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Client Alert

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Genetic Information Nondiscrimination Act Takes Effect

Late last year, a new federal employment statute governing workplace behavior took effect throughout the United States. Title II of the Genetic Information Nondiscrimination Act (GINA), signed into law by President Bush in 2008, took effect on November 21, 2009. Title II of GINA prohibits employers with 15 or more employees from discriminating against employees or applicants because of genetic information. (Another portion of GINA, Title I, addresses the use of genetic information in the context of health insurance.) The Equal Employment Opportunity Commission (EEOC), which is responsible for enforcing Title II of GINA, issued proposed regulations in March 2009, but the final regulations have not yet been released. Nevertheless, the Act and the proposed regulations make it clear that GINA will have a far-reaching effect on employers.

GINA's Prohibitions On The Use and Acquisition of Genetic Information

GINA defines "genetic information" broadly to include:

1. information about an individual's genetic tests;
2. information about the genetic tests of an individual's family members; and
3. information about any disease, disorder, or condition of an individual's family members (i.e., an individual's family medical history).

According to the EEOC, family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of developing a disease, disorder, or condition in the future, but does not tell the employer anything about someone's current ability to work. Information about an individual's age and gender is *not* considered genetic information, nor is information regarding tests for alcohol or drug use.

GINA forbids discrimination or harassment on the basis of genetic information with respect to any aspect of employment, including hiring, firing, compensation, promotions, layoffs or any other term or condition of employment. Moreover, in most cases, employers are prohibited from even acquiring an individual's genetic information. There are several narrow exceptions to this prohibition, including:

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1. inadvertent acquisitions of genetic information, such as in situations where a manager overhears someone talking about a family member's illness (i.e., the "water cooler" exception);
2. obtaining genetic information, such as family medical history, as part of health or genetic services, including wellness programs, offered by employers on a voluntary basis, *as long as certain specific requirements are met*;
3. acquisition as part of the certification process for Family Medical Leave Act leave or leave under other similar laws;
4. acquisition through commercially and publicly available documents like newspapers;
5. acquisition through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where the monitoring is required by law or, in very limited situations, where the program is voluntary; and
6. acquisition by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification, again under limited circumstances.

Not surprisingly, under GINA, it is also illegal to fire, demote, harass or otherwise retaliate against an applicant or employee for filing a charge of discrimination based on genetic information or for participating in a discrimination proceeding.

How Will GINA Affect Your Business?

GINA's prohibitions on employers' acquisition and use of genetic information will have substantial effects on employers' current workplace practices. For instance, in an example cited by the EEOC, prior to GINA, some employers conducted post-offer health exams during which prospective employees were asked about their family medical history. Given the broad definition of "genetic information," such a practice would now be prohibited. Similarly, GINA will likely also affect employers' ability to collect genetic information as a part of health assessments conducted in connection with wellness programs.

Should a violation of GINA occur, the remedies are the same as those available under Title VII of the Civil Rights Act—that is, primarily back pay, as well as compensatory and punitive damages based on the size of the employer. In addition, as with claims under Title VII, an employee who believes that he or she has been discriminated against on the basis of his or her genetic information must file a charge with the EEOC prior to bringing suit. Unlike Title VII, GINA does not currently allow for disparate impact claims, or claims alleging a discriminatory effect on a protected class caused by an employment practice that appears on its face to be nondiscriminatory. However, GINA provides that this prohibition on disparate impact claims will be revisited after several years.

Looking Ahead

All employers should evaluate their current practices to ensure that they are not improperly acquiring or utilizing genetic information in violation of GINA. Furthermore, equal employment opportunity policies should

be updated to indicate that discrimination based on genetic information will not be tolerated. In addition, employers should make sure that they obtain and post the latest version of the EEOC's *EEO is the Law* poster, which has been recently updated to include information about GINA, as well as other changes in federal employment discrimination law.

If you have additional questions about GINA and how it may affect your business, please contact one of the members of the AGG Employment Law Team.[1]

1 http://www.agg.com/Contents/PracticeAreaDetail.aspx?ID=212