

EMPLOYMENT ALERT

November 18, 2009

Law Restricts Employers' Possession and Use of Employees' Genetic Information

The Genetic Information Nondiscrimination Act ("GINA"), effective November 21, 2009, prohibits group health plans and employers from accessing, using, and disclosing individuals' genetic information, including family medical history, in the course of an individual's employment. The employment provisions of GINA apply to employers that are subject to Title VII of the Civil Rights Act of 1964 and add another category of protection to the list of prohibited bases for discrimination. GINA prohibits the use of genetic information in employment, restricts the acquisition of genetic information, and strictly limits the disclosure of genetic information. Genetic information is defined broadly and includes not only results of an employee's genetic tests, but also the employee's personal or family medical history that may indicate a genetically-linked illness, such as cancer or heart disease. However, the results of workplace drug testing or the fact that an employee has the manifestations of an illness are not considered genetic information.

GINA prohibits an employer from acquiring genetic information about applicants or employees except in narrow circumstances. An employer would not be penalized for inadvertently obtaining information about an employee's genetic information if the information is simply overheard in the hallways or is volunteered by an employee responding to an inquiry as to a family member's illness. However, that information could not be used or otherwise considered in hiring or firing an individual, or when making decisions regarding employees' compensation or placement. Nonetheless, an employer may have to use genetic information when it is provided as part of the certification of an employee's request for FMLA leave or request for accommodation of a disability. As with other medical information gathered for these purposes, any genetic information must be kept separate in employees' personnel files.

GINA provides victims of genetic discrimination with the same administrative and judicial remedies provided by Title VII, including compensatory and punitive damages. Employers should take action now to avoid violating GINA, including updating employment policies to include information on genetic discrimination and posting the new

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EEOC/DOL nondiscrimination posters which include information on GINA. Employers that require any post-offer/pre-employment and fitness for duty medical examinations must eliminate inquiries related to the individual's family medical history. Employers also must be careful to avoid overly broad requests for information related to requests for leave or disability accommodations.

We want you to be as informed as possible and ready when GINA takes effect on November 21, 2009. If you have any questions or would like more information about GINA, please do not hesitate to contact one of our healthcare or employment law attorneys.

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