tests; (2) genetic tests of family members; and (3) the manifestation of a disease or disorder among family members. A genetic test means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

Information on a person’s sex and age is excluded from the definition of genetic information.

Employers Beware of GINA:

Title II of GINA applies to employers, employment agencies and labor organizations. Consistent with Title VII of the Civil Rights Act of 1964, GINA applies to employers with fifteen or more employees.

GINA prohibits employers from failing or refusing to hire, discharging, or otherwise discriminating against an employee with respect to the compensation, terms, conditions, or privileges of employment because of the genetic information of the employee or his or her family members. Employers may also not limit, segregate or classify employees because of genetic information in a way that would deprive them of employment opportunities or otherwise adversely affect their status as employees.

Importantly, employers are prohibited from obtaining **any** genetic information with respect to an employee or his or her family members unless:

- the employer obtains genetic information inadvertently when requesting or requiring a family medical history;
- the employer offers health or genetic services (including as part of a wellness program), obtains proper consent and does not receive individually identifiable information unless in aggregate terms where the individuals identities are not disclosed;
- the information is necessary to comply with FMLA or similar state family and medical leave laws;
- the employer purchases commercially and publically available documents that include family medical history (e.g., newspapers, magazines, but not medical databases or court records);
- the information is used for genetic monitoring of the biological effects of toxic substances in the workplace; and,
- the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory.

These are the only available exceptions allowing employers to avoid violations of the law. Because of these restrictions, employers should exercise extreme caution when engaging in any activity that collects an employee's family health history. Health and wellness programs should be reviewed to ensure compliance with GINA.

Confidentiality Requirements:

If employers possess genetic information it must be maintained on separate forms in separate files and treated as a confidential medical record, consistent with the standards under the Americans With Disabilities Act.

Employers may not disclose any genetic information they have received except:

- to the employee upon written request,
- to an occupational or other health researcher,
- in response to a court order,
- to a government official investigating a GINA complaint,
- for FMLA or state leave law purposes, or
- to a public health agency.

Penalties:

Employers violating GINA face penalties under Title VII of the Civil Rights Act of 1964, including but not limited to, enjoining the employer from engaging in the violating practice and order affirmative action including reinstatement or hiring of employees (with or without back pay) or other equitable relief.

Where intentional discrimination is found, the employee may also recover compensatory and punitive damages from the employer if it is demonstrated that the employer acted with malice or reckless indifference. The maximum amount of compensatory and punitive damages per individual is \$300,000 (scaled based on size of employer).

Disparate Impact Claims:

GINA explicitly excludes disparate impact discrimination causes of action from coverage under its provisions. Therefore, currently neutral employment policies which in operation are genetically discriminatory do not give rise to a claim under GINA.