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How Does GINA Impact Your Workers' Compensation Practices?

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Effective November 21, 2009, the Genetic Information Nondiscrimination Act (GINA) prohibits employers with 15 or more employees from discriminating against employees because of "genetic information." Genetic information is a term defined in the legislation and includes, among other things, medical information, current and historical, regarding an employee's family members.

There are two main provisions of GINA. An employer is not permitted to request, require or purchase the genetic information of its employees or their family members except in limited circumstances, such as the employer's "inadvertent" requests or receipt of genetic information. Likewise, an employer may not disclose genetic information.

Effective January 10, 2011, regulations promulgated by the Equal Employment Opportunity Commission provide that if an employer uses certain language when requesting medical information about an employee or family member, any receipt of genetic information will be deemed inadvertent. This "safe harbor" language puts the medical provider on notice that the provider should not provide any genetic information when responding to the request for medical information. If the medical provider disregards this warning, the employer's

About the photo: Flag flying over Hancock County Courthouse.

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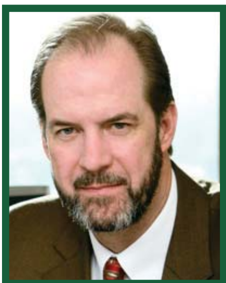
receipt and possession of genetic information will be considered inadvertent under GINA. Of course, the most common request for medical information is a request for copies of medical records.

Family medical histories are also often included in reports of physicians performing independent medical examinations at the request of the employer. The GINA regulations require employers to warn physicians not to collect genetic information, including family medical histories, as part of any medical examination "related to employment." This warning "is mandatory in all cases" where the employer is requesting "an employment-related medical examination" because the acquisition of genetic information "would be likely in the absence of the warning."

Information regarding a workers' compensation claimant's family history is often not critical to the defense of a workers' compensation claim. In certain instances, however, the claimant's family history arguably is relevant, for example, a family history of arthritis. The legislation provides for an exception regarding family history or genetic information which is relevant to a workers' compensation claim, but, unfortunately, the regulations do not address the circumstances under which this exception may apply. Thus, a reasonable approach for employers would be to include safe harbor language in all written requests for medical records unless the employer believes family history is relevant to the claim issue being addressed. If the family history is relevant, the employer should be able to rely upon the exception.

GINA also requires employers who possess written or electronic genetic information about their employees to "maintain such information on forms and in medical files … that are separate from personnel files and treat such information as a confidential medical record." As a practical matter, all medical records containing genetic information should be kept separate from an employee's personnel file.

Why is all of this important? GINA provides the same enforcement mechanisms as found in Title VII of the Civil Rights Act of 1964. In addition, the regulations provide for a separate action against employers for compensatory and punitive damages, reasonable attorney's fees, expert fees, and injunctive relief, including reinstatement and back pay.



Mr. Johnson is a member of the Firm. While his practice includes all areas of employment law, Mr. Johnson concentrates his practice in workers' compensation defense. To contact Mr. Johnson in regards to GINA, please call 419-241-6000.

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