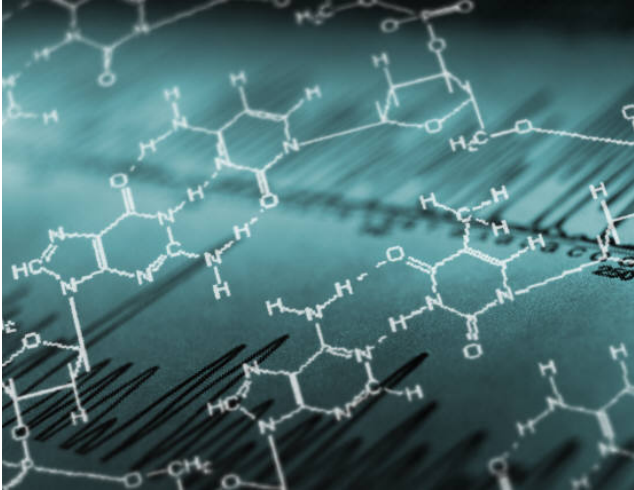


# LABOR AND EMPLOYMENT LAW UPDATE



## GINA CLAIMS BEGIN!

Horror stories of employers using genetic testing for employment decisions are largely found in science fiction rather than in actual practice. Indeed, the Genetic Information Nondiscrimination Act (“GINA”) was passed primarily to prevent genetic information discrimination before it had taken firm hold in the workplace.

Since GINA became effective on November 21, 2009, however, approximately 80 discrimination charges have been filed with the EEOC under the new law. No charge has received more attention than that filed in late April 2010 by Pamela Fink against her former employer, MXenergy. Fink alleges a genetic test at the Yale Cancer Center revealed a gene which predisposed her to breast cancer. She opted for a double mastectomy as a preventive measure. In her charge, she alleges she was discharged shortly after she voluntarily disclosed information regarding her genetic test and surgery to her employer.

As illustrated by the Fink charge, it is not essential to an employment discrimination claim under GINA that an employer inquire about or test for genetic information. A claim may allege that an employment decision was motivated by information (1) voluntarily disclosed to an employer, or (2) overheard by an employer. To minimize the risk of a charge or suit, employers must be wary of this and other potential traps lurking within GINA.

**WHAT IS PROTECTED BY GINA?** GINA protects the “genetic information” of employees and applicants for employment with employers with 15 or more employees. The Act broadly defines “genetic information” as “information about”:

- (1) The genetic test of a protected individual;
- (2) The genetic test of a family member of a protected individual;
- (3) The manifestation of a disease or disorder in family members of a protected individual (i.e. family medical history);
- (4) A protected individual’s request for, or receipt of, genetic services, or participation in clinical research that includes genetic services by the individual or a family member; and
- (5) The genetic information of a fetus carried by a protected individual or by a pregnant woman who is a family member and the genetic information of an embryo legally held by the individual or family member using an assisted reproductive technology.

**EXAMPLE:** An employer asks an employee how he is doing and the employee responds by volunteering that his mother is being treated for Polycystic kidney disease. This information, which reveals the employee’s family medical history, may be protected by GINA.

**EXAMPLE:** A supervisor overhears a conversation in which an employee laments to a coworker about a positive genetic test of his sister for Huntington’s disease. This information regarding the genetic test of a family member may be protected by GINA.

**WHAT IS NOT PROTECTED BY GINA?** GINA does not protect the following:

- (1) Information about the sex or age of a protected individual or his family members; and
- (2) Medical information that is not genetic information although such may be protected by the Americans with Disabilities Act (“ADA”).

**WHAT IS PROHIBITED BY GINA?** GINA outlaws the following employer conduct with respect to the genetic information of a protected individual:

- (1) Except as authorized by the Act, the acquisition by the employer, by request, requirement, or purchase, of genetic information regarding the individual or family member;
- (2) Discrimination against the individual on the basis of genetic information in any term of employment, such as hiring, firing, pay, job assignments, promotions, layoffs, training or fringe benefits;
- (3) Harassment of the individual because of genetic information; and
- (4) Except as authorized by the Act, the disclosure of the genetic information of the individual, even when the information is received in oral form.

**EXAMPLE:** Suppose the employee who volunteers that his mother is being treated for Polycystic kidney disease does so in confidence. Any disclosure of this information by the employer to an unauthorized person could result in a GINA claim.

**EXAMPLE:** Suppose the employee who reveals the positive genetic test of his sister for Huntington's disease is teased by coworkers who act out the involuntary movements associated with the disease. Such misconduct could expose the employer to a harassment claim under GINA.

**WHAT IS NOT PROHIBITED BY GINA?** The following conduct by an employer with respect to a protected individual is not unlawful under GINA:

- (1) A test for the presence of drugs or alcohol;
- (2) A medical test or exam which is not a genetic test although such a test or exam may be prohibited by the ADA; and
- (3) A request for family medical history to comply with the certification provisions of the Family and Medical Leave Act.

**HOW IS GINA ENFORCED?** The EEOC and comparable state agencies play the same role in the enforcement of GINA as they do for the enforcement

of the ADA and Title VII of the Civil Rights Act of 1964. A private right of action exists for reinstatement, hiring, back pay, compensatory and punitive damages, attorney's fees and other relief.

**WHAT CAN BE DONE TO MINIMIZE THE RISK OF GINA CLAIMS?** Education of management and modification of personnel policies are two essential risk management steps. Employment decisions also should be reviewed for one other risk factor – genetic information.

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