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Employment Provisions of Genetic Information Non-Discrimination Act Take Effect

December 17, 2009

Employers must begin complying with Title II of the Genetic Non-Discrimination Act ("GINA") as of November 21, 2009. This portion of GINA expands Title VII of the Civil Rights Act of 1964, imposing broad restrictions on the collection, use, and disclosure of genetic information, as well as prohibiting discrimination on the basis of genetic information.

What employers are covered by GINA?

GINA applies to all employers who are subject to Title VII. This includes all employers which have fifteen or more employees, including private employers as well as state and local government employers. GINA also applies to employment agencies and labor organizations.

What is "genetic information"?

The term "genetic information" includes genetic tests of employees and their family members as well as any "manifestation of a disease or disorder" in the employee's family members (a term which is broadly defined to include relatives to the fourth degree).

"Genetic information" does not include information about the sex or age of an individual or his or her family members, nor does it include information that an individual *currently* has a disease or disorder.

What restrictions does GINA impose on employers?

GINA imposes these prohibitions:

1. Employers may not discriminate against employees or applicants on the basis of genetic information, in hiring or any other terms or conditions of employment.
2. Employers may not acquire genetic information, except pursuant to several limited exceptions outlined below.
3. Employers may not disclose genetic information.
4. Employers may not retaliate against individuals who assert their rights under GINA.

Are there circumstances in which an employer may acquire genetic information?

Employers *may* acquire genetic information in the following limited circumstances:

1. Inadvertent acquisitions;
2. Acquisitions obtained through a voluntary wellness program;
3. Acquisitions obtained through the Family Medical Leave Act certification process;
4. Acquisitions obtained through commercially and publicly available documents (excluding court records or medical databases);
5. Acquisitions obtained because of genetic monitoring of the biological effects of toxic substances in the workplace; and
6. Acquisitions obtained because of an employer program to conduct DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification.

Are there circumstances in which an employer may disclose genetic information?

GINA allows for disclosure under the following limited circumstances:

1. Disclosures that are necessary for the employee to comply with federal or state medical leave laws;
2. Disclosure to government agencies investigating compliance with GINA;
3. Disclosure in response to a court order provided that the employer notifies the employee of the disclosure if the order was issued without the employee's knowledge; and
4. Disclosure to a federal, state or local public health agency that an employee's family member has manifested a contagious disease if the disease presents an imminent hazard of death or life-threatening illness, and the employee is notified of the disclosure.

What confidentiality provisions are included in GINA?

Employers must apply the same confidentiality for genetic information as are applicable to other types of medical information protected under the ADA. Employers must keep any genetic information obtained in a separate and confidential medical file. Internal access must be strictly limited to those with a need to know.

Is there a disparate impact theory available under GINA?

Currently, individuals may only claim disparate treatment under GINA and not disparate impact. This means that the law is limited to intentional acts of discrimination, and does not apply to "facially neutral" policies or practices (i.e., those that do not appear to be discriminatory on their face but are discriminatory in application or effect).

However, six years after enactment, a Genetic Nondiscrimination Study Commission will be established, which will review the developing science of genetics and to make recommendations as to the advisability of providing

for a disparate impact cause of action.

Does this change the state law?

GINA does not disturb state laws that are more protective. New York State protects against discrimination on the basis of predisposing genetic characteristics in its Human Rights Law. *See* Executive Law § 296.1(a). Plaintiffs may bring a claim under either GINA or the New York Human Rights Law or both.

What recourse is available for violations of GINA?

GINA incorporates Title VII's remedial scheme. An aggrieved individual may seek reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-pecuniary damages, including compensatory and punitive damages, and attorney's fees and costs. As is the case in Title VII, an aggrieved individual may pursue such remedies at the United States Equal Employment Opportunity Commission ("EEOC") or the New York State Division of Human Rights (except that attorney's fees and costs are not awarded at the state level, while civil fines may be imposed at this level). If before the EEOC, an aggrieved individual may bring an action against the employer after receiving a Right to Sue letter. Adverse decisions of the SDHR may be appealed to the State Supreme Court.

Has the EEOC issued regulations with regard to GINA?

The EEOC has issued proposed regulations, but the final regulations have not yet been released.

What should my company do now?

You should revise any employment policies and wellness programs to comply with GINA, as well as update your current posters. The EEOC has issued a new poster which includes GINA.

If you have any further questions about this or any employment or labor-related issue, please do not hesitate to contact us at 516-357-3700.

Practices

- Civil Rights and Employment Litigation
- Labor and Employment

Attorneys

- Gerard Fishberg