

Legal Alert

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QUESTION: HOW DID JOY OFFEND GINA?

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ANSWER: JOY UNDERGROUND MINING VIOLATED THE GENETIC INFORMATION NON-DISCRIMINATION ACT (“GINA”)!

GINA who?

The Genetic Information Non-Discrimination Act of 2008 (“GINA”) makes it illegal to discriminate against employees or applicants based upon genetic information. GINA prohibits the use of genetic information in making employment decisions. It also restricts employers and others, such as employment agencies or labor unions from requesting, purchasing or requiring genetic information for employment purposes and strictly limits the disclosure of genetic information.

The Departments of Health and Human Services, Labor, and the U. S. Treasury will come after you for using genetic information in health insurance matters. The Equal Employment Opportunity Commission (“EEOC”) enforces genetic discrimination claims in employment settings.

What is GINA’s Genetic Information?

GINA regulates both an individual’s genetic information and the genetic information of a person’s family members. Genetic information includes genetic tests and family medical histories.

Diseases or disorders out there on the family-tree are forbidden topics for employers. Employers can’t ask about or use great-aunt Tilly’s mental foibles or grandfather’s gout because family medical histories can be used to predict whether an applicant or employee is prone to getting a condition, disorder or disease in the future.

Even participation in clinical studies is protected genetic information. So is genetic information from the fetus or embryo of an applicant, employee, or a family member. The mere ordering of the 23andMe test is protected genetic information!

GINA Forbids Discrimination or Harassment Because of Genetic Information!

Genetic information cannot be the basis of discrimination in employment matters, including hiring, firing, setting pay, job assignments, promotions, lay-offs, training, benefits, or anything else involving employment. Genetic information is irrelevant to an individual’s present ability to work and employers may never use genetic information in employment decisions!

GINA also forbids harassment due to genetic information. Such harassment can be by the employer, supervisors, co-workers, or even a client or customer. You can't make derogatory or offensive remarks about someone's genetic information, at least in the workplace. **NO GENETIC TAUNTING!** If employees claim genetic discrimination or harassment, GINA forbids retaliation for those reports or complaints.

Don't Ask for or Even Acquire Genetic Information!

Employers, labor unions, employment agencies and others can violate GINA by getting, or even asking for genetic information. That is what got Joy Mining Machinery in trouble.

After making conditional employment offers, Joy Mining required post-offer medical examinations. Joy Mining asked applicants if they had family medical histories for "TB, Cancer, Diabetes, Epilepsy, Heart Disease." The EEOC said Joy can't ask about that stuff. *EEOC v. Joy Underground Mining, LLC*, Civil Action No. 2:15-CV-01581-CRE, January, 2016.

Joy Mining, or other employers, would be ok acquiring genetic information in six limited exceptions:

- (1) Inadvertently learning of genetic information;
- (2) Genetic information obtained as part of health and wellness programs offered on a voluntary basis;
- (3) Family medical history acquired while certifying applications for Family and Medical Leave Act leave;
- (4) Genetic information acquired through commercially and publicly available documents, as long as the employer was not looking for the genetic information;
- (5) Genetic information acquired through monitoring programs on the effects of toxic substances in the workplace; or
- (6) Genetic information of employees if employers are engaged in DNA testing for law enforcement purposes, so long as the information is only be used for quality control to detect any sample contamination.

None of those exceptions helped Joy Mining.

Keep Genetic Information on Employees Confidential!

Disclosing genetic information about applicants or employees is unlawful. Any genetic information must be kept confidential in a separate medical file.

GINA is pretty demanding and easily offended! As to genetic information, including family medical histories: "Don't Ask – Don't Tell – and certainly Don't Use."

If you need assistance complying with GINA or other employment regulations, please call me.