

## Don't Ask And Don't Tell

### How to Avoid GINA Liability

By Debra S. Friedman

In today's workplace, most organizations regularly obtain health-related information from employees and their health care providers. Pre-employment medical exams, fitness-for-duty exams, leaves of absence, requests for accommodations, wellness programs and receipt of doctors' notes are just several examples. Sometimes these include genetic information, such as family medical history — even if no one asked for it. Organizations that obtain, use and/or disclose an applicant's or employee's genetic information may run afoul of Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits companies from using genetic information to make employment decisions. In-house counsel, therefore, have a duty to take affirmative steps to avoid liability under this law.

#### TIME TO TAKE ACTION

The final regulations around Title II of GINA went into effect earlier this year. Nevertheless, many companies have not taken steps to comply with its mandates. It's time to take action. In FY 2010, the Equal Employment Opportunity Commission (EEOC) received 201 GINA charges, and that number is expected to rise dramatically. Moreover, as GINA charges make their way through administrative agencies and into the courts, organizations are likely to get hit with substantial verdicts. Don't let this happen to your company.

The following looks at how in-house counsel can help their organizations reduce the risk of a GINA violation and the significant monetary damages that could result.

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#### WHAT IS GINA?

GINA is a law aimed at protecting individuals from discrimination, harassment and retaliation because an employer or potential employer believes the individual has an increased risk of acquiring a medical condition sometime in the future. GINA became effective on Nov. 21, 2009. Final regulations clarifying employers' obligations under GINA went into effect on Jan. 10, 2011.

#### Is Your Organization Covered?

GINA applies to private employers with 15-plus employees. It also covers all federal and state government employers, employment agencies, labor organizations and joint labor-management training and apprenticeship programs.

#### What Damages Could Result from a Violation?

Aggrieved individuals may seek the same remedies under Title II of GINA that are available under Title VII of the Civil Rights Act of 1964, as amended. These remedies include injunctive and equitable relief (such as hiring, reinstatement, promotion and back pay), compensatory and punitive damages, and attorneys' fees and costs. Organizations also may be fined up to \$100 for each separate offense of willfully failing to post a GINA notice in places where other employment notices are customarily posted.

#### What Constitutes

##### 'Genetic Information'?

"Genetic Information," as defined by GINA, is very broad. It includes: 1) an individual's family medical history; 2) the results of an individual's or family member's genetic tests; 3) the fact that an individual or an individual's family member sought or received genetic services; and 4) genetic information of a fetus carried by an individual or an individual's family member, or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Genetic tests include tests such as amniocentesis and carrier screening to determine risk for sickle cell anemia or cystic fibrosis. Not all medical tests, however, are covered by GINA. For instance, tests for drugs or alcohol, cholesterol and HIV are not considered genetic tests.

"Family members" also is broadly defined and encompasses many types of non-blood relationships. Under GINA, family members include all dependents of an individual as the result of marriage, birth, adoption or placement for adoption and all relatives of the individual or the individual's dependents, to the fourth-degree. Therefore, family members are everyone from children to great-great grandchildren, spouses, and parents, to great-great-grandparents, aunts, uncles, nephews, nieces, siblings and half-siblings, first cousins and first cousins, once removed.

#### What Is Prohibited?

GINA prohibits employers and potential employers from: 1) requesting, requiring or purchasing genetic information; 2) disclosing genetic information, except in very limited circumstances; 3) discriminating against applicants and employees based on genetic information; and 4) retaliating against applicants and employees who refuse to provide genetic information, who file a charge of discrimination claim, who participate in a GINA discrimination investigation or proceeding, or who otherwise oppose discrimination under GINA. In other words, do not ask for genetic information in most instances, and do not tell others about any genetic information that may lawfully come into your organization's possession.

#### What Is Permitted?

Employers may acquire genetic information without violating GINA in the following situations:

- **Inadvertent acquisition:** For instance, a manager or supervisor may accidentally overhear a conversation about genetic information or learn of genetic information through a casual conversation with the employee. A manager or supervisor may not, however, intentionally listen to a third-party conversation where genetic information is being discussed, or probe an employee with questions that may likely elicit more genetic information.
- **Social media:** Inadvertent acquisition also may include receiving genetic information

*continued on page 10*

## **GINA Liability**

*continued from page 9*

from a social media site. If the site has restricted access, however, inadvertent acquisition is permitted only if a supervisor or manager is given access by an employee, and the employee discloses genetic information on that site. Employers may not access sources from which they are likely to acquire genetic information, such as online, genetic testing discussion groups.

- Acquisition from a commercially and publically available source: Employers may obtain genetic information from sources such as newspapers, magazines, television shows, books and the Internet. Employers may not search these sources to locate an individual's genetic information.
- FMLA and related certifications supporting an employee's leave to care for a family member with a serious health condition: Employers may acquire genetic information as part of a Family and Medical Leave Act (FMLA) certification for an employee's leave to care for a family member with a serious health condition. Likewise, an employer may acquire genetic information when requesting medical information to support this request under state or local law, or the employer's policies.
- As part of a voluntary wellness program, if certain conditions are met: Employers may obtain genetic information about an employee as part of a voluntary wellness program. The employee receiving these services, however, must first give knowing, voluntary, written authorization for the acquisition of genetic information. A financial incentive also may be offered to employees who complete a health risk assessment that includes questions about family or medical history, as long as the employees

are advised that provision of family medical history is voluntary and does not affect receipt of the financial incentive.

- As part of a genetic monitoring program, if certain conditions are met: In limited situations, employers may use employees' genetic information to determine if employees are being affected by harmful substances in the workplace.
- As part of DNA testing for law enforcement purposes, if certain conditions are met: Employers that engage in DNA testing for law enforcement purposes as a forensic laboratory, or for human remains identification, may collect their employees' genetic information in certain circumstances, such as for quality control.

### ***Avoiding Inadvertent Acquisition***

In-house counsel should advise appropriate personnel to warn an employee's health care provider not to provide genetic information when the organization requests the employee's health-related information, to support, for example, a request for a reasonable accommodation or for sick leave. The warning may be in writing or it may be oral, if the organization typically does not make requests for health-related information in writing. GINA regulations contain sample warning language, which in-house counsel can advise their organizations to put into place. Provision of the warning provides a "safe harbor" protecting the organization from a GINA violation.

If no GINA-related warning is given and an organization inadvertently obtains genetic information, no GINA violation occurs if the request for health-related information was not made in a way that would likely result in the receipt of such information. For example, the EEOC states that if an employer requests a doctor's note to support an employee's absence due to the flu, the doctor's provision of an individual's family medical history taken as part of the employee's medical examination would not be considered a GINA violation. As a best practice, howev-

er, include a GINA-related warning whenever requesting medical information from, or about, an applicant or employee.

### **WHAT ABOUT ADA COMPLIANCE?**

Under the Americans with Disabilities Act (ADA), employers may request medical information from applicants and employees in certain circumstances. GINA, however, prohibits employers from obtaining family medical history or conducting genetic tests of applicants once a job offer has been made, even if such history or tests are required of all post-offer job applicants.

In-house counsel should take several affirmative steps to ensure compliance. First, verify that any post-offer medical exams do not include acquisition of family medical history or genetic tests. Second, advise your organization to tell health care providers not to provide genetic information as part of any examination, history intake, etc., of an applicant or employee. This includes responses to requests for information regarding whether an employee or applicant is disabled, information supporting requests for a reasonable accommodation and information in connection with a fitness for duty examination. Third, if your organization learns that its company doctor or other health care provider over which it has some control is collecting genetic information, take measures to prevent this from happening in the future, such as not using the health care provider's services.

### **FMLA ADMINISTRATION**

Employees requesting FMLA leave generally must provide some medical information to their employers. As GINA regulations require employers to provide warnings to health care providers when requesting employment-related medical information, in-house counsel should have their organizations provide a GINA-related warning in FMLA forms used for an employee's own serious health condition, as well as requests for a second or third medical opinion and return-to-work certifications.

*continued on page 12*

## 'Bounty Hunter' Rules

continued from page 11

reports of violations are received.

- Assure employees that there will be no retaliation for whistleblower reports.
- Review anti-retaliation policies to ensure that they comport with Dodd-Frank, which protects a broader range of disclosures than the Sarbanes-Oxley Act.

Even when a company learns about a whistleblower issue that has been or likely will be reported to the SEC, opportunities remain for companies to limit the likely damage. For one thing, companies may be able to help shape the SEC's decision about whether to proceed with an enforcement action. This is because currently the SEC is neither fully staffed nor prepared to handle the expected number of whistleblower complaints, which it estimates to be about 30,000 annually.

Moreover, the SEC has said that its staff will continue the practice of receiving information from companies in the early stages of an internal investigation and may agree to await further results from the investigation before deciding what may be its next step. This makes it vital for companies to obtain the assistance of outside counsel to help advise them and oversee an expedited but thorough internal investigation.



## Where Is the Data?

continued from page 4

ESI involved in the litigation at hand and be able to present this information herself or make use of an ESI

Coordinator of some kind to assist in the technical details.

### CONCLUSION

The two meetings outlined above should get the legal team started on their preservation and collection re-

sponsibilities. More issues will arise, but setting up a line of communication with IT can help to try and avoid or predict those issues in respect to ESI.



## GINA Liability

continued from page 10

While the EEOC has commented that no GINA-related warnings need to be attached to the Department of Labor's FMLA forms as they are not likely to elicit genetic information, the EEOC has not issued formal, written guidance on this point. Accordingly, the recommended approach at this time is to include a GINA-related warning as part of all FMLA forms used for the situations covered above.

### REDUCING THE RISK OF A VIOLATION

Whether you are in-house counsel for an organization of 15 or 1500, it is critical to work with your company and HR to ensure that you have all the policies and procedures in place to avoid a genetic information breach. In line with the above, following is a checklist of what in-house counsel can do to ensure compliance with GINA.

- Post a GINA notice. Make sure your organization posts a GINA notice where other employment notices are posted. A sample notice may be found at [www.eeoc.gov/employers/](http://www.eeoc.gov/employers/)

upload/eeoc\_self\_print\_poster.pdf.

- Use GINA's safe harbor warning. Include a GINA-related warning when requesting employment-related medical information from applicants, employees and/or their health care providers. GINA-related warnings should be used when requesting medical information related to: 1) a pre-employment medical exam; 2) an employee's potential or known ADA disability; 3) information about possible reasonable accommodations; 4) an FMLA or other leave due to the employee's own serious health condition; and 5) a return-to-work certification or a fitness for duty exam. GINA-related warnings are not necessary in connection with an employee's request for leave to care for a family member with a serious health condition.
- Conduct training. Train supervisors and managers on GINA's requirements. Also train employees on GINA's non-discrimination, non-harassment

and non-retaliation requirements.

- Keep all GINA-related information confidential. Genetic information must be treated in the same way as other medical information. Place all GINA-related information received after Nov. 21, 2009 in confidential, medical files and only allow access or disclosure on a strict need-to-know basis.

### CONCLUSION

By taking the above steps, in-house counsel can help reduce their organization's exposure to GINA liability. This is imperative as non-compliance exposes organizations not only to potential lawsuits based solely on GINA violations, but also to additional claims in other lawsuits, particularly those alleging violations of the ADA and/or the FMLA.



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