What the Regulations for the Genetic Information Nondiscrimination Act Mean for Employment Screening

By Russ Dempsey, Esq.

The EEOC recently issued final regulations for the Genetic Information Nondiscrimination Act, which became effective Jan. 10, 2011. GINA prohibits employers from discriminating, harassing or retaliating against employees based on genetic information, and from acquiring genetic information, with certain exceptions.

GINA will likely have a broad impact on employers, including on internal confidentiality policies, medical requests relating to the Family and Medical Leave Act and disability accommodations, and employee fitness-for-duty requests. This article provides a general summary of the regulations, and reviews the implications to employment screening policies and practices.

Overview of GINA regulations

According to the regulations, GINA applies to employers with 15 or more employees. The regulations define genetic information as including information about an individual's genetic tests, the genetic tests of a family member, family medical history and genetic services by an individual or a family member.

The regulations prohibit an employer from acquiring genetic information by requesting, requiring or purchasing such information. Exceptions to the rule against acquiring genetic information include inadvertent acquisition of such data, such as in casual conversations with employees, information voluntarily offered by employees related to an employer wellness program, certain FLMA certifications or when genetic information is obtained from publicly available documents.

Drug and alcohol tests are not genetic tests

According to the EEOC, drug and alcohol tests are not genetic tests and information gathered from such tests is not subject to GINA regulations. Other tests that are not genetic tests include HIV and cholesterol tests.

Safe harbor notice for requests for medical information

The EEOC has provided a safe harbor notice for employers to include in requests that may elicit genetic information from health care providers. Use of the safe harbor notice will protect employers from claims that they illegally obtained protected information. For example, employers may perform medical examinations after making a job offer or during employment, pursuant to the Americans With Disabilities Act. However, employers may not collect family medical histories as part of the process. Employers must inform health care providers not to collect genetic information as part of employment-related medical exams and are advised to include the following safe harbor notice with such medical examinations:

> The Genetic Information Nondiscrimination Act of 2008 prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of employees or their family members. In order to comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's

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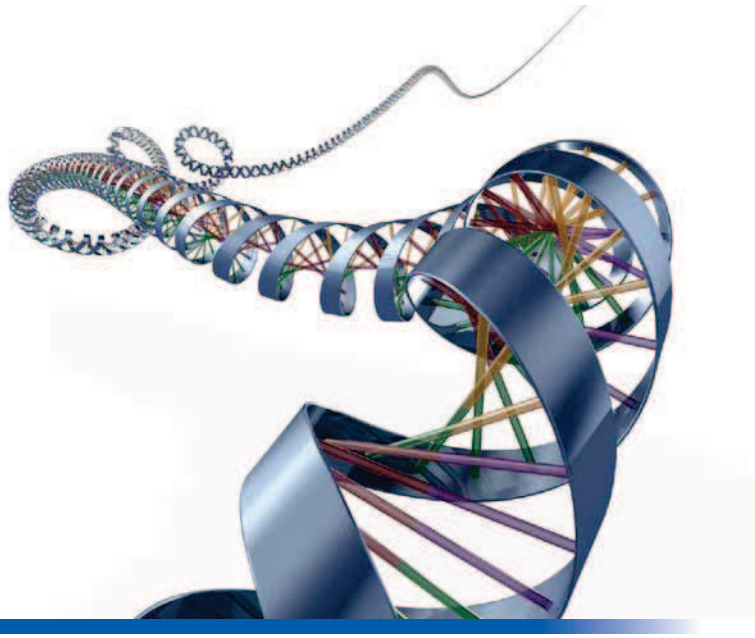

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family medical history, the results of an individual's or a family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or an individual's family member receiving assistive reproductive services.

Genetic information may not be used by companies when making employment decisions. An employee's or applicant's genetic information is not related to the individual's ability to perform a given job.

Genetic information may not be used to make employment decisions

Genetic information may not be used by companies when making employment decisions. An employee's or applicant's genetic information is not related to the individual's ability to perform a given job. Employers should review job applications and their hiring processes to ensure that genetic information is not collected or used in conjunction with employment decisions.

Internet and social media searches

Employers risk violating GINA, and other laws, by performing in-house Internet and social media searches. It is advisable that employers hire an experienced employment screening firm to conduct background checks, as trained staff is necessary to navigate the various legal issues. For example, employers searching social media sites might ask questions that are likely to uncover genetic information, which is a violation of GINA. Further, searches of popular social media sites such as Facebook or LinkedIn may uncover other legally protected information (e.g., race, gender or religious affiliation) and is another reason to engage a knowledgeable employment screening firm.

Genetic monitoring

Some companies have positions for which certain genetic monitoring is required by law. An employer does not have to secure the consent of employees to comply with legally required genetic monitoring, such as the Occupational Safety and Health Administration standards (which require employers to monitor employees' workplace exposure to particular toxic substances, such as lead or cadmium), but must provide notice of the monitoring and otherwise conform to the monitoring program requirements.

The requirements for genetic monitoring programs not required by law differ in that employers must first provide written notice of the monitoring program and obtain the prior written consent of employees. Moreover, an employer is prohibited from retaliating or discriminating against an employee who refuses to participate in genetic monitoring that is not required by law.

Confidentiality

Employers must treat an employee's genetic information as a confidential medical record and maintain it separately from the employee's personnel file. Genetic information that was placed in a personnel file prior to Nov. 21, 2009, does not have to be removed.

Conclusion

Employers are well-advised to consider the full impact of GINA on their policies and practices and to plan accordingly. With respect to employment screening practices, employers should note that drug and alcohol tests are not considered genetic tests, that there may be implications to in-house Internet and social media searches, that inclusion of the safe harbor notice with employment-related medical exams provides protection against claims that genetic information was illegally secured, and that genetic information should not be a basis for an employment decision. ▮

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