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Genetic Information Lawsuits Are No Longer a Thing of the Future

By Jerilyn Jacobs

The Equal Employment Opportunity Commission ("EEOC") has followed through on its strategic enforcement plan to address emerging and developing issues by initiating litigation this year under the Genetic Information Nondiscrimination Act of 2008, commonly referred to as GINA. On April 29, 2013, the EEOC filed its first lawsuit against an employer for an alleged violation of GINA. Less than a month later, on May 16, 2013, it filed its second. Both lawsuits targeted employers that had retained third-party medical providers to perform medical examinations during which the agent medical providers acquired family medical history information. One suit has already settled.

GINA prohibits employers from discriminating against employees on the basis of their genetic information. Genetic information is defined by statute as information about one's own genetic tests, the genetic tests of one's family members, and the manifestation of a disease or disorder in one's family members. *See* 42 U.S.C. § 2000ff

In addition to prohibiting discrimination on the basis of genetic information, GINA expressly prohibits the "acquisition" of genetic information with respect to an employee or a family member, except in certain circumstances. As GINA states, "It shall be an unlawful employment practice of an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee" except in certain enumerated situations. The most notable exceptions include:

- where the employer "inadvertently" requests or requires family medication information;

- where health or genetic services are being offered as part of a wellness program;
- where the employee provides a prior, knowing, voluntary, and written authorization;
- where information is provided to an employer as part of compliance with the certification provisions under the Family and Medical Leave Act or a similar state medical leave law; and
- where only the employee (or family member, if applicable) and a licensed health care professional or board certified genetic counselor providing services receive individually identifiable information concerning service results.

Importantly, no exception exists for the acquiring of information during non-medical-leave screenings, such as post-offer or return-to-work medical examinations. [As we first cautioned when GINA was passed in 2008](#), GINA's prohibition against the acquisition of genetic information casts a large net in which employers might become ensnared.

The first lawsuit filed by the EEOC under GINA was against Fabricut, a fabric distributor based in Tulsa, Oklahoma. According to the complaint, Fabricut sought genetic information by virtue of sending an applicant to a post-offer medical examination at which the applicant was asked to complete a questionnaire that prompted her to disclose the existence of certain disorders in her family history. The complaint further alleged that Fabricut withdrew its offer of employment after the medical examination due to a belief that the applicant either had Carpel Tunnel Syndrome or was predisposed to develop Carpel Tunnel Syndrome. The complaint also alleged a cause of action for disability discrimination under the Americans with Disabilities Act ("ADA") along with the cause of action for an alleged violation of GINA. The matter settled on May 7, 2013, with Fabricut agreeing to a \$50,000 payment and entering into a consent decree that will require it to take certain actions in the future.

On the heels of the *Fabricut* settlement, the EEOC filed a second lawsuit under GINA on May 16, 2013, this time against a New York nursing home, Founders Pavilion. In the complaint, the EEOC alleged that the nursing home violated GINA by having in place a practice that requested family medical history information from applicants and employees as of part of its pre-employment, return-to-work, and annual medical examinations. This lawsuit also contained claims that the employer violated the ADA and Title VII. This litigation is just underway and as of the date of this article no responsive pleading had yet been filed by the nursing home.

Interestingly, both the *Fabricut* and *Founders Pavilion* lawsuits involved outside medical providers, and it was their requests for family medical history information that were the basis of each lawsuit. Thus, employers should be aware that the EEOC's position is that employers are liable under GINA for the collection of information by contract medical examiners retained by employers to conduct post-offer, return-to-work, and other similar medical examinations.

The public filings regarding the lawsuits leave unanswered questions for employers trying to comply with GINA. Neither complaint indicated whether the actual genetic information provided by the candidates and employers in the medical examinations was passed along to the employer. However, it is clear that the EEOC considers third-party medical providers as agents of the employer, and thus may pursue litigation even where the genetic information itself is not provided to the employer.

Additionally, neither case has yet tested the meaning of the "prior, knowing, voluntary, and written authorization" exception. The exception, merely by its existence, must afford an employer protection in cases where such authorization is obtained. However, what constitutes a valid waiver, including what information has to be disclosed to the employee, and what constitutes "voluntary" are issues to be settled at a later time.

Employers who retain contract medical examiners may want to consider working with their examiners to ensure that routine medical history questionnaires are modified so as not to collect family genetic information in instances involving post-offer and/or fitness-to-work examinations. Further, as both the *Fabricut* and *Founders Pavilion* complaints both involved disability claims, employers' efforts to ensure their compliance with the ADA and other disability-related and discrimination laws may not only help reduce disability claims, but any would-be companion GINA claims as well.

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