Coates' Canons Blog: Employers, GINA, and Family Medical History

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A supervisor overhears one employee tell another that her mother has developed breast cancer. In that inadvertent way, the supervisor—and therefore the employer—has acquired genetic information about the employee. Under the Genetic Information Nondiscrimination Act (GINA), the acquisition of genetic information is unlawful. Has the employer violated GINA?

GINA was enacted in 2008 and its provisions that govern the actions of employers became effective in 2009. GINA is both a non-discrimination statute and a confidentiality statute. It was enacted to encourage people to make use of the health advantages related to advances in genetic science without fearing that they will lose their health insurance or their jobs.

The employment provisions apply to the same employers and employees as Title VII of the Civil Rights Act of 1964, so in that respect its provisions are very familiar. It is modeled after Title VII, and its enforcement is through the Equal Employment Opportunity Commission, as with Title VII. GINA is found at 42 U.S.C. 2000ff et. seq. and the regulations adopted under it are found at 29 CFR Part 1635.

Its prohibitions on the use of genetic information are absolute. There are no affirmative defenses related to hiring, discharge, or other employment actions. There is no "direct threat" defense as with the Americans with Disabilities Act (ADA). There is no "business necessity" defense as with Title VII. Why? Because GINA's protections run to people who are not currently incapacitated or disabled (once a disability does develop, then the ADA provides the fullest protection). Rather, GINA is chiefly protecting people who are at risk of future impairment because of their genetic profile, and that future impairment has no impact on their current qualifications for employment or ability to do a job.

"Genetic information" includes an individual's genetic tests, genetic tests of family members, the fact that an individual has used genetic services, and genetic information of a fetus carried by an individual or family member. Most importantly, the term also includes family medical history. It is with respect to family medical information that employers stand the greatest chance of running into trouble under GINA. And that's because GINA prohibits not only discriminating on account of genetic information that an employer may have acquired, but it also prohibits the very *acquisition* of such information, including family medical history.

***Discrimination Prohibited*.** GINA prohibits an employer from discriminating in hiring, discharge, compensation, or the terms, privileges, or conditions of employment because of an individual's genetic information. Harassment on account of genetic information is prohibited, as is retaliation for opposing discrimination on account of genetic information.

***Acquisition Prohibited*.** GINA prohibits an employer from simply *acquiring* genetic information. Moreover, it prohibits an employer from even requesting such information. Don't ask!

Specifically prohibited in the regulations are "conducting and Internet search on an individual in a way that is likely to result in [an employer] obtaining genetic information" and "making requests for information about an individual's current health status in a way that is likely to result in [an employer] obtaining genetic information."

Don't ask!

So how is an employer likely to get into trouble? There are four chief ways.

The first is in conducting medical examinations of individuals who have received conditional offers of employment. Under the ADA employers are prohibited from making inquiries about medical conditions during the hiring process, except that

once an applicant is selected for employment, that person can be required to submit to a medical examination, as long as the employer requires that process of all employees in the same job category. Under the ADA, the employer has been entitled to make wide-ranging medical inquiries. Now with GINA, however, the employer may not inquire about genetic information, including family medical history. The employer must tell the health care providers who are conducting the medical examinations not to make genetic inquiries.

The second is in conducting fitness-for-duty examinations. The ADA permits medical inquiries when there is reason to believe that an employee is no longer able to perform the duties of the job or poses a direct threat to the health and safety of others. Once again, health care providers must be told not to provide genetic information in their responses to the employer.

The third is when an employer seeks health information in support of an employee's request for leave under the Family and Medical Leave Act. If the employee's request relates to his or her own medical condition, then the same restrictions apply: the employer must take care not to acquire genetic information, including family medical history. But if the employee's request relates to time off to care for the medical condition of a family member, then the employer may receive the relevant medical information regarding that family member.

And last, an employer may learn genetic information—usually in the form of family medical history—inadvertently. The boss is friends with the employee on Facebook and the employee discusses a family member's medical condition there. An employee sends an email around to everyone, including the manager, with news about her father's medical condition. Or, as in the example at the start of this blog, a supervisor overhears two employees talking about the family medical history of one of them.

In these inadvertent cases, the regulations under GINA make clear that while the initial acquisition of the family medical information (in response, say, to a question like, "How's your son feeling today?") may be no violation, the supervisor must be on guard not to follow up. The initial inadvertent acquisition is OK; the follow up is not. The regulations say that the inadvertence exception does not apply to follow up questions "that are probing in nature, such as whether other family members have the condition, or whether the individual has been tested for the condition," because the employer "should know that these questions are likely to result in the acquisition of genetic information."

And now you know.