

EMPLOYMENT LAW ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

New GINA Regulations Underscore Need for Employer Compliance Review

November 18, 2010

On November 9, 2010, the EEOC issued final regulations implementing Title II of the Genetic Information Nondiscrimination Act (GINA). GINA, which went into effect on November 21, 2009, generally prohibits employment discrimination based on genetic information, restricts employers from requesting or otherwise acquiring an employee's genetic information, and imposes confidentiality requirements on genetic information acquired by an employer. The regulations, which go into effect 60 days after their publication, highlight the necessity for employers to consider whether they need to rewrite policies, train HR personnel and supervisors, revise forms related to employee medical inquiries, review wellness programs, and revise record-keeping systems in order to be in compliance with GINA.

Application and Discrimination

Employers may not discriminate against an individual on the basis of the individual's genetic information in regard to "hiring, discharge, compensation, terms, conditions, or privileges of employment." GINA also prohibits harassment based on genetic information as well as retaliation for opposing violations of the Act or participating in an investigation of an alleged GINA violation. The regulations make clear that GINA not only protects current employees, but also former employees and applicants.

GINA states that an individual's genetic information includes the individual's genetic tests, the genetic tests of the individual's "family members," and the individual's family medical history. The regulations add that the genetic information of a fetus carried by (or an embryo, used for assisted reproduction, held by) a protected individual or their family member falls under the definition of "genetic information." "Family member" includes dependents of the protected individual, not only as the result of birth, but also as the result of marriage or adoption. The term also includes first-degree through fourth-degree family members of the protected individual or his/her dependent. The regulations help to clarify this definition by providing examples of what would constitute a first-degree (parents, siblings, children), second-degree (grandparents/children, uncles, aunts, nieces, nephews, half-siblings), third-degree (great-grandparents/children, great aunts/uncles, and first cousins), and fourth-degree (great-great grandparents/children and first cousins once-removed) family member.

Acquiring Genetic Information

GINA prohibits covered entities from requesting, requiring or purchasing genetic information of a protected individual or an individual's family member. However, where a request is "inadvertent," no GINA violation occurs. If a supervisor actively listens to a third-party conversation for the purpose of obtaining genetic information, a violation occurs. However, if a supervisor acquires genetic information by merely overhearing a conversation, or if a supervisor receives unsolicited genetic information regarding an employee from the employee or a third-party, no violation occurs.

Communications between supervisors and their subordinates regarding health matters is one of the more unsettling issues surrounding GINA. The regulations state that if a supervisor acquires genetic information about an employee during casual conversation, no violation occurs. This includes situations in which the information is provided in response to an "ordinary expression of concern that is the subject of the conversation." For example, if an employee's child has been diagnosed with cancer and the supervisor asks the employee how he/she is doing, how the child is doing, whether the cancer was detected early, and so on, no violation occurs if genetic information is disclosed by the employee.

However, where the supervisor's questions are worded in such a way "that is likely to result" in the disclosure of genetic information, a GINA violation may occur. Questions such as whether the employee has been tested for the medical condition at issue, whether other family members have been tested, whether other family members have the condition, and so on, are prohibited. Clearly, this is a very thin line to walk, especially considering the personal friendships that often develop in the workplace.

Specific Scenarios Surrounding the Acquisition of Genetic Information

If an employer makes a lawful request for medical information, such as under the Family and Medical Leave Act (FMLA) or Americans with Disabilities Act (ADA), and acquires genetic information regarding an employee or his/her family member, the acquisition will not generally be considered inadvertent unless the employer informs the healthcare provider (either orally or in writing), at the time of the request, not to provide genetic information. To aid in compliance, the GINA regulations provide "safe harbor" language that an employer can include in its lawful medical information requests. By using this language, the employer can avoid liability for any acquisition of genetic information made pursuant to such request.

Another major concern for employers is whether GINA will impact the implementation of workplace wellness programs. Many wellness programs include health risk assessments, which often include questionnaires regarding current medical conditions and family medical history. The regulations state that if an employer offers health or genetic services, it may acquire genetic information without violating GINA if the information is voluntarily provided by the employee, the employee provides prior written authorization, and certain confidentiality requirements are satisfied. Furthermore, while an employer may offer financial inducements for the completion of health risk assessments which include questions about genetic information, attainment of the financial inducement cannot be based on the completion of those genetic information questions. In other

words, the employer must make clear to the employee that the inducement is available upon completion of the assessment regardless of whether the employee answers the specific questions regarding genetic information. On the other hand, once an employee has voluntarily provided genetic information indicating that he/she is at an increased risk of a certain health condition, the employer may offer financial inducements to encourage the employee to participate in disease management programs or other wellness programs, so long as certain conditions are met.

With social media permeating the modern workplace, it is no surprise that the acquisition of genetic information by means of the internet is an issue contemplated by the GINA regulations. Generally, if an employer acquires genetic information from documents that are "commercially and publicly available for review," no violation occurs. For example, if an employer inadvertently acquires genetic information by performing a simple online search of an employee's name (as opposed to an internet search that is "likely to result" in genetic information), no violation occurs. Similarly, if an employee posts genetic information on his/her Facebook page which is visible to his/her supervisor (i.e., the employee makes his/her profile visible to the general public, or is Facebook friends with the supervisor), the supervisor's acquisition of such information is likely not a violation of GINA. However, where an employer seeks access to media sources, such as sending a friend request to an employee on Facebook, with the intent of obtaining genetic information, the employer may be liable for a violation.

Confidentiality of Genetic Information

GINA states that any covered entity that possesses written genetic information about an employee must maintain such information on forms in separate medical files and must treat such information as a confidential medical record. The regulations elaborate, stating that such medical files must be separate from personnel files, and noting that an employer would be compliant with this requirement if it maintained an employee's genetic information in the same file in which the employer maintains the employee's confidential medical information subject to the ADA.

Compliance

If they have not already, employers must begin taking steps toward compliance with GINA, which should include at least the following steps: (1) re-writing EEO, discrimination and harassment policies to include genetic information as a protected category; (2) informing and training management and HR personnel with regards to the requirements and prohibitions under GINA, especially those requirements dealing with the acquisition of genetic information; (3) inserting certain safe harbor language into all form medical inquiries; (4) reviewing wellness programs and health risk assessments for compliance with GINA; and (5) establishing a record-keeping system which ensures that genetic information documentation is stored in a separate medical file and is treated as a confidential medical record.

These efforts on the front-end may go a long way in avoiding liability down the road, which, according to the regulations, may include compensatory and punitive damages, attorneys' fees, expert fees, and injunctive relief, including reinstatement and hiring.

If you have any questions about GINA or wish to discuss implementation of these procedures, please contact one of our Labor and Employment attorneys below.

Bass, Berry & Sims Labor and Employment Attorneys

Lymari Martinez Cromwell
(615) 742-7903
lcromwell@bassberry.com

Davidson French
(615) 742-6240
dfrench@bassberry.com

Tim K. Garrett
(615) 742-6270
tgarrett@bassberry.com

Robert W. Horton
(615) 742-7708
rhorton@bassberry.com

Lin B. Howard
(615) 742-7927
lhoward@bassberry.com

Alonda W. McCutcheon
(615) 742-7717
amccutcheon@bassberry.com

Michael S. Moschel
(615) 742-6297
mmoschel@bassberry.com

Annie Warnock Neal
(615) 742-6517
aneal@bassberry.com

William N. Ozier
(615) 742-6232
bozier@bassberry.com

Justin A. Page
(615) 742-7786
jpage@bassberry.com

The materials contained herein have been abridged from the statutory sources and should not be construed or relied upon for legal advice. Readers are urged to consult legal counsel concerning particular situations and specific legal questions.

To ensure compliance with requirements imposed by the IRS, we inform you that this message is not intended to be used, and cannot be used, by the addressee or any other person for the purpose of avoiding penalties that may be imposed under the Internal Revenue Code.