

All in the Genes: GINA Explained



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Our eye color, stature and propensity toward one disease or another may very well be determined by genetics. Genes determine a lot about who we are, what we become. But one thing is for sure, our genes cannot be used to determine whether a company decides to hire us or fire us. And if a company tries to base an employment decision on genes – or family medical history – it may very well find itself on the defensive.

In fact, the US Equal Employment Opportunity Commission (EEOC) is receiving more complaints from employees who are saying that companies for violating the Genetic Information Nondiscrimination Act, commonly known as GINA. GINA was passed and signed into law in 2008. It bars employers from requesting, requiring or even purchasing genetic information from a potential or present employee, and from making employment decisions based on genetic information.

The EEOC defines genetic information broadly to include genetic testing about employees, applicants and their families. The term also includes information about prior or present diseases and your family's medical history. A family member includes relatives up to the 4th degree, as well as spouses and dependents (adoptive or otherwise). It does not include information about a person's sex, age, race or ethnicity.

Because most employers do not conduct DNA testing on employees or applicants, employers have paid little attention to GINA. However, GINA goes far beyond outlawing requests for an employee's DNA. It also prohibits employers from asking employees about their family medical history or genetic information. To date, since the law was passed in 2008, EEOC has received more than 700 charges under GINA and has resolved nearly 600 of these charges.

Fabricut and Upstate New York Nursing Home

Recently, the EEOC pursued two claims for discrimination. The suits were filed under both GINA and ADA (Americans with Disabilities Act).

In May 2013, the EEOC filed its first-ever GINA enforcement action against Tulsa, Oklahoma-based Fabricut, Inc. Fabricut, a major fabrics manufacturer, made a job offer contingent on the applicant taking a medical examination through its contract medical examiner. The examination included a questionnaire asking about her family's medical history, including whether anyone in her family had suffered from heart disease, hypertension, cancer, diabetes and/or mental disorders. Fabricut rescinded its job offer after the examination concluded that the applicant suffered from carpal tunnel syndrome. They settled the suit the same day the EEOC filed it. They paid \$50,000 in damages and also agreed to post and distribute anti-discrimination policies around its workplaces.

Following shortly after this action, the EEOC filed another GINA enforcement action against a nursing home in upstate New York, Founders Pavilion, Inc. The nursing home required both applicants and employees to undergo annual medical examinations that included requests for family medical information. The EEOC also alleged that the nursing home fired two employees because they were perceived to be disabled and therefore, also violated the Americans with Disabilities Act (ADA). The facility agreed to pay \$370,000 to settle a discrimination lawsuit with the EEOC. According to an EEOC news release issued in January, as part of a five-year consent decree resolving the suit, Founders Pavilion will provide a fund of \$110,400 for distribution to the 138 individuals who were asked for their genetic information. Founders Pavilion will also pay \$259,600 to the five individuals who the EEOC alleged were fired or denied hire in violation of the ADA or Title VII.

After the lawsuit was filed, Founders Pavilion sold the nursing facility to another company and ceased operating any business. If Founders Pavilion resumes conducting business, they must post notices and send a memo to employees regarding the lawsuit and consent decree. They will also adopt a new anti-discrimination policy that will be distributed to all employees, provide antidiscrimination training to all employees and provide periodic reports to the EEOC regarding any internal complaints of discrimination. While the Fabricut settlement was relatively modest, the Founders Pavilion illustrates the severe impact GINA violations can impose on small and mid-size businesses.

Employers of all sizes need to pay attention to potential GINA violations in their

employees' and applicants' medical examinations. Some employers are even growing more wary of collecting background medical information as part of their wellness programs. The law outlines some of the dos and don'ts around collecting generic information or family medical history to help employees initiate an appropriate wellness program for them. For instance, such information cannot be provided with an incentive; it has to be provided voluntarily. The EEOC has targeted employers that provide incentive-driven wellness programs for their employees in which an employer or health plan asks employees and their family members to complete a health risk assessment (HRA) in exchange for a discount on premiums or some other incentive.

In the end, if an employee does provide genetic information for the purpose of a wellness program, that information goes nowhere else. It is only accessible to the employee or other family member receiving the wellness services, or to any health care professional or board-certified genetic counselor involved in providing the services. This information cannot be shared or accessible to managers, supervisors, others who make employment decisions or anyone else in the workplace.

To make sure hiring and other workplace practices are not in danger of violating GINA, companies can seek assistance from their Employment Practices Liability insurance provider. Top EPLI insurers also offer their clients access to HR and legal resources for guidance on GINA and other employment concern as well as to offer guidance making sure hiring protocols are followed appropriately.

Inquiring about an employee's mother's health seems innocent enough, but if these inquiries result in a promotion denial, poor performance evaluation or termination – and the employee blames it on the disclosure of the family medical history – a business can find itself under EEOC's GINA scrutiny.

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