



## The EEOC Ramps Up Enforcement of GINA

by Matt Lynch and Nate Bailey

The Genetic Information Nondiscrimination Act (GINA) governs how employers may acquire and use employee genetic information. Since GINA became effective in 2009, there has been little enforcement of GINA and therefore little guidance on employer responsibilities under GINA. In May, however, the Equal Employment Opportunity Commission (EEOC) began actively enforcing GINA. The EEOC's recent enforcement activity serves as a reminder that employers must proactively ensure that their practices comply with GINA.

### GINA Basics

GINA prohibits employers from intentionally acquiring genetic information about employees and from discriminating against employees based on genetic information. Genetic information includes (1) an employee's genetic tests; (2) the genetic tests of an employee's family member; (3) the fact that an employee or the employee's family member sought genetic testing; and (4) an employee's family medical history. Genetic information does not, however, include all medical information about employees or their families. GINA does not regulate information about an employee's age, race, and sex; information from drug or alcohol tests; or information about an employee's *manifested* disease or disorder (but GINA does protect information about the diseases or disorders of an employee's family members). Remember that other laws, such as the Americans with Disabilities Act, may protect other information that is beyond the reach of GINA.

GINA prohibits employers from requiring employees to disclose genetic information, purchasing genetic information, and asking employees for genetic information. Some unlawful methods of acquiring information are not obvious. For example, while a sympathetic supervisor may ask an employee about a sick family member, the supervisor may not probe the employee for specific information about the family member's condition. GINA also forbids actively listening to employee conversations about genetic information. Not all acquisition of genetic information, however, is unlawful. GINA has several exceptions that allow employers to acquire genetic information in certain circumstances

### The EEOC's Recent Enforcement Activity

In May, the EEOC filed and settled its first lawsuit alleging a violation of GINA. In *EEOC v. Fabricut Inc.*, the employer, Fabricut, offered a job to Rhonda Jones. Fabricut then sent Jones to a medical examiner for a pre-employment physical. At the physical, the examiner instructed Jones to fill out a questionnaire, which required her to disclose her family medical history. The medical examiner ultimately concluded that Jones might have carpal tunnel syndrome, and Fabricut rescinded the job offer.

It was not at all clear that Fabricut discriminated against Jones based on her genetic information. Rather, Fabricut seemed to withdraw Jones's job offer in violation of the Americans with Disabilities Act, not GINA. Nevertheless, the fact that Fabricut's agent, the medical examiner, required Jones to disclose family medical history was a clear violation of GINA. This is true even though medical providers routinely request family medical history as part of a physical. In a press release, the EEOC's general counsel warned employers that "[w]hen illegal questions are required as part of the hiring process, the EEOC will be vigilant to ensure that no one be denied a job on a prohibited basis."

Less than two weeks after filing and settling the *Fabricut* case, the EEOC filed another GINA class action in *EEOC v. Founders Pavilion, Inc.* Similar to *Fabricut*, the EEOC alleged that Founders Pavilion illegally requested prospective employees' family medical history during post-offer, pre-employment medical exams. In addition, the EEOC alleged that Founders Pavilion requested the information during current employees' annual exams and as part of employees' return-to-work paperwork. The EEOC's lawsuit against Founders Pavilion is ongoing.

### **Ensuring Compliance with GINA**

These two EEOC enforcement actions show the EEOC's new commitment to enforcing GINA. In fact, the EEOC appears to be cracking down on the acquisition of genetic information even when the employer does not also discriminate based on that information. Thus, given the EEOC's recent enforcement activity, we recommend reviewing your organization's HR policies to ensure compliance. Specifically, we suggest that your organization:

- Train supervisors and HR professionals on GINA's requirements
- Review and update anti-discrimination policies to prohibit discrimination based on genetic information
- Ensure the hiring process complies with GINA, especially if your organization requires any medical examinations
- Update forms requesting medical information (*e.g.*, FMLA forms) to instruct employees not to provide information protected by GINA
- Ensure lawfully-acquired genetic information remains confidential

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