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Being Compassionate But Cautious: Workplace Conversations Under The Genetic Information Non-Discrimination Act

By Julie T. Bittner, Esq.

One of the unfortunate side effects of stringent anti-discrimination laws is, despite the best of intentions, an unwitting manager may expose his or her employer to a claim of discrimination when all he or she intended to do was demonstrate compassion. It is a scenario that plays out in workplaces nationwide every day: an employee tells her manager that the employee's mother has cancer and is undergoing treatment. The manager, out of compassion, comforts the distraught employee. But after the passage of the Genetic Information Non-Discrimination Act of 2008 ("GINA"), which prohibits discrimination on the basis of genetic information - including family history of diseases such as cancers - where does compassion end and liability begin? It is a difficult question that thankfully received some recent clarification from the EEOC.

How should a manager respond to the hypothetical employee?

In the final regulations for GINA, published last month, the EEOC identified one of GINA's safe harbors for employers - the inadvertent disclosure of genetic information. The regulations clarify that an employer is not automatically subject to potential liability under GINA when a supervisor or manager accidentally learns of an employee's or an employee's family's genetic information through casual conversation or by inadvertently overhearing the disclosure of the information. This is what is known as the "water cooler" problem.

This safe harbor rule applies to the hypothetical manager and employee. The EEOC explained that Congress did not intend to prohibit all compassionate workplace conversation by passing GINA. Thus, asking an employee whose family member was recently diagnosed with cancer such questions as, "Did they catch it early?" or "Is she feeling alright?" is not in violation of GINA. Nor is asking an employee suffering from an illness such questions as, "How are you feeling?" a violation of GINA. Rather, the EEOC has chosen to draw the line at "probing" questions intended to elicit additional genetic information about the employee or employee's family. Thus, while a manager may ask an employee, "Did they catch it early?", the manager should not follow that question up by asking whether the employee was getting tested for the disease or whether other family members suffered from the disease ("Does cancer run in your family?").

Mindful of the ubiquitous nature of social media in the modern workplace, the EEOC has even included clarification on exposure to genetic information through social media sites. Under the regulations, there is a safe harbor when the manager or supervisor "inadvertently learns genetic information from a social platform which he or she was given permission to access by the creator of the profile at issue." In non-legal-speak, this means that it is not a violation of GINA to learn genetic information through an employee's Facebook status (imagine, for example, "John Doe is at the doctor's office undergoing a genetic test to determine whether he has a greater likelihood of cancer"), so long as the employee has granted the supervisor or manager access to the employee's Facebook page.

The realities of the GINA regulations put employers in the uncomfortable position of balancing compassion with the realities of employment law. However, proper training will allow those managers and supervisors to comfort employees without exposing their employers to potential claims of discrimination under GINA.

A couple of additional points to keep in mind regarding GINA:

- GINA prohibits the use of genetic information in making decisions related to hiring, firing, or any other terms, conditions or privileges of employment.
- GINA only applies to private and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs.
- "Family member" is defined as a first-, second-, third-, or fourth-degree relative. This means that family history about diseases and disorders of, for example, your mother, grandmother, great-grandmother, and great-great grandmother is protected information under GINA.
- As always, keep confidential any genetic information that you happen to acquire about an employee.
- Continue to maintain any genetic information learned about an employee in a separate file. Do not keep medical

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information in an employee's personnel file.

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