Employment Alert

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# The EEOC Filed its First Lawsuits Under GINA, Giving Employers a Reminder to Update their Policies and Practices to Avoid Liability

***by Heidi N. Hartman, Esq.***

Since the Genetic Information Nondiscrimination Act (GINA) became effective in January 2009, employers who have more than 15 employees have been prohibited from: 1) using genetic information to discriminate in employment; 2) requesting or requiring genetic information from or purchasing genetic information about employees; and 3) disclosing employee genetic information. Genetic information as defined by GINA includes an individual's family medical history, the results of an individual's or family members' 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.

Many employers condition offers of employment to candidates on the successful completion of a post-offer medical examination or inquiry or require a fitness-for-duty examination at certain points during an employee's employment. Such examinations are permissible under the ADA. As part of the prohibition against requesting or requiring employees to provide genetic information, GINA prohibits employers from obtaining genetic information from employees during these medical examinations. Thus, GINA requires employers to affirmatively advise the physicians they engage to perform these examinations not to collect genetic information during the examinations.

The EEOC has been charged with enforcement of GINA and the number of charges filed has increased over the years, with 201 charges of discrimination filed under GINA in 2010, 245 charges in 2011 and 280 charges in 2012. One of the six enforcement goals articulated by the EEOC for 2013 is addressing emerging and developing issues in equal employment law, which includes genetic discrimination. In May 2013, the EEOC filed its first two lawsuits against employers under GINA and has widely publicized its actions and intent to become more active in this area.

In the first lawsuit, which was both filed and settled on the same day, the EEOC charged a Tulsa, Oklahoma employer with violating ADA for refusing to hire a woman for the position of memo clerk because it regarded her as having carpal tunnel syndrome and violating GINA by asking for the woman's family medical history in its post-offer medical examination. Specifically, the medical examiner required the employee to complete a questionnaire which asked about the existence of separately listed disorders in her

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family medical history, such as heart disease, hypertension, cancer, tuberculosis, diabetes, arthritis and mental disorders. The employer in this case chose to pay $50,000 and enter into a consent decree with the EEOC as a result of these violations rather than proceed with litigation.

The second lawsuit filed by the EEOC in May is a class action against a New York nursing and rehabilitation center under GINA, the ADA and Title VII. According to the EEOC, this employer also conducted post-offer, pre-employment medical examinations of applicants which were repeated annually if the person was hired, and asked for family medical history as part of the examinations.

Based on the EEOC's recent enthusiasm for pursuing actions under GINA, employers should review their policies and practices with regard to seeking medical examinations of employees or candidates. Clearly, the EEOC intends to attempt to hold employers liable for the actions of physicians that they contract with to perform medical evaluations. Therefore, employers must make sure to specifically warn the examining physician, either verbally or in writing, not to obtain genetic information and not to provide it to the employer when reporting the results of the examination. The rules specifically state that if an employer provides these warnings but nevertheless receives genetic information, the receipt of the genetic information will be considered an "inadvertent receipt" of genetic information and not a violation of GINA. The GINA regulations provide model language that can be used when an employer seeks medical examinations of individuals.

The lawsuits filed by the EEOC do not involve seeking medical information from employees, but this area presents its own set of landmines. For example, when seeking certification of an employee's need for leave due to a serious health condition, an employer should advise the employee and his or her physician not to provide any genetic information in the certification. Of course, even though the Department of Labor recently updated is FMLA certification form, it did not include the language GINA requires in the new form. Therefore, employers also may want to revise their FMLA forms to incorporate the appropriate warnings. However, the GINA language should not be used in every circumstance, because there are situations when employers can request genetic information as defined by GINA. For example, GINA includes an exception permitting employers to ask for "family medical history" when an employer is seeking certification to support an employee's request for leave to care for a family member with a serious health condition. Employers may wish to have experienced employment counsel assist in ensuring that all communications regarding medical information are compliant with all applicable laws.

*If you have any questions regarding this or any other labor and employment law issue, please contact Heidi N. Hartman (419-247-1748; hnhartman@eastmansmith.com) or visit our web site at www.eastmansmith.com.*

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