

The Genetic Information Nondiscrimination Act: Employers Beware

By

Anne-Marie L. Storey, Esq.

astorey@rudman-winchell.com

The Genetic Information Nondiscrimination Act of 2008 (GINA) took effect on November 21, 2009. Among other things, it prohibits discrimination on the basis of genetic information in employment by adds it as a protected category under Title VII of the Civil Rights Act for applicants and employees. It applies to employers with 15 or more employees (but beware that Maine has a similar state law already in place which applies to all employers, regardless of size).

Generally, GINA: 1) prohibits discrimination on the basis of genetic information in hiring, promotion, compensation, termination and other terms and conditions of employment; 2) prohibits employers from requiring or requesting genetic testing or from purchasing or collecting genetic information; 3) prohibits disclosure of genetic information; and 4) requires that genetic information be maintained in a confidential manner with limited disclosure. Genetic information includes an employee's own genetic tests, the genetic tests of family members, and any manifestation of disease or disorder in family members. Family members include the employee's spouse, dependent children (either by birth or adoption) and up to fourth-degree relatives.

There are exceptions to some of these prohibitions. For instance, GINA does not prohibit disclosure of genetic information: 1) in the event of an employee request for the information; 2) to an occupational or health researcher; 3) under court order; 4) to a governmental official investigating compliance with the law; 5) in connection with FMLA compliance; or 6) to a public health agency. There are also exceptions to the provision that the employer is not permitted to require, request, or purchase genetic information, including: when information is inadvertently disclosed to or received by the employer (i.e. from idle chat); for an FMLA medical certification necessary to support a request for leave; when the employer is required by law to conduct genetic monitoring for toxic substances; where the employer offers health or genetic services (such as wellness programs; but, the law imposes significant restrictions on information sought through such programs); or where the employer purchases "commercially and publicly available" documents that contain genetic information. The regulations state that an example of inadvertently disclosed information would include family medical history directly from an employee following a general inquiry by the employer to that person about his or her health, such as "How are you?" or "Did they catch it early?" asked of an employee who was just diagnosed with cancer. The regulations further say that a casual question between colleagues, or between a supervisor and subordinate, concerning the general well-being of a family member would not violate GINA (such as "How's your son feeling today?") and it points out that an inadvertent disclosure would also include genetic information that was not solicited or sought by the employer, such as where a manager or supervisor receives an unsolicited email from a co-worker about the health of an employee's family member. With regard to commercially or publicly available material, the regulations state that an employer that purchased a newspaper that happened to contain an obituary about a family member of an employee indicating that the employee's relative died of a disease or disorder that has a genetic component would not violate GINA. Likewise, an employer would not violate GINA if it learned that an employee had the

breast cancer gene by reading a newspaper article profiling several women living with the knowledge that they have the gene. However, if the employer performed an internet search with the name of the employee and a particular genetic marker, this would likely violate the statute.

If an employer obtains genetic information inadvertently, it cannot use the information for purposes of unlawful employment action and it must maintain the information in a confidential manner.

The final rules interpreting GINA became effective on January 10, 2011. Among other things, these rules distinguish genetic from non-genetic tests. Examples of genetic tests are screening tests for predisposition to illnesses such as breast cancer; carrier screenings for cystic fibrosis or sickle cell anemia; amniocentesis or other evaluations that test for genetic abnormalities of a fetus during pregnancy; newborn screenings; DNA testing to detect genetic markers associated with information about ancestry; and DNA testing that reveals family relationships, like paternity. Examples of non-genetic tests include those for cholesterol or liver function, and tests to detect the presence of drugs or alcohol (but a test to determine whether someone has a genetic predisposition for addiction or use is a genetic test).

The rules also discuss the inadvertent production of genetic information. The law contains a “safe harbor” for employers if genetic information is produced by a medical provider in response to a lawful request for medical information (such as under the FMLA or ADA), but the rules only apply that safe harbor definitively where the employer warned the employee and/or health-care provider *not* to provide genetic information in response to lawful requests. Thus, to be sure production of such materials will be considered inadvertent, any written request for medical information from an employer should include the following paragraph:

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.

Without this language, acquisition of prohibited genetic information may only be inadvertent if the employer can show that its request was not likely to elicit a response containing genetic information.

GINA is a complicated law. Covered employers should be certain they understand its impact on employment practices and amend policies and practices accordingly.