

Maryland Lawyer

News and analysis of legal matters in Maryland

Cover story

Family History

Similarity between Maryland's genetic anti-bias statute and GINA means that employers need only maintain the status quo, attorneys say

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The U.S. Equal Employment Opportunity Commission opened a 60-day public comment period last week on its proposed regulations for enforcement of the federal 2008 Genetic Information Non-Discrimination Act, which is aimed at preventing genetic discrimination.

The law, otherwise known as GINA, prohibits companies from collecting genetic data on employees and job applicants and bars employers from basing hiring, firing and assignment decisions on the information they might discover about a worker's family history of physical or mental illness. It also directs the EEOC to issue regulations by May 21, 2009, the first anniversary of when then-President George W. Bush signed the measure into law.

"As I see it, EEOC's job is to do everything in [its] power to minimize the potential risks that genetic testing could have a negative impact on a person's current employment or future jobs," Andrew J. Imparato, president of the **American Association of People with Disabilities**, said during last Wednesday's commission meeting.

"This can be accomplished by restricting the ability of employers to obtain genetic information, protecting the confidentiality of the information after it is acquired by an employer and prohibiting discrimination on the basis of the information."

Under the federal Genetic Information Non-Discrimination Act of 2008— which mirrors Article 49B Section 16 of the Maryland code — companies with at least 15 employees that discover a worker's genetic, or hereditary, propensity for illness are barred from basing an employment decision based on that knowledge.

The law, scheduled to go into effect Nov. 21, also prohibits employers from requiring genetic testing of its employees or intentionally acquiring genetic information about its employees and job applicants.

Employers who violate the law could face penalties of up to \$300,000 per offense, along with punitive damages, attorneys' fees and administrative remedies.

In addition, GINA prohibits group health plans and health insurers from denying coverage or charging higher premiums to those who have a genetic predisposition toward developing a disease but are currently healthy.

'A new language'

To the EEOC — an agency well-versed in fighting job bias based on race, gender, disability, age and national origin — the workplace application of 21st

century genetic monitoring is new.

"This [statute] involves learning a new language," EEOC Commissioner Constance S. Barker told attendees at the commission meeting.

Stuart J. Ishimaru, the EEOC's acting chairman, called GINA the largest expansion of the commission's authority since 1990, when Congress extended the legal protection against job discrimination to 43 million disabled workers with its enactment of the Americans with Disabilities Act. Now, federal anti-discrimination law protects not just those employees who have a manifested disability but those who have a perceived propensity, based on their family history and genetic testing, to become disabled.

"Indeed, things have changed quite a bit" since 1990, Ishimaru said, referring to the medical advances in the last 19 years.

Jeremy Gruber, president of the **Council for Responsible Genetics**, called GINA a "relatively common-sense law" that protects employees from discrimination based on a family history of illness.

"Under the best of circumstances, discrimination cases are difficult to prove," said Gruber, a former legal director at the **National Workrights Institute**, which advocates on behalf of employees.

"Employers are often the only party with access to information supporting a discrimination claim; indeed, employees are often unaware, let alone able to





Stephanie D. Kinder said employers should not be intimidated by the new federal law or EEOC's proposed regulations. Companies should 'just say no' to any information they receive from an employee or his or her doctor that exceeds what the employer needs to know, she said.

prove, that discrimination has occurred," he told the commission. "Preventing access to information that can lead to discrimination is the best way to ensure discrimination never happens."

Imparato said the new federal law prohibiting genetic discrimination is important for employees — and their parents.

"As a person with bipolar disorder, a condition that I understand to have a genetic link, I am delighted that GINA will provide protections to my two boys and future generations who may have a genetic predisposition to develop some version of my condition and a host of other conditions," he said.

Heightened scrutiny

Baltimore attorney Stephanie D. Kinder said **employers should not be intimidated by the new federal law or EEOC's proposed regulations. Employers can avoid liability under the new law by maintaining the same employment practices they have been using to comply with the older and more familiar laws that ban workplace discrimination based on race, gender, national origin, age and disability**, she said.

Employers, for example, must continue to base employment decisions solely on the person's ability to do the job — and not on any non-job-related factors, such as his or her family's medical history, said Kinder, a solo practitioner.

Companies should "just say no" to any information they receive from an employee or his or her doctor that exceeds what the employer needs to know, Kinder said. Employers do not need to know an employee's family medical history to determine whether he or she can do the job, she added.

To help ensure compliance with the state and new federal law, companies should keep any health-related information about an employee confidential and kept, whenever possible, from supervisors and others who make employment decisions, said Kinder. **These steps can avoid the appearance that an adverse employment decision was illegally based on an employee's family health history and the risk that a disease or mental illness, such as manic depression, has been passed down to the worker**, she added.

"You want to make sure there are no accidental disclosures and certainly no intentional disclosures," said Kinder, who advises both employers and employees on job-discrimination laws. **"They [compa-**

nies] have to be on heightened scrutiny of any information they are revealing."

High-profile case

GINA's enactment followed EEOC's \$2.2 million settlement in 2002 with **Burlington Northern and Santa Fe Railway Co.** of the agency's allegation that the company had ordered 36 employees to take a blood test for a genetic marker. The workers had filed claims or internal reports of work-related carpal tunnel injuries before the railroad issued its order, the EEOC said.

In its lawsuit, EEOC had claimed that the ordered genetic testing violated the Americans with Disabilities Act, a theory never tested in court. The railroad admitted no wrongdoing in agreeing to the mediated settlement.

Since Maryland's law became effective in 2002, no employment discrimination claims have been filed under the statute with the state's **Commission on Human Relations**, which investigates and litigates job-bias claims. But the absence of claims does not mean that discrimination based on family health history is not occurring, said Glendora Hughes, the commission's general counsel.

"I suspect that it may happen to folks but they don't know it," Hughes said, noting that genetic bias is not as apparent as discrimination based on race, gender or disability. She praised Maryland's law as "a preventive tool to tell employers, 'Don't use this method to screen people out.'"

Exceptions

EEOC's proposed regulations state that a company may not request, require or purchase genetic information about a job applicant or employee. The proposal also states that companies may not seek genetic data about an employee and if they come upon the information, they may not base an employment decision upon it.

Companies, under the proposed regulation, would not violate GINA if they inadvertently acquire information about an employee's family health history. Such an unintentional discovery could occur if a manager overhears a personal conversation between co-workers, an event EEOC calls the "water-cooler" exception to the prohibition on companies collecting genetic information.

An employer also would not run afoul of GINA if an employee inadvertently discloses a family history of illness to support a request for a reasonable workplace accommodation under the Americans with Disabilities Act or a request for unpaid time off under the federal

Family and Medical Leave Act, according to EEOC's proposal.

But employers would not be permitted to rely on genetic information — even if acquired inadvertently — in making make an employment decision, such as refusing to hire a job candidate based on a family history of mental illness.

Guarding information

Baltimore lawyer Kevin C. McCormick, who advises employers on job-discrimination matters, agrees with Kinder that companies should be able to avoid liability by continuing to do what many of them already do under existing laws, such as keeping medical information about employees to a minimum and in a separate part of the office.

"They don't just throw it [the information] in the personnel file for anybody to see," McCormick said of these law-abiding companies. "They jealously guard employees' medical information."

He added that companies strive to keep the information confidential for two reasons: respect for the employees' privacy and the more practical concern about liability.

"They don't want to be sued," said McCormick, who chairs the labor and employment section at **Whiteford, Taylor & Preston LLP** in Baltimore.

As with all federal laws banning job discrimination, the employers' overwhelming concern should be whether the employee can get the job done, not what hereditary illnesses his or her parents might have passed down, he added.

To that end, employers who require medical proof that a worker's absence is due to illness should be satisfied with a simple doctor's note attesting to the fact the employee is unable to work, without requiring the physician to go into more detail.

"There isn't this overwhelming desire [by law-abiding employers] to want to know more," McCormick said. "Most employers don't like to play doctor."

McCormick added that he is hard-pressed to think of any time an employer would take into consideration an employee's family health history in making an adverse employment decision such as firing, demoting or reassigning the worker.

"I don't know many employers, I don't know any, who would use that information in an employment context," McCormick said. "It's just not good information."