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The Employer Provisions of the Genetic Information Nondiscrimination Act ("GINA") Are Now Effective

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The Genetic Information Non-Discrimination Act ("GINA"), enacted by Congress to allay growing public concern about the misuse of genetic information in employment, took effect on November 21, 2009. The employment provisions of GINA (which are contained in Title II), stem from Congress's determination that the limited federal and state laws addressing genetic discrimination in employment are an incomplete patchwork that warrant uniform, federal legislation.

Title II of GINA prohibits employers from engaging in three types of conduct: (i) discrimination on the basis of genetic information, (ii) the intentional gathering of genetic information about employees or applicants, and (iii) retaliation against employees who complain about a violation of any GINA provision. In addition, GINA creates new rules regarding the protection of genetic information to the extent it is obtained by employers. GINA covers employers with 15 or more employees, employment agencies, labor unions, and apprenticeship or training programs. It protects employees, job applicants, labor union members, and apprentices and trainees.

Employers May Not Discriminate on the Basis of Genetic Information

GINA makes it unlawful for employers, employment agencies, unions, and training programs to discriminate against an individual on the basis of genetic information in regard to hiring, discharge, compensation, terms, conditions, or privileges of employment.

"Genetic information" is defined as information about: (i) an individual's genetic tests; (ii) the genetic tests of that individual's family members; (iii) the manifestation of a disease or disorder in family members of the individual (family medical history); (iv) an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic information by the individual or a family member of the individual; and (v) genetic information of a fetus carried by an individual or family member, and genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology. Information about the sex or age of the individual or the individual's family members is expressly excluded from the definition of genetic information.

GINA's definition of "family member" is broad. It is defined to include a person who is (i) a dependent of the employee as the result of marriage, birth, adoption, or placement for adoption, or (ii) a first-, second-, third-, or fourth-degree relative of the employee, or of a dependent of the employee.

Under GINA's anti-discrimination provisions, an employer may not, for example, terminate a healthy employee based upon a concern that, because her mother has Alzheimer's disease, the employee may someday suffer from the same disease and be unable to perform her job in the future. Nor may an employer decline to promote an asymptomatic employee, based on its knowledge of the employee's genetic predisposition to develop a medical condition, in order to avoid expenses associated with absenteeism, health benefits, or risky occupational exposure. Such actions would constitute prohibited uses of an employee's family medical history or genetic profile as the basis for employment decisions.

Employers May Not Intentionally Gather Their Employees' Genetic Information

An effective way to limit discrimination based on genetic information is to limit collecting the information at all. GINA prohibits covered employers from requesting, requiring, or purchasing genetic information relating to its employees and applicants. GINA makes clear that the employer will not be in violation of GINA's prohibitions as long as its acquisition of the information falls into one of six narrow exceptions: (i) the employer *inadvertently* requests or requires genetic information about the individual or the individual's family member, such as through a casual conversation or as part of documentation provided to support a request for a reasonable accommodation, so long as the request was lawful; (ii) the information is obtained as part of an employer-offered health or genetic services program, such as a voluntary wellness program; (iii) the information is obtained as part of an employer's lawful request for medical information to comply with the certification provisions of the Family Medical Leave Act ("FMLA") or similar state laws; (iv) the employer acquires genetic information from documents that are commercially and publicly available for review or purchase;[1] (v) the employer acquires genetic information for use in the genetic monitoring of the biological effects of toxic substances in the workplace; or (vi) the employer conducts DNA analysis for law enforcement as a forensic laboratory or for purposes of human remains identification, where the employee's genetic information is used to detect sample contamination.

If an employer acquires genetic information pursuant to one of the six enumerated exceptions, the employer is, nonetheless, prohibited from discriminating against the employee based on such information, and must keep such information confidential.

Employers Are Obligated to Keep Confidential All Genetic Information

An employer that possesses genetic information about its employees must treat the information as a confidential medical record. Accordingly, it must maintain such information on forms and in medical files that are separate from personnel files.

Additionally, an employer may not disclose its employee's genetic information to others except: (i) to the employee or member of a labor organization about whom the information pertains upon receipt of the employee's or labor organization member's written request; (ii) to an occupational health researcher if the research is conducted under applicable federal regulations; (iii) in response to a court order; (iv) to government officials investigating compliance with GINA; (v) to the extent the disclosure is made in support of an employee's compliance with the certification provisions of the FMLA; or (vi) to government officials if in relation to a contagious disease that presents an imminent hazard of death or life-threatening illness.

Employers May Not Retaliate Against Employees Who Complain About Violations of GINA

Covered employers also are prohibited from retaliating against an employee because he or she has opposed any act or practice made unlawful by GINA. Employers also may not retaliate against an employee who makes a charge, testifies, assists, or participates in any manner in an investigation, proceeding, or hearing under GINA.

Employers Must Be Aware of GINA's Interaction With Other Laws

Employers must be mindful of how GINA interacts with other laws that address medical conditions, disabilities, leaves, and privacy concerns. While employers are advised to contact employment counsel with such questions, a brief summary is provided below.

FMLA and similar state laws ("FMLA"): GINA recognizes that employees and their health care providers often provide unrequested genetic information in support of an employee's request for medical leave. Under such circumstances, the acquisition of genetic information will be considered inadvertent, so long as the request for documentation was lawful (*e.g.*, was not overly broad). However, any genetic information that is obtained inadvertently still is subject to GINA's confidentiality requirements, and the information must be placed and maintained in a separate medical file.

Americans with Disabilities Act and similar state laws ("ADA"): The ADA permits employers to require employees to submit to focused medical examinations under certain circumstances. GINA imposes certain limitations on these employer rights. For example, although the ADA allows an employer to require a medical examination of all employees to whom it has offered a particular job in order to determine whether they can perform the job, an employer may no longer obtain family medical history or conduct genetic tests of post-offer job applicants. This prohibition also extends to any medical examination conducted for the purpose of determining an employee's fitness for duty.

In addition, under the ADA, employers may request medical information related to an employee's need for a reasonable accommodation or fitness for duty. As with the FMLA, the receipt of unrequested genetic information in this context will not violate GINA. However, GINA's prohibition against acquiring genetic information governs the interactive process during which the employer and employee discuss appropriate reasonable accommodation.

Health Insurance Portability and Accountability Act ("HIPAA"): GINA provides that Title II is not intended to apply to uses and disclosures of health information governed by the HIPAA Privacy Rule. Thus, entities that are subject to both the HIPAA Privacy Rule and GINA, such as a hospital that treats a patient who also is an employee of the hospital, must apply the requirements of the HIPAA Privacy Rule, and not the requirements of Title II of GINA, to genetic information that is protected health information.

State Laws Related to Genetic Discrimination and Information: GINA is not intended to preempt any state or local law that provides for equal or greater protections related to discrimination or retaliation on the basis of genetic information. GINA also does not limit the rights or protections under federal, state, local, or Tribal laws that provide greater privacy protections to genetic information.

What Must Employers Do to Comply With GINA?

Employers immediately must adjust their human resources practices to comply with GINA and its regulations. Specifically, employers should:

- **Review and revise their existing non-discrimination policies and handbooks** to include the prohibitions against discrimination on the basis of genetic information and post the new EEOC non-discrimination poster, which incorporates the prohibitions of GINA.
- **Train human resources personnel and "first-line responders"** regarding the new GINA prohibitions, including how to address employee concerns or complaints about possible genetic discrimination, related privacy violations, and retaliation. This also should include training for

human resources personnel and decision-makers related to the hiring or termination of employees so that decisions are not made on the basis of genetic information or family medical history.

- **Review and revise FMLA and/or ADA forms**. Although GINA protects employers where there is inadvertent acquisition of genetic information in connection with employees' accommodation and medical leave requests, employers should consider additional proactive steps to avoid such inadvertent acquisition of genetic information. In its summary of the proposed regulations implementing GINA, the EEOC has indicated that, as a "best practice," employers should consider modifying any form provided to a health care professional to state expressly that family medical history or other genetic information should not be provided.

- **Review policies, procedures, and forms related to post-offer medical examinations** to ensure that no family medical history is obtained and no genetic tests are conducted.

- **Review medical information consent forms and authorizations utilized with Employee Assistance Programs ("EAP")**. Employees may authorize their employers to receive and share information with their EAP. The same modifications to forms provided to health care professionals to facilitate FMLA- and ADA-related disclosures should be applied to EAP-related forms.

- **Ensure that proper privacy procedures are in place** so that all medical information is maintained in a file that is separate from an employee's personnel file. This requirement also applies to medical information related only to a family member of the employee.

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[1] Note that the EEOC's proposed regulations, which are yet to be finalized as of the date of this Client Alert, prohibit employers from researching medical databases or court records, even where such databases are publicly available, for the purpose of obtaining genetic information about an employee and his/her family members.

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