

Energy Employment Update

Energy Employment Law Group



The EEOC's Crackdown on Genetic Information Gathering and Its Impact on the Energy Industry

In 2008, a bipartisan Congress passed the Genetic Information Nondiscrimination Act (GINA) to bar employers from using genetic information in employment decisions. One of GINA's key provisions is its prohibition against requesting or collecting certain kinds of genetic information from employees or job applicants. (Texas has its own version of GINA, found at Texas Labor Code §§ 401-05, but it prohibits discrimination only—it is silent on collecting genetic information.)

Since 2013, the EEOC has made GINA enforcement a priority. Two recent GINA settlements suggest that the Commission is just getting started. These settlements—and the EEOC's aggressive interpretation of GINA (which we recently blogged about [here](#) and [here](#))—should cause concern among employers in the energy industry, particularly those that conduct routine medical screenings on field workers or other employees. They also demonstrate that employers may become EEOC targets even for unintentional violations.

What kind of information does GINA protect?

GINA prohibits employers from collecting a broad range of "genetic information," such as genetic testing regarding a person's family medical history, information about certain past or present diseases, and even participation in clinical studies. In discrete circumstances, an employer may request genetic information, such as in connection with a volunteer wellness program, or to support an employee's FMLA leave to care for an ill family member. If an employer possesses an employee's genetic information, the employer may disclose that information to the employee if requested in writing.

What's the EEOC doing?

In 2013, the EEOC filed three separate enforcement actions alleging violations of GINA, two of which recently settled. What makes these actions particularly unsettling is that they arise from conduct that may have been unintentional. In one of the settled cases, a fabrics manufacturer rescinded a job offer after a medical screening—which required disclosure of the applicant's family medical history—revealed that the applicant suffered from carpal tunnel syndrome. In the other settled case, a nursing home systematically required all applicants to provide family medical history. In both cases, the EEOC alleged that the practices violated GINA. The companies settled the claims for \$50,000 and \$110,000, respectively.

Why should Energy Employers care about this?

Many employers could be unwittingly violating GINA because it prohibits even passive collection of employees' or applicants' genetic information, regardless of the employer's intent to violate the law. This risk is particularly acute in sectors like the

energy industry, where employers routinely require pre- and post-hire medical screenings for field personnel and other employees. Moreover, because these practices are typically uniform (baked into medical checklists and questionnaires), they may invite EEOC scrutiny or even become fodder for class actions. Perhaps worst of all, to the extent that medical screenings are delegated to third-party vendors, these unlawful data-collection activities may be outside the employer's control.

How Can Energy Employers mitigate these risks?

Employers can avoid liability for collecting genetic information by including a "safe harbor" provision in their requests for health-related information. The safe-harbor language suggested by the EEOC (found [here](#)) warns the employee and/or healthcare provider collecting the information not to provide, request, or receive genetic information. If this type of warning is provided, any resulting acquisition of genetic information will be considered inadvertent, and therefore not in violation of GINA. Employers should also consider including GINA waivers in severance and settlement agreements. Even with such protections, however, employers should make efforts to ensure that their medical screenings and related requests for health-related information steer clear of genetic information that could implicate a GINA claim in the first place.

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