"You Don't Bring Me Flowers Anymore"

GINA Creates Risks for the Sympathetic and the Unwary

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When you learn a co-worker's father was killed in car accident, which was caused by him driving drunk, you want to go talk to her. Even though you are a manager and she is not, you began your careers with the company together and you have remained close. Your families have had dinner together many times and she was very supportive through your own cancer treatments. You are friends on Facebook and you are both active participants in a wide, mutual social circle. You want to go to her and give her a hug. You want to process with her the emotional devastation caused by her father's alcoholism and depression that resulted in his violent and sudden death. You want to go to the wake and the funeral. You want to care. You can care but in light of the regulations implementing a portion of the Genetic Information Non-Discrimination Act of 2008 (GINA), you just have to be careful about caring too much.

Effective in January 2009, the Equal Employment Opportunity Commission promulgated its final regulations implementing the portions of GINA applicable to employers.[1] The regulations establish, among other things, that (1) employers cannot discriminate, harass or retaliate against an employee[2] based on the employees' genetic information; (2) employers cannot request, require or purchase genetic information except as permitted by the regulations; and (3) employers cannot disclose the employees' genetic information. GINA was enacted in response to societal concerns that the evolving and growing use of genetic research and genetic testing would cause employers and insurance companies to discriminate against employees with known genetic markers for costly diseases. The GINA regulations, which apply to private and state, however, provide for some esoteric and counter-intuitive requirements that employers ignore at their peril.

1. Genetic Information Is More Than You Think

For over a decade, many states, including Maine, have had laws that protect employees from being discriminated against based on their genetic information. Under Maine law, "genetic information" is defined as "information concerning genes, gene products or inherited characteristics that may be obtained from an individual or family member." 5 M.R.S.A. § 19301(2). The EEOC's regulations, however, define genetic information more broadly. Of course, the regulations define "genetic information" to include what most would think constitutes genetic information. That is (1) information about an individual's or a family member's genetic tests; (2) requests for, and receipt of, genetic services by an individual or a family member; and (3) genetic information about a fetus carried by an individual or family member, or about an embryo legally held by the individual or family member using assisted reproductive technology. But the regulations further define genetic information to include "family medical history" which is defined as "information about the manifestation of disease or disorder in family members of" the employee. So, if your friend and co-worker talks to you about her deceased father's alcoholism and depression (i.e, a family member's manifested disease), you have just acquired genetic information, which GINA prevents you from doing if the acquisition is not inadvertent.

2. Caring Too Much Could Violate The Regulations

As with the definition of genetic information, the definition of a "request" for information encompasses more than one might think. Under GINA's regulations, a "request" may be as informal as "actively listening to third-party conversations for the purpose of obtaining genetic information," "conducting an Internet search on an individual that is likely to yield a result containing genetic information," or "making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information." While the rules do provide exceptions to the broad rule, employers and their managers must be very careful.

The regulations' general prohibition on acquiring genetic information does not apply if the employer inadvertently acquires genetic information. The employer may inadvertently acquire genetic information if a manager simply overhears a conversation between employees. But, actively listening would violate the rules. A manager can have "a casual conversation" or make "an ordinary expression of concern" but the manager cannot follow up with questions "that are probing in nature." So, while a manager can ask, "How are you?" or "Did they catch it early?", the manager cannot ask, "Does cancer run in your family?" or "I grew up with an alcoholic mother. Isn't it terrible?" With respect to your friend and co-worker, you would be able

[1]GINA applies to private, state and federal employers as well as to employment agencies and labor organizations. In this article, we refer only to employers for convenience.

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HR Times May 2011 Q1V5.indd 32 4/22/2011 1:19:18 PM

to sympathize about her father's death but you could not talk with her in a manner that would likely result in her revealing that her grandfather and uncle also died as a result of actions caused by alcoholism and depression. If you were to add to the scenario that your co-worker has been missing a lot of work in the last six months and you have always been a little unnerved by her drinking habits, your acquisition of her family's medical history becomes even more complicated and problematic for your employer.

3. Other Exceptions

Employers may also be deemed to have inadvertently acquired genetic information in response to lawful requests for medical information, such as a fitness for duty verification or a leave request, if the employer instructs the health care provider and/or individual from whom it requests the medical information not to provide genetic information. In the rules, the EEOC provided the following specific language that employers would be wise to use when requesting medical information:

> *The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. 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 family medical history, the results of an individual's or 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 family member receiving assistive reproductive services.*

GINA also provides an exception from its general prohibition of acquiring genetic information, if the employer acquires the genetic information from a publicly available source, such as a newspaper, television, or the Internet. The final rules, however, specify that GINA prohibits conducting an Internet search on an individual with an intent to acquire genetic information or in a way that that is likely to result in the employer obtaining genetic information. GINA also excludes from the "publicly available" exception information that an employer learns through a site such as Facebook or another social networking site, in which access has been restricted to those with permission. In some circumstances, the acquisition of genetic information through a social networking site will be covered by the inadvertent acquisition exception, such as where a manager is a "Facebook friend" of an employee and inadvertently learns of family medical history from the site. A manager who actively participates online, however, with an employee who discusses family medical history or the employee's own health issues may very well be deemed to have inappropriately acquired genetic information. To limit potential liability, employers must consider GINA's implications on employee use of social media, and address these concerns in its social media policy, including prohibiting managers and staff from "friending" each other in cyberspace.

Employers that offer voluntary wellness programs and/or health risk assessments must also consider GINA's restrictions. Except in very limited circumstances, the requesting or requiring an individual to undergo a genetic test or collecting genetic information from an individual prior to, or in connection with, its enrollment in the plan, or an any time for under writing purposes. If the circumstances for such information are permissible, the employer must ensure that the employee provides knowing, voluntary and written authorization when providing

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HR Times May 2011 Q1V5.indd 33 4/22/2011 1:19:22 PM

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any genetic information. The EEOC specifies that the authorization and program meet certain criteria in order to meet the standards of the exception. In addition, the final rules clarify that an employer may offer a financial inducement to participate in a health risk assessment only if the inducement is available irrespective of whether questions about family medical history/genetic information are answered.

4. To Disclose or Not to Disclose

The GINA regulations regarding the disclosure of genetic information also are a bit counterintuitive. As one would expect, the GINA regulations require that all genetic information acquired by the employer, whether in writing or orally, be kept confidential and be treated as a confidential medical record except for information acquired through sources that are commercially and publicly available. The employer must maintain genetic "information on forms and in medical files" that are separate from personnel files. Information acquired prior to November 21, 2009 and that exists in personnel files need not be removed but the prohibitions on use and discrimination apply to all information acquired, including information acquired prior to November 21, 2009.

The regulations, however, treat disclosure of genetic information differently than disclosure of personnel files and regular medical information. The employer may disclose genetic information in its possession only in the following manner:

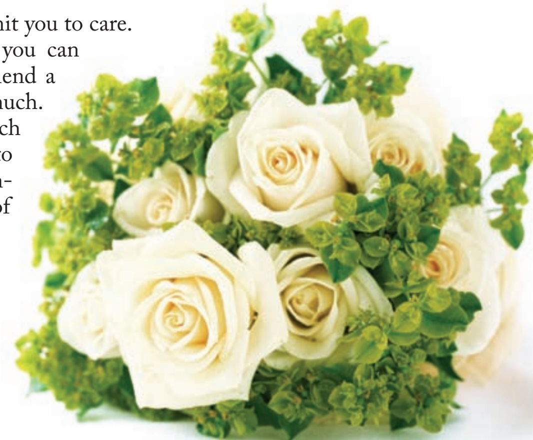
- To the employee or family member if the information pertains to them and only upon a written request;
- To an occupational or health researcher if research is conducted in compliance with other applicable Federal regulations;
- In response to a court order that "expressly" authorizes the disclosure of genetic information and then only if the employee has been notified of the court order;
- To government officials investigating compliance with the GINA regulations;
- To the extent such disclosure is made in support of an employee's compliance with State or Federal FMLA certification provisions; or
- To health officials in order to provide information about manifestations of a disease or disorder that concern a contagious disease that presents "an imminent hazard of death or life-threatening illness."

What this means is that an employee's written authorization for her personnel file, including the medical records file, to be sent to her attorney would not permit the disclosure of any genetic information in the file to that attorney. The file would have to be sent only to the employee. A subpoena would not suffice to permit the disclosure nor would a typical court order requiring the production of an entire personnel file, which under Maine law, includes every document pertaining to the employee. In short, employers must be very careful when responding to an otherwise lawful request for the disclosure of personnel information.

5. What's the Big Deal?

Unlike the Title VII and state discrimination laws with which employers are familiar, GINA's prohibition on the acquisition or disclosure of genetic information creates liability even where there may not be an adverse employment action, such as firing, demotion, or denial of an employment benefit. Violations of GINA may result in costly damages. Remedies available for wrongful acquisition of genetic information include reinstatement, injunctive relief, back pay, compensatory and punitive damages, and attorney's fees and costs, as well as monetary fines of up to $100 per day per individual. In short, GINA creates traps for the unwary and for those who care too much. To comply with GINA, employers must be sure that they post the revised version of the "EEO is the Law Poster" which is available at http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf. In addition, employers are encouraged to consult with legal advisers to review and revise their human resources practices and policies to ensure compliance with GINA, such as adding safe harbor language to FMLA and fitness-for-duty forms, making sure that social media policy is crafted in a way to limit potential liability under GINA, as well as training managers on the limits of permissible conduct under GINA.

In closing, GINA does permit you to care. You can send flowers and you can give your co-worker and friend a hug. You just can't care too much. You cannot process too much information that will lead to a discussion of "genetic information." Irrespective of whether you think the rules make sense in some circumstances, they are the rules.



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