

The Genetic Information Nondiscrimination Act's effect on employers

On Jan. 10, 2011, regulations implementing the Genetic Information Nondiscrimination Act (GINA) went into effect. GINA makes it illegal for employers who employ 15 or more employees to discriminate based upon "genetic information." GINA also prohibits employers from requesting, requiring or purchasing "genetic information" relating to an employee. Because the GINA regulations define "genetic information" very broadly, employers may easily find themselves in violation of the law, and should therefore review their employment practices to assure that they are in compliance.

GINA was signed into law on May 21, 2008 to protect individuals from discrimination on the basis of genetic information. With the advancement in genome mapping and the ability of genetic testing to determine a person's potential for developing certain medical conditions, Congress enacted GINA to prohibit the potential misuse of genetic information.

The regulations' broad definitions of "genetic information" and "family member" subject a large number of employers to GINA's requirements. GINA defines "genetic information" as (1) genetic tests of an individual, (2) genetic tests of an individual's family members, (3) any manifestation of a disease or disorder in family members of the individual, (4) an individual's request for or receipt of genetic services, and (5) the genetic information of a fetus carried by an individual who is a family member of the individual. Information about the sex or age of an individual is not considered "genetic information." A "family member" is defined as a dependent and any other relative up to and including the fourth degree.

GINA prohibits three types of employment practices. First, employers are prohibited from refusing to hire, discharging or otherwise discriminating against any employee with respect to the terms, condition or privileges of employment because of "genetic information." However, unlike many other discrimination laws, GINA provides no cause of action for employment practices that have a "disparate impact" on protected employees.

Second, employers may not limit, segregate or classify employees in any way that would deprive them of employment opportunities because of genetic information.

Third, an employer may not request, require or purchase genetic information with respect to an employee or the employee's family member. Therefore any employer requesting medical information must instruct the respondent to avoid providing any "genetic information" in their response. Employers requesting medical information may protect themselves by including the following language in every request for medical information:

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 an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical 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."

An employer who has included the foregoing information in their request for medical information, but nevertheless receives "genetic information," will not be in violation of GINA.

Additionally, there are six exceptions to the prohibition against requesting or receiving genetic information. The first is referred to as "an inadvertent request." This may occur where an employer happens to overhear an employee discussing a family member's illness, or even where an employer expresses concern for or asks about a family member's illness. However, if the employer's questions become more probing, they may rise above the level of an inadvertent request.

A second exception is where the employer offers health or genetic services to its employees as part of a voluntary wellness program. The third exception states that the employer may require an employee to disclose certain family medical history in order to comply with certification provisions of the Family and Medical Leave Act. Next, an employer may purchase documents that are commercially and publicly available that happen to include family medical history. This fourth exception refers to documents such as newspapers, magazines, periodicals and books, not medical databases or court records.

The fifth and sixth exceptions have fairly narrow application. The fifth applies to employers who use "genetic information" for genetic monitoring of the biological effects of toxic substances in the workplace as may be required by federal or state law. The sixth applies to employers who conduct DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification and requests or requires genetic information of its employees, but only to the extent that the information is used for analysis of DNA identification markers for quality control to detect sample contamination.

Employers in possession of "genetic information" must keep it confidential. If the information is in writing, it must be kept separate from other personnel information. However, "genetic information" that was placed in personnel files prior to Nov. 21, 2009 need not be removed.

Employers violating GINA can be held liable for reinstatement, hiring, promotion, back pay, injunctive relief, monetary damages (including compensatory and punitive damages) and attorneys' fees and costs.

GINA does not preempt state laws relating to discrimination based upon genetic information. Nor does GINA limit an individual's rights under any other federal or state statute. Because several states have previously implemented non-discrimination and confidentiality laws relating to "genetic information," some employers have already complied with many of GINA's requirements. However, based upon the broad definition of "genetic information" employers should review and update their employment practices and provide training to assure they do not violate the law.



David Kelley

David Kelley is an attorney at Fabian Law and has practiced employment law, ERISA litigation and general commercial litigation since 2001. His practice focuses on representing employers defending all types of discrimination claims and claims for denial of benefits under employer-sponsored plans governed by ERISA. Kelly can be reached at (801) 531-8900 or dkelley@fabianlaw.com.