

Contact:
Christian A. Carrillo
Attorney at Law
213.417.5319
ccarrillo@mpplaw.com

Understanding GINA Can Help Employers Avoid Genetic Testing Discrimination Lawsuits

Advances in medical technologies since the 1970s have been stunning. From magnetic imaging resonance and CT scans, to DNA sequencing and gene therapy, all aspects of American society and well-being have been altered by these inventive, new technologies. One such technology is the use of gene analysis to determine whether an individual has a genetic predisposition to a medical disorder. This can provide patients valuable information regarding potential future health risks, but it can also alert employers and insurance companies to the same risks, and to potential future costs. This ability to peer into the future and estimate future costs and odds could cause employees to fear, for example, that they will be passed over for promotion if they are more likely than others to develop Alzheimer's disease, or that they will not be hired if doing so will result in greater employer medical costs.

Against this backdrop in 2008, Congress passed, with almost unanimous support, the Genetic Information Nondiscrimination Act ("GINA"). GINA's stated purpose is to encourage workers to get tested for genetic medical conditions, without having to worry about fallout at work. While certainly a worthy goal, the new law is a complicated one, presenting both a potential minefield for employers, as well as opportunities for plaintiffs' lawyers and disgruntled employees.

GINA prohibits workplace discrimination, such as decisions of hiring, termination, compensation, and other terms and conditions of employment, based on genetic testing. Further, employment agencies cannot refuse to place a worker, and labor unions are prohibited from excluding members, based on genetic information. In addition, workers cannot be segregated or classified based on their genetic information. Finally, GINA requires that genetic information in the possession of employers, labor unions, or employment agencies be treated as a confidential medical record and kept separately. GINA permits an employee to file a complaint with the Equal Employment Opportunity Commission ("EEOC").

GINA's other provisions, and the EEOC-issued regulations, guide employers so that they do not run afoul of them, either intentionally or accidentally. GINA prohibits companies with fifteen or more employees from requesting, requiring, or purchasing the genetic information of their employees, including test analysis of DNA, RNA, chromosomes, and gene markers associated with certain cancers. Fetal information is prohibited, as is family medical histories dating back to great-great-grandparents. In short, employers are prohibited from requesting any genetic information about workers or their families. If, for some reason, an employer does have such information, it is prohibited from discriminating based upon the

information. And any genetic information must be kept in separate confidential files apart from standard personnel files.

GINA does provide several exceptions to employer liability. For example, health care providers may provide to the employer a report that may include history or genetic information. GINA provides a “safe harbor” for this scenario – specifically, boilerplate language to be used by the employer instructing the provider not to supply genetic information. If the information is then provided, the employer escapes liability on the basis that the information was “inadvertently” obtained. Similarly, information overheard accidentally in conversation or obtained from public sources is excepted from GINA’s reach. And, GINA allows employers to collect aggregate genetic information of unidentified employees as part of company wellness and disease management programs.

GINA is a well-intended but complicated law, whose scope and attendant regulations pose traps for the unaware employer. Understanding its provisions, and implementing proper procedures and training for employees, will enable companies to avoid EEOC complaints and litigation.