

February 2, 2011

January 2011 Regulations Impact Employer-Employee Relations Regarding Genetic Information

The Genetic Information Nondiscrimination Act of 2008 ("GINA") is a federal law that prohibits employment discrimination based on genetic information. Genetic information includes, but is not limited to, an individual's family medical history (including family members' current illnesses), genetic testing results, and genetic information about a fetus carried by the individual or his/her family member. In January 2011, new regulations went into effect and impact the way routine interactions with employees must be handled. **What Constitutes Genetic Information or Genetic Tests** The following are examples of genetic information about an employee:

- Grandmother died of breast cancer
- Adopted child has chicken pox
- Father was deaf

Genetic tests can include those that test for:

- Predisposition to certain conditions
- Presence of genetic abnormalities in an embryo or fetus (e.g., amniocentesis)
- Family relationships (e.g., paternity tests)
- Ancestry
- Prohibited Communications

Managers must not ask for or seek genetic information except in limited circumstances.

- If managers overhear employees discussing medical or genetic information, they must remove themselves from the area and instruct the employees to refrain from discussing such information in the workplace.
- If employees volunteer medical information regarding themselves or family members, managers should not engage in any further conversation about the matter. General expressions of concern, such as "Are you feeling better?" or "Is your daughter all right?" are permissible, but managers must not probe for additional information with questions such as, "Did you get tested?" or "Does heart disease run in your family?"
- Managers must not conduct Internet searches or other investigations that would likely result in discovery of employees' genetic information.
- Even if employees have granted access, managers must not monitor employees' social media pages for information or updates regarding the status of their or their family members' medical conditions.

Medical Inquiries and Examinations

- When handling medical inquiries to employees' doctors, including those requesting information relating to medical leave requests and requested accommodation, always advise employees and their doctors that they should not provide genetic information. The Equal Employment Opportunity Commission has suggested "safe harbor" language for this purpose.
- For work-related examinations such as fitness-for-duty and pre-offer/post-offer medical examinations, instruct health care providers to refrain from taking employees' family medical histories. If the health care provider nonetheless collects medical histories despite this instruction, they can no longer be used to conduct such examinations.

Maintain Confidentiality Keep all genetic information confidential.

- Medical and genetic information, including documentation concerning family and medical leave requests, must be kept in a confidential file that is separate from employees' personnel file.
- Before providing employees' managers or supervisors with personnel files, remove any medical or genetic information.
- Confer with the legal counsel before responding to any requests for information regarding employees' medical or genetic information.

If you have any questions or concerns regarding the above, please contact employment counsel.

Authors



Francine Esposito

Partner

Parsippany, NJ | (973) 966-8275

fesposito@daypitney.com