Get To Know GINA

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Does your company or the company's medical advisor use forms created more than three years ago asking for information about an applicant's or an employee's family medical history?

Do your supervisors and managers know that if they are "friended" by an employee to allow access to the individual's social media site, and they see medical information relating to the individual or the individual's family member, they have violated a federal law and subjected the company to liability?

Are You Out Of Compliance?

Has your company failed to update Family Medical Leave Act, Americans with Disabilities Act, workers' compensation, no-harassment, and other policies and procedures to comply with the Genetic Information Nondiscrimination Act (GINA)?

If you answered yes to any of these questions, read on and take heed so that your company does not become the next GINA "headline."

What Is GINA?

The Genetic Information Nondiscrimination Act (GINA) has been an active federal law for five years. However, many employers still know little about the law apart from its acronym. Enacted in 2008, GINA generally prohibits employers from engaging in three types of conduct:

- Prohibits employers with 15 or more employees from discriminating against an employee on the basis of the employee's genetic information. "Genetic information" is rather broadly defined and includes information from genetic tests, the genetic tests of family members, and family medical history, but it does not include an individual's race and ethnicity.
- Prohibits employers from requesting an employee's genetic information, subject to certain exceptions.
- Prohibits employers from retaliating against an employee who has opposed a practice made unlawful by GINA.

Most credit GINA's enactment, and its requirements, as a response to a trend in which employers sought to rely on genetic information in an attempt to screen out potentially unhealthy employees and to lower surging health care costs. While such practices were potentially already barred by the Americans with Disabilities Act or state laws, GINA clearly bars the practices now.

Inadvertent Collection Of Genetic Information

Many employers today pay little heed to GINA on the mistaken assumption that they do not collect genetic information. But there are three very common situations in which an employer can unknowingly collect genetic information.

First, employers regularly request medical documentation to support a potentially disabled employee's request for a reasonable accommodation.

Second, employers regularly request medical documentation to support an employee's request for leave under the Family and Medical Leave Act.

Third, many employers require a medical examination upon hire and receive medical information in that context.

In each of these situations, the employer might acquire genetic information (without intentionally requesting it) and would violate GINA as a result of doing so. Fortunately, GINA provides a "safe harbor" that can protect an employer in such situations.

How To Avert Noncompliance

When an employer requests medical information, it must warn the provider not to provide genetic information. When the employer makes such a warning, the "safe harbor" provision provides that any receipt of genetic information in response to such a request will be deemed inadvertent and not in violation of GINA.

As a result, it is imperative that employers include this specific warning any time that it requests health-related information from a health care provider or an employee.

Of course, an employer may obtain genetic information in less formal situations. For example, a supervisor could obtain an employee's genetic information during a casual conversation, through email, or through social media. This acquisition of genetic information also would be deemed inadvertent so long as the supervisor does not ask follow-up questions and does not take any employment-related action based on the inadvertently acquired information (but the use or disclosure of the inadvertently acquired information would still violate GINA).

Does Your Wellness Program Violate GINA?

The federal regulations implementing GINA also make clear that an employer does not violate GINA if the employer requests genetic information as part of a "voluntary wellness program."

For such a program to be deemed voluntary, the employer must show that:

- The employer does not require employees to provide genetic information or penalize them for not providing it.
- The employee provided knowing, voluntary, and written authorization stating that the employee understands the type of genetic information to be obtained and how it will be used. Individually identifiable genetic information may be provided only to the health care professionals involved in providing the services.

In addition to the law's recent enactment, another reason that employers may be less knowledgeable about GINA as compared to other federal laws is that relatively few lawsuits have arisen under the law.

According to statistics from the U.S. Equal Employment Opportunity Commission (EEOC), there were just 280 charges of GINA-related discrimination filed in 2012, or just 0.3 percent of the overall charge filings for that year. However, the number of filed, GINA-related charges has increased by nearly 40 percent since the first year individuals could file under the statute.

Moreover, recent activity by EEOC suggests that employers would be unwise to delay in getting into GINA compliance.

A Cautionary Tale

On Jan. 13, 2014, EEOC announced that it had reached a $370,000 settlement with a New York-based nursing home after EEOC sued the nursing home for allegedly violating GINA and other laws.

In the first "systemic" case of its kind, EEOC alleged that the nursing home maintained an unlawful practice of asking applicants and employees for their family medical history as part of its pre-employment, return-to-work, and annual medical examinations. EEOC also alleged that the nursing home failed to post EEOC-required notices in the workplace that summarize key provisions of GINA.

It is not clear from the face of the complaint the exact type of information the nursing home unlawfully requested or why it requested it at all. Regardless, even assuming the nursing home did not have a specific intent to discriminate against individuals on the basis of genetic information, this case serves as a reminder to all employers of the perils in requesting health-related information from an applicant/employee in a haphazard or careless manner.

In fact, unknowing or unintentional violations of GINA are perhaps the most worrisome type of violations since they are the most likely to occur. This is particularly true for employers that rely on dated, pre-GINA human resources documents (including employment applications) or employment policies.

Employers should update existing nondiscrimination and antiharassment policies and handbooks so that discrimination/harassment on the basis of genetic information is clearly prohibited. Similarly, employers should update Family Medical Leave Act and Americans with Disabilities Act forms to include the requisite "safe harbor" language that warns employees and health care providers not to provide genetic information.

Employers also should ensure that an employee's medical information is maintained separately from the employee's personnel file, as required by the law.

It is time for employers to ensure that they are in compliance with GINA.

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