
What Employers Need To Know About the New Genetic Discrimination Law

By Attorney Brian G. Formella



The Equal Employment Opportunities Commission (“EEOC”) recently issued a final rule to implement the federal Genetic Information Non-discrimination Act of 2008 (“GINA”). These rules became effective January 10, 2011.

Under GINA, it is illegal to discriminate against employees or applicants because of genetic information. GINA prohibits covered entities from using genetic information in making employment decisions and from requesting, requiring or purchasing genetic information.

The law forbids discrimination on the basis of genetic information that applies to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits or any other term or condition of employment. An employer may never use genetic information to make an employment decision because genetic information does not tell the employer anything about a person’s current ability to work.

Under GINA, it is also illegal to harass a person because of his or her genetic information. It is also illegal to fire, demote, harass or otherwise retaliate against an applicant or employee for filing a charge of discrimination, participating in discrimination proceedings or otherwise opposing discrimination based on genetic information.

Wisconsin already restricts the use of genetic testing in the workplace. Genetic testing refers to a test of a person’s genes, gene products or chromosomes, for abnormalities or deficiencies, including carrier status, that are linked to physical or mental disorders or impairments, or that indicate a susceptibility to illness, disease, impairment or other disorders, whether physical or mental, that demonstrate genetic or chromosomal damage due to environmental factors.

Currently, labor unions and employment agencies may not directly or indirectly do any of the following: (1) solicit, require or administer a genetic test to any person as a condition of employment; (2) affect the terms, conditions or privileges of employment or terminate the employment of any person who obtains a genetic test; or (3) enter into an agreement with another person offering employment or any pay or benefit to that person in return for taking a genetic test.

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To ensure an applicant's fitness to perform a particular job, an employer may condition an employment offer on a satisfactory medical examination, but only if all entering employees in the same job category, regardless of disability, are required to take such an examination. However, such testing may not gather genetic information.

There are certain exceptions under the federal law. For example, when an employer obtains information through publicly-available sources, there is not a violation of GINA or Wisconsin law. Other exceptions apply as well.

Compliance Check For Employers

- ✓ Update your organization's discrimination and harassment policies to state that the organization does not discriminate on the basis of genetic information.
- ✓ Keep medical records in a separate file and treat them consistent with the Americans with Disabilities Act and the Wisconsin Fair Employment Act.
- ✓ Examine employment forms to make sure that genetic information is not requested.
- ✓ Use the "safe-harbor" language found in the new regulation when requesting medical information.
- ✓ Review any wellness or disease-management programs to make sure they are in compliance with Wisconsin and federal law.
- ✓ Post applicable GINA notices, available through the EEOC.



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