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There’s No Putting GINA Back in the Bottle

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Employers can now add GINA to the long list of acronyms, which started with **OSHA** back in the 1970s and now includes **ADA, FMLA, HIPAA**, and a host of rules and regulations whose acronyms have either been forgotten or have never been used. The newest version is known as the Genetic Information Non-Discrimination Act, and essentially prevents employers from inquiring into the family medical history of employees who have been injured on the job, even if those employees are alleging a substantial aggravation of a pre-existing condition or a psychological condition which could well be a part of the family history.

Effective January 10, 2011, the **federal Genetic Information Non-Discrimination Act of 2008, otherwise known as “GINA”, prohibits an employer from requesting an individual’s genetic information and that of his/her family**. This applies to an employer’s request for medical records and also applies to **Independent Medical Examinations (IMEs).**

An employer may not request information about an employee's health status in a way that is likely to result in the exposure of the employee’s genetic information or that of his/her family (which includes relatives up to the fourth degree). "**Genetic information**" is classified as genetic tests, the manifestation of a disease or disorder, and participation in genetic testing (i.e. studies by market-research firms sampling medications). Clarifications regarding sex, age, and race are not considered genetic information. Family history is.

The definition of a fourth-degree relative is interesting. A parent is one, grandparent is two, great-grandparents three, and great-great grandparents four. Assuming 40 years per generation, this could go back 160 years. Imagine the permutations through aunts, uncles and cousins. The fourth-degree relationship applies to spouses as well, so the genetic history of in-laws is covered.

Under GINA, an employer may not request, require, or purchase an employee’s genetic information or that of the employee’s family. However, genetic information obtained "inadvertently" is not a violation of the Act. Such inadvertent acquisitions are not specifically defined, but examples are given where a conversation is overheard (not subject to targeted surveillance) and information is divulged in response (One employee saying to another “I heard your son has been diagnosed with cancer, is he ok?”); an unsolicited exposure from the employee him/herself (“my son has cancer, but thankfully

we caught it early…"); or via social media outlets (posting of a family member's health status on facebook, twitter, etc.).

In the IME scenario, to protect the company from genetic information received, the requesting party should direct the health care provider (in writing or verbally if the requester does not typically make requests for medical information in writing) not to provide genetic information. The inclusion of the following safe-harbor language, straight from the statute, in the employer's letter will render any disclosure of genetic information inadvertent:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's 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.

If the employer does not provide the safe-harbor language, genetic information can still be classified as inadvertent if the request was not likely to result in the employer obtaining genetic information (i.e. an overly-broad response from the doctor is received in response to your tailored request for medical information).

If the above notice is given to a health care provider and genetic information is provided, the employer must "take additional reasonable measures within its control" to make sure that the violation is not repeated by the same health care provider. Unfortunately, reasonable measures are not defined.

Finally, the Act also applies to pre-employment health screenings, which also may not solicit genetic information regarding the potential employee or his/her family.

In order to ensure compliance with GINA, employers may wish to implement the following measures:

1. Letters to physicians requesting medical records or an examination should include the safe-harbor language.
2. In the event that records are obtained which contain genetic information despite the safe-harbor language, employers may wish to redact the information prior to its transmission to a third-party.

Failure to comply with GINA's mandates expose employers to potential claims for both compensatory and punitive damages, the threat of EEOC involvement and oversight, as well as penalties from the Department of Labor. Fines can be as large as $50,000 for a first offense, and go

to $100,000 for repeat violations. Punitive damages of up to $300,000 are available as well.

There surely are meritorious reasons for enacting GINA, but for those who represent employers, particularly in workers' compensation cases, the Act adds additional burdens requesting medical information.

As seen in the September issue of the *Cincinnati Bar Association Repor*t.

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