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Introducing GINA: What Human Resource Educators Need to Know

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Introducing GINA: What Human Resource Educators Need to Know about the Genetic Information Nondiscrimination Act of 2008

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ABSTRACT

The article identifies important issues about which human resources educators should be knowledgeable in order to equip their students with information to act in compliance with the Genetic Information Nondiscrimination Act (GINA) and minimize the potential for employer liability. In 2008, Congress passed and President George W. Bush signed GINA into law. It became effective eighteen months later in November 2009. GINA prohibits disparate treatment discrimination in employment and the provision of health insurance based on genetic information. In 2013, the Equal Employment Opportunity Commission (EEOC), one of the agencies charged with enforcement, brought its first cases seeking to enforce GINA (LaCroix, 2014). In 2014, it is beginning to settle these initial cases. Likewise, federal courts are beginning to render decisions involving the Act. This article reviews the law, its limitations, and the relevant academic literature. It discusses enforcement efforts to date and suggests direction for future research.

Key Words: GINA, Genetic Information Nondiscrimination Act, employment practices

INTRODUCTION

Owing to advances in technology, we know much more about the genetic composition of humans than we did only a few decades ago. The scientific advances in this area are significant and growing exponentially. Applications for genetic testing and the accessibility of such tests are increasing apace. Law enforcement officers now routinely solve crimes by matching DNA found on the victim to an alleged perpetrator. Cancer-free women who discover they have the BRCA1 or BRCA2 gene scientifically linked to the likelihood of developing breast cancer are undergoing *elective* mastectomies in order to avert the possibility of developing such cancer, for which that gene evidences a genetic pre-disposition. Men, women and children seeking to establish paternity need go no further than their computers to order DNA testing materials in order to do so.

The power of the genetic testing technology and information produced by it has become apparent. While the majority of the developed applications produce benefits for individuals and society, such as the prevention or eradication of disease, this powerful information in the wrong

hands can be used for an improper purpose and does cause harm (Varner, 2011). African Americans, through programs intended to detect and screen carriers of the gene linked to sickle cell anemia, were some of the first victims of genetic information based discrimination as early as the 1970s (Health Law - Genetics, 2009). Persons seeking genetic counseling in connection with the likelihood of developing inherited diseases express fear of possible discrimination (Klitzman, 2010). Other individuals who might benefit from genetic testing decline it out of fear that employers or insurers will use the information to deny them work or coverage (Allain, Friedman, & Senter, 2012). In a 2004 study, more than 80% of respondents expressed the view that health insurers should *not* have access to genetic information in making health insurance underwriting decisions (Baruch & Hudson, 2008).

States responded with varying attempts to regulate the use and protection of genetic information. Others looking to existing federal laws for protections found that they were inadequate to address concerns. For example, the Health Insurance Privacy Protection Act (HIPPA), which affords certain privacy protection to information provided to procure group health insurance, did not protect the same information provided by individuals seeking to procure insurance. Likewise, while the Americans with Disabilities Act (ADA) provides protections for a manifested disability, it provides no protection for the individual pre-disposed to developing the disease or condition but who is not exhibiting it (Abiola, 2008). Concerned by the differences and inconsistencies among these approaches, and in response to public opinion on the issue, the medical community and affected citizens began to pressure Congress for a uniform federal regulatory scheme. (For a detailed account of the legislative history of GINA, see Roberts 2010).

As a result, in 2008, Congress passed GINA, which took effect in 2009. Although GINA has been in force for nearly five years, information about the Act is not widely disseminated. In a general survey of adults aged 18-64, only 8.8% reported that they had heard of GINA and only 34% of those correctly identified GINA as prohibiting the use of genetic information in employment and insurance (Huang, Huston, & Perry, 2013). A comprehensive review of the academic literature reveals over sixty articles studying the Act either prior to or after passage. Few, however, examine issues from the perspective of, and with a focus on the responsibilities of the human resource educator or professional. Those that do are limited in scope or were written prior to the promulgation of GINA regulations in late 2009. The bulk of the literature addresses the medical community, including for example nurses (Steck, 2011); genetic counselors (Clifton, 2010; Erwin, 2009); and genetic test administrators (Dressler, 2009) who will need to secure informed consent from patients. Addressing the legal community, Smith (2009) observes that employers will need education about this "difficult subject" and their "new responsibilities under the law" and provides some guidance. While medical and legal professionals certainly have a need to be educated about the law and have a role to play in the dissemination of such information, it is particularly important that the human resources teaching community be knowledgeable about the Act in order to educate current and future professionals who will craft and implement employer policies.

This article fills the gap in the literature by providing an overview of GINA and its implications for employers and their human resource practices. In Part I, I review the law, its limitations and the relevant academic literature. In Part II, I review the EEOC's recent efforts at enforcement as well as individual-initiated litigation. In Part III, I identify important issues about

which human resources teaching professionals should be aware in order to guide students on issues of compliance with the goal of minimizing the potential for employer liability. In Part IV, the article offers suggestions for future research on the law and associated human resource practices.

PART I: BACKGROUND AND LITERATURE REVIEW

The Law

GINA regulates the acquisition and use of genetic information in connection with health insurance and employment. The full Act is available on the Equal Employment Opportunity Commission (EEOC) website. Detailed questions and answers on the Act are available for businesses in general (EEOC, 2009) and for small businesses (EEOC, 2014).The Act required the EEOC to promulgate regulations for use in enforcing the law by November 2009, which it did in March 2009. These regulations were adopted in November 2010 (EEOC GINA Regulations, 2010).

GINA applies only to those businesses that employ 15 or more persons (Schrimsher & Fretwell, 2012). While its passage was motivated, in part, to address concerns about the patchwork of state laws regulating the use of genetic information, GINA does *not* pre-empt state law (Hillstrom 2009). (For a detailed discussion of GINA and its relation to other relevant federal and state laws, see Schlein, 2008 and Tan, 2009).

Title I: Insurance. Title I of GINA prohibits discrimination in decisions regarding health insurance issuance, terms and pricing. Notably, GINA does not apply to life, disability, and long-term care insurance. Kostecka (2009). The law entrusts enforcement to the Department of the Treasury, the Department of Labor (for employer- sponsored plans) and the Department of Health and Human Services (for individually procured insurance.) This article focuses on the provisions governing the use of genetic information in employment found in Title II below. (For information and commentary on GINA Title I see Payne, et al. 2009; Relland 2009; Ziskind 2009; and Wilde 2009-2010).

Title II: Employment. Title II of GINA prohibits discrimination against applicants and employees based on genetic information in the terms or conditions of employment. It precludes harassment based on genetic information as well as retaliatory discharge. Further, the Act prohibits employers from acquiring genetic information. In addition to employers, employment agencies, labor unions and training programs are "covered entities" whose practices also are subject to similar regulation by GINA (§§ 203, 205, 206). Before initiating any litigation in court, claimants are required to exhaust administrative remedies by filing a charge with the EEOC, which has responsibility for enforcement.

Title III: Miscellaneous provisions. Title III of GINA contains miscellaneous provisions including that the provisions of the law are severable to protect it from challenge on constitutional grounds, meaning if a part of the Act were deemed unconstitutional, the remainder of the Act would survive. Because Title III's provisions are not substantive in nature, I do not review them in detail.

Key Definitions

- "Genetic information" is considered to be that 1) discovered through testing of individuals or family members; 2) associated with a family member's actual manifestation of disease as well as 3) participation in a research study or in connection with the use of genetic counseling services**.**

- "Genetic test" is defined to be "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes. (GINA § 201[4]).

It is important to note that these definitions are *not* identical for both Title I and Title II, but are complementary, accounting for the differences in application for the different contexts, i.e., insurance and employment.

Exceptions

Acquisition Exceptions. The Act makes it unlawful for employers and other covered entities to acquire genetic information. There are six exceptions to the prohibition. First, colloquially referred to as the known as the "water cooler" exception, GINA does *not* prohibit employers from the use of information found inadvertently. Second, the Act does not prohibit the acquisition of genetic information in connection with employer sponsored wellness programs, provided 1) the employee participates voluntary and gives informed written consent prior to providing his or her genetic information and 2) such information is provided to the associated health care services provider only. However, the health service provider may give *aggregate* information from such a program to the employer for its use. Third, GINA permits employers to acquire genetic information in connection with certification of time off required by the Family and Medical Leave Act (FMLA). Fourth, the Act does *not* prohibit use of information found from public sources, e.g., obituaries or newspaper articles. Fifth, GINA permits employers to acquire genetic information for purposes of monitoring an employee's exposure to toxic substances in the workplace. Finally, GINA does not prohibit the use of genetic information in connection with law enforcement activity (GINA § 202(b)). (For a more detailed discussion of these exceptions, see Blackwell 2009.) To the extent a covered entity acquires or comes into possession of genetic information, such information is to be kept strictly confidential and separately maintained as a confidential medical record subject to the protections of the Americans with Disabilities Act (ADA). (GINA. § 206.) With respect to all above, while the exceptions mean that acquiring genetic information will not constitute a violation, misuse of it will still conflict with GINA's prohibitions.

Disclosure Exceptions. GINA permits the dissemination of genetic information obtained by employers in the following situations. First, the employer may disclose information when it has obtained prior employee consent. Second, it may provide information in response to court order or government investigation. Third, employers may disclose genetic information in order to comply with certifying leave under the FMLA. Fourth, companies may disclose information to an occupational health researcher, if done in accordance with Department of Health and Human Services protocols on the protection of human research subjects. Finally, an employer may disclose to public health agencies information about a contagious disease that represents an imminent threat to the public health, provided it gives notice to the employee.

Remedies

Remedies for violations of GINA are similar to those available for Title VII violations and include monetary (back pay, compensatory and punitive damages, costs and attorney fees) and equitable relief (hiring, reinstatement, promotion, other injunctive relief). The remedies are also subject to the same limitations imposed by Title VII. For example, the sliding scale cap on compensatory and punitive damages as determined by the number of persons employed by a violator and the prohibition against punitive damages for federal state and local government employers.

Limitations

Unlike other anti-discrimination statues, such as the Americans with Disabilities Act (ADA), and because GINA's regulatory scheme prioritizes privacy of genetic information, there is no requirement of reasonable accommodation (Areheart, 2012). In addition, there is no intent needed in order to find a violation of the Act such as that required under Title VII (Callier, Huss, & Juengst, 2010). Further, GINA does *not* provide a private action for disparate impact discrimination as found in other anti-discrimination laws (Abiola, 2008). However, the Act does call for the establishment of a Commission to assess whether the Act should be amended to provide for that right after six years which, by virtue of the passage of time, should be established in the next year (GINA § 208).

Critics of the Act argue that it is duplicative of, and provides no additional protections than those found in the ADA or Title VII, that its failure to include a formal definition of "genetic information" leaves it open to potentially conflicting interpretation (Hillstrom, 2009) and that Congressional compromises leading to its passage weakened the resulting bill leaving apparent gaps (McDevitt, 2009). Others argue that the Act does not go far enough; that by limiting protection to the acquisition and dissemination of genetic information, it does nothing to address the misuse of sensitive information being generated by neuroscience (Kostiuk, 2012) and its reach is narrow in scope with mandates applying only to certain "covered entities." For example, it would not appear to address genetic testing required of student athletes by the NCAA (Quick, 2012) or of military personnel (Baruch, 2008). Some legal scholars believe GINA will have a limited deterrent impact and propose criminal sanctions as a better means of deterring the collection and use of genetic information from persons who have not provided their consent to such activities (Guarnieri, 2011). Concerned with the burdens the Act will visit upon an EEOC already stretched to its limits, some argue that the strapped agency will likely simply issue right

to sue letters without fully processing the charges presented, resulting in an increase in frivolous litigation which, in turn, will burden our courts (Blackwell, 2009). My exploratory study of individual cases involving GINA to date that have resulted in court opinions validates those concerns. As shown below, the courts are working to separate those cases that have potentially viable GINA claims from those that do not. See Part II Enforcement, Individual Cases, below.

PART II: ENFORCEMENT

As noted above, the EEOC is responsible for enforcement of the Title II employment provisions of GINA. In 2010 and 2011, less than one-quarter of one percent of all charges brought to the EEOC involved allegations of GINA violations (Langford, 2012) and it was unclear whether there was indeed a meaningful role for the law to play (Corbett, 2011). That landscape is beginning to look a bit different with that percentage doubling in 2013. In May 2013, the EEOC initiated its first GINA action on behalf of persons bringing administrative charges under GINA that have settled. Further, litigation of GINA claims by individuals are now generating written decisions. I detail below the EEOC enforcement actions followed by a selection of individual written opinions.

Government Initiated Litigation

The first case, *EEOC v. Fabricut* (2013) was filed on May 7, 2013 simultaneously with the entry of a consent decree memorializing Fabricut's agreement to pay $50,000 to resolve charges made under both GINA and ADA. In other words, the EEOC and employer reached a negotiated resolution of the matter prior to filing. In *Fabricut*, the EEOC challenged the employer's post-offer medical examination of the claimant during which the medical service contractor asked the employee about family medical history in violation of GINA. The employer made its offer of permanent employment to a temporary worker contingent upon a physical examination and drug testing. The medical service provider determined that the claimant had carpal tunnel syndrome, a diagnosis that claimant's personal physician disputed. Fabricut consequently withdrew the offer of employment. The EEOC asserted that the employer's decision to "regard" the applicant as having carpal tunnel syndrome was a violation of the ADA. Requesting family history, which here revealed a family history of arthritis (a condition which may genetically predispose persons to develop carpel tunnel syndrome and which may have instigated the further testing) is a GINA violation. The settlement addressed both ADA and GINA violations. In additional to the monetary settlement, Fabricut agreed to adopt anti-discrimination policies, to give notice to employees about such policies and to provide anti-discrimination training for the employee involved with the hiring function (Colaizzi 2013; Wagner 2013; Wilson & Woodard 2014).

The second case, *EEOC v. Founders Pavilion* (2014) was filed in U.S. District Court for the Western District of New York in Rochester on May 16, 2013. The District Court approved a settlement of that case on January 9, 2014. In *Founders Pavilion*, the EEOC alleged that the employer violated GINA by seeking family medical history as part of pre-employment, return to work and annual employee medical exams. This was the first instance in which the EEOC alleged systematic discrimination by an employer. In the settlement, which included five years of operations monitoring, the company agreed to pay $800 per claimant for a total of $110,400 to a class of 138 individuals who were hired during the period that the company used a form that included a family history section. In the consent decree, the EEOC and Founders Pavilion also agreed to settle claims of discrimination under the ADA involving two employees fired because of a perceived disability and allegations under Title VII that it had fired or refused to hire three women because they were pregnant for $259,600. Founders Pavilion was sold after the EEOC filed suit. The consent decree included the new owner as a non-party signatory and obligated it to

revise its anti-discrimination policies to include specific references to laws prohibiting disability, pregnancy and genetic information discrimination; provide training to employees and develop a complaint and investigative procedure for the intake of future charges (Colaizzi, 2013; Wilson & Woodward, 2013; Cohen, 2014; Herzfeld, 2014).

Finally, in *United States v. Baltimore County* (2012), the content of a consent decree reflects the emerging importance of GINA. GINA claims were *not* asserted in this ADA case. Rather, this case involved multiple ADA claims challenging the appropriateness of medical testing and examinations, requests for medical information and a practice of excluding from employment persons with Type I diabetes. The resulting consent decree required five years of extensive monitoring and reporting. It mandated the County make detailed reporting on all grievances and responses thereto and maintain documentation of hiring and employment decisions to ensure ADA and GINA compliance. Further, it obligates the County defendant to develop a training curriculum to educate all supervisors about GINA as well as the ADA and to provide notice to contracted service providers that they too will be required to comply with ADA and GINA. This case is instructive. While the claims asserted were only ADA claims, the resulting settlement encompassed more. It demonstrates that ADA and GINA claims often have a close relation and failure to abide by one law may result in additional scrutiny of all employment practices.

Individually Initiated Litigation

To study litigation initiated by individuals asserting GINA claims, I conducted a case law search for "Genetic Information Nondiscrimination Act" using Google Scholar resulting in 73 hits. An examination of those opinions revealed that 60 cases involve GINA in some direct way other than containing a passing reference to the Act or legislation. Of the 60 cases, 10 do not involve causes of action asserted under GINA but reference pre-passage legislative activity about the proposed legislation. One involved an ADA enforcement action that referenced GINA in the resulting consent decree. It is discussed above. Of the 49 post-GINA opinions from individual initiated cases, 5 were rendered in the same case. Consequently, I studied opinions in the 44 identified cases.

What these initial cases reveal is that few actually contain claims that involve GINA in a substantive way such that any written opinion is being generated. Of the 44 post-GINA cases, 11 did not actually involve GINA at all. These cases reference GINA only because the plaintiff's EEOC right to sue letter included GINA as part of its boilerplate language; the cases assert other discrimination claims. An additional 6 cases reference GINA, but the opinions at issue did not involve the Act itself; most being procedural in nature. A further 23 cases were dismissed either on the plaintiff's own initiative or because of the defendant's motion to dismiss. In these 23 cases, the court found that 1) they did not state of cause of action under GINA because the plaintiff did not exhaust administrative remedies or 2) they did not involve the acquisition or disclosure of, or employment discrimination based on, genetic information, genetic testing or the use of genetic counselling. While the GINA claims were not to move forward, a handful of the opinions written to justify their dismissal are instructive and contain a good discussion of the standards the courts are using to evaluate GINA claims. I discuss them below.

The final four cases have something of substance to tell us about GINA. The first two involved a motion to dismiss which was denied and plaintiff given permission to replead, leaving open the possibility of the GINA claim continuing. The final two cases involved summary judgment motions, which were granted. These are instructive because the court engaged in an analysis of the GINA claims based on a detailed factual record. The lessons from these opinions are summarized below.

The courts will require persons seeking to establish claims under GINA to link the employer's alleged wrongful action to the results of genetic testing, the use of genetic counselling or other genetic information and will need to make clear the basis of the GINA claim as distinct from other theories of liability. In Leone *v. North Jersey Orthopaedic* (2012), plaintiff Leone alleged that she was discriminated against under GINA based on a genetic based condition, Protein S Deficiency. She also asserted claims for disability and age discrimination. The court dismissed plaintiff's GINA claim because plaintiff did not link the denial of time off, loss of job assignments and ultimate termination to the results of genetic testing. The court however, did grant plaintiff leave to replead so that she could attempt to align her factual allegations with the supporting liability theory.

Using the standard articulated in *Leone*, the court in *Allen v. Verizon Wireless* (2013) directed that Allen must allege "(1) that she was an employee; (2) who was discharged or deprived of employment opportunities; (3) because of information from Plaintiff's genetic tests." While finding that Allen had met the first two prongs of the test, the court found that Allen failed to establish the third prong, i.e., that Allen needed to, but did not establish that, in this instance, "family history" is "genetic information" when the claimant suffers from the same or similar condition as another family member. The court maintained that plaintiff failed to establish a reasonable interference that the purported "genetic information" had a connection to the denial of short-term disability benefits in connection with Allen's own experience with high anxiety, depression and dental pain. Likewise, in *Poore v. Peterbilt* (2012), the court found that Poore's termination from employment after his employer learned that Poore's wife had multiple sclerosis, an inheritable disease, does not state a GINA claim because the "genetic information" about his wife in no way suggests that Poore himself has a propensity to develop the disease. The court noted that while Poore may have an ADA claim on these facts, he does not state a GINA claim.

Again insisting that plaintiff make the link between the genetic information and alleged employment discrimination, the court in ***Tovar v. United Airlines*** (2013) granted defendant's motion for summary judgment, finding that Plaintiff presented no evidence that defendant's knowledge of his mother's diabetes had any connection to his termination. In fact, persons who managed the termination were not aware that Plaintiff's mother had diabetes when they made the decision to terminate. This case demonstrated that the inadvertent acquisition of "genetic information" without more would not constitute a GINA violation.

As with other employment discrimination, courts will require that plaintiffs exhaust administrative remedies before bringing a GINA claim. In *Wright v. Stonemor Partners*, the court granted defendant's motion to dismiss plaintiff's GINA and ADA claims commenting that plaintiff's EEOC charge alleged only race discrimination and retaliation claims and did not

exhaust administrative remedies as to any purported GINA or ADA claim. “The charge does not directly allege, or even tenuously allude, to any possibility of a claim under GINA or the ADA.” Further, those seeking to state a GINA claim will need to provide more than the EEOC right to sue letter and will need to link requested medical information to “genetic information” as defined by the Act. In *Tate v. Quad/Graphics* (2011), the court remarked that “Plaintiff’s simple allegation that defendants violated the Genetic Information Nondiscrimination Act of 2008 (‘GINA’)…. by requesting medical information from him is not sufficient to state a GINA claim.” In Tate, the court gave Plaintiff a chance to do so by repleading.

Finally, medical information at issue must come within the statutory definition of **“**genetic information.” In *Smith v. Donahue* (2013), the court found that “genetic information” must be that of the plaintiff or a family member. The court dismissed the pro se plaintiff complaint’s that he was discriminated against by: 1) his employer, the U.S. Postal Service, and its handling his posting an advertisement about his book “how DNA works” on bulletin boards; and 2) the Department of Education and National Institute of Health by their refusal to integrate his DNA research into their curriculum. The court found that their respective treatment of plaintiff’s book on “genetic and religious theory” did not constitute employment discrimination based on “genetic information” as defined by GINA. This case illustrates that courts will look to the statutory definition of “genetic information” and strictly interprets it in construing the protections of the law. In *Conner-Goodgame v. Wells Fargo Bank* (2013) the court found that HIV status and testing is not “genetic information” because the disease is not passed on in the DNA. This decision makes clear that GINA will *not* be interpreted to protect against discrimination based on non-genetic health related information. Further, it reinforced that GINA does not protect against employment discrimination based on a manifested disease, even one with a genetic basis. The court invoked EEOC guidance, which states "GINA is concerned primarily with protecting those individuals who may be discriminated against because an employer thinks they are at increased risk of acquiring a condition in the future." In a critical footnote, the court further elaborated as follows: “The court questions whether AIDS has any sort of genetic basis because "[a]lthough [HIV] is a retrovirus that inserts itself into human DNA, HIV is not itself human DNA and measuring its presence does not constitute a genetic test under the law's definition.”

These cases underscore how important it will be for those educating the human resources professional to know and communicate the statutory definitions of “genetic information” and “genetic tests” to ensure compliance with the law and to educate and properly respond to employees who may believe they have a GINA claim where none exists. Given that, without guidance, these employees are likely to attempt to bring them to the EEOC and to court without the assistance of counsel, human resource professionals may have an important educational role to play in keeping unfounded claims out of the adjudicatory process while minimizing exposure and expense for their employer.

PART III: APPLICATIONS FOR EDUCATING THE PRACTITIONER

As human resource educators, we are preparing the vast majority of our students to practice and apply what we teach in their workplaces. Beyond teaching the specifics of the law, students will need to understand how day-to-day business operations may be impacted and

require change. The following is a non-exhaustive list of business practices and operations that may require review and action in order to comply with GINA's mandates.

1. Revise or replace forms.

   Forms and notifications used during the application process and benefit enrollment or renewals should be examined for compliance with GINA. This includes not only forms used in the employee hiring and orientation process, but also those in other programs such as wellness initiatives (Maroney, 2010; Klautzer, 2012) and the processing of workers compensation and other employee claims (Greaves & Smith,2009). Employers should take care to ensure that such forms make no inquiry about the applicant/ employee's family medical history or about his or her use of genetic counseling services.

2. Review and update policies and notifications.

   Employee applicant screening procedures, employee handbooks and training materials should be scrutinized for compliance with GINA. Examine what data are acquired on applicants and employees as well as how who has access to it (Francis, 2010) and how it is kept and secured Update handbooks and training materials to reflect existence of rights conferred and duties imposed by GINA. Review employee hotline scripts and procedures for reporting possible violations. The review should include policies on the use of social media both in the pre-screening process (Peebles, 2012) as well as in the workplace generally. Informal searches conducted by employees at their place of employment, or in connection with their employment, which reveal genetic information could constitute a GINA violation by the covered entity (Elefant, 2011) and the search itself leaves evidence of the violation.

3. Develop and deliver curriculum for training.

   Knowledge of GINA is still in the nascent stage. Two years after passage of the Act, a survey about the law conducted of occupational physicians, revealed that they were "not prepared to deal with genetic testing in the workplace" (Brandt-Rauf, 2011). These are persons likely to be making the very inquiries prohibited by GINA. Existing anti-discrimination trainings should be amended to include reference to GINA and/or supplemented by offering GINA-specific training. At a minimum, such training should include: the specific conduct prohibited by GINA and statutory penalties for violations; exceptions which permit acquisition or disclosure of otherwise prohibited information; acceptable employer uses of acquired employee genetic information; requirements for safeguarding such information; and caution in dealing with outside agents and service providers whose actions may visit liability upon the employer. Such trainings should also cover any related state laws that will hold the company to more stringent requirements. Introducing factual scenarios, which illustrate how these issues potentially could arise in the workplace, should help employees understand how the law applies in context.

4. Study labor agreements.

   It will be particularly important for industries such as medicine, professional sports and manufacturing that have unionized labor to review agreements in place. If collective bargaining agreements do not incorporate, "clear and unmistakable language" (*Poore v. Peterbilt* [2012]) that GINA claims are subject to collective bargaining agreements and arbitration requirements contained therein, then they likely will be subject to litigation (Wagner, 2012; Bland, 2013). Further, Wagner cautions that college and amateur players dealing with such organizations are likely to be considered "applicants" protected by GINA and that sports organizations should make sure that forms, policies and procedures used in recruitment are also in compliance with GINA.

5. Make and keep appropriate documentation.

   Document purposes for, procedures used and consents obtained to acquire genetic information that fall within statutory exceptions. If charged with a GINA violation, the burden will fall on the employer to prove its actions fall within the exceptions

6. Coordinate with vendors and affiliates.

   We know from *Fabricut* and *Founders Pavilion* that the EEOC will hold an employer responsible for the inquiries of its agents. This is true even when no adverse employment action is taken based on the information obtained, as was the case in *Founders Pavilion*. The EEOC considers the request alone to constitute a GINA violation. It is imperative that employers review the policies, documentation and procedures of its vendors to determine whether they comply with the statute.

   The EEOC recommends employers use the following language in contractual agreements with a third party to minimize employer liability under GINA from collection or disclosure of genetic information by that third party:

   > The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services (EEOC, 2014).

In addition, employers will need to examine contractual relationships with their vendors to see if they provide for indemnification and consider the need for indemnification agreements (Greaves & Smith, 2009).

7. Anticipate and prepare for EEOC proceedings.

   Results from the study of individual GINA cases reported in Part II above show that many private lawsuits filed to date that have resulted in court opinions addressing GINA claims are simply the product of ignorance or error. Pro se plaintiffs working with broad form right to sue letters from the EEOC assert claims in follow-on litigation that are not even remotely implicated by the facts. Use the EEOC process and any associated mediation proceedings to educate the claimant about his/her potential claims to maximize the possibility that extraneous claims will not be asserted in subsequent litigation resulting in additional legal expense to have them dismissed.

8. Evaluate need for liability insurance.

   Consider whether the company has insurance against possible violations. Check comprehensive general liability, employment practices liability, errors and omissions, as well as directors and officers liability policies for coverage. Check with your broker or agent about likely interpretations and procedures to be followed to comply with cooperation clauses. Purchase or supplement insurance to protect against legal fees, settlements and damages connected with alleged violations.

9. Seek legal counsel.

   It may be prudent to discuss proposed changes in policies, procedures, notices, trainings and forms with legal counsel who are knowledge about GINA and other federal and state anti-discrimination laws.

PART IV: SUGGESTIONS FOR FUTURE RESEARCH

Because the life of GINA is still in its early stages, there is so much we do not know, making it a fertile filed for research at all levels: individual, organizational and societal (Markel & Barclay 2007). Scholars continue to debate the balance among individual privacy needs, economic considerations and public health concerns (Rubel, 2012; Levin, 2013; Rothstein, 2013). This discussion is important because undoubtedly there will be debate over whether GINA should be expanded—on the insurance side to other products (life, disability, long term care)—and to other forms of "sensitive" health information such as that being generated by neuroscience.

From the perspective of the human resources educator, we have no information on how corporate practices and policies have changed or will change as a consequence of the Act and are not yet in a position to offer comprehensive summaries. While there is some survey research on information dissemination about the Act to the general public, medical and patient community, there is none that assesses the level of dissemination among employers in general, human

resource professionals or educators. Research that reviews and analyzes material settlements and ensuing legal opinions will be needed to inform students who are or will be directing employer policy and practice with respect to the Act.

CONCLUSION

It is important that human resource educators become familiar with the Genetic Information Nondiscrimination Act and the conduct it prohibits and regulate in order to guide students and their prospective or current employers regarding issues of compliance with the goal to minimize the potential for employer liability and ensure fair treatment of all applicants and employees. Information about emerging enforcement activity is useful for understanding the kinds of practices that are suspect so that they can be identified and remediated before they attract the attention of enforcement agencies. It is important to keep in mind that there is much we do not know about how GINA will be deployed and interpreted, as well as the impact it will have on employment and insurance practices. The academic community will need to conduct further research to understand these issues at the individual, organizational and societal levels. It is a field ripe for exploration.

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REFERENCES

Abiola, S. (2008). Recent developments in health law: The Genetic Information Nondiscrimination Act of 2008: "First major civil rights bill of the century" bars misuse of genetic test results. *The Journal of Law, Medicine & Ethics: A Journal of the American Society of Law, Medicine & Ethics,* 36 (4), 856-866. doi:10.1111/j.1748-720X.2008.00344.x

Allain, D. C., Friedman, S., & Senter, L. (2012). Consumer awareness and attitudes about insurance discrimination post enactment of the Genetic Information Nondiscrimination Act. *Familial Cancer,* 11 (4), 637-44. doi: 10.1007/s10689-012-9564-0.

Allen et al. v. Verizon Wireless et al., Civ. Action No. 3:12-CV-482 (JCH) D. Conn. (2013).

Areheart, B. A. (2012). GINA, privacy, and antisubordination. *Georgia Law Review*, 46 (3), 705-718.

Baruch, S., & Hudson, K. (2008). Civilian and military genetics: Nondiscrimination policy in a post-GINA world. *American Journal of Human Genetics,* 83 (4), 435-44. doi:10.1016/j.ajhg.2008.09.003

Blackwell, M. S. (2009). Insurance, employment, and the Genetic Information Nondiscrimination Act of 2008. *Loyola Law Review,* 55 (1), 125-172.

Bland, J. A. (2011). There will be blood ... testing: The intersection of professional sports and the Genetic Information Nondiscrimination Act of 2008. *Vanderbilt Journal of Entertainment and Technology Law,* 13 (2), 357-383.

Brandt-Rauf, S., Brandt-Rauf, E., Gershon, R., Li, Y. & Brandt-Rauf, P. W. (2011). Genes, jobs, and justice: Occupational medicine physicians and the ethical, legal, and social issues of genetic testing in the workplace. *Ethics & Medicine,* 27 (1), 51-61.

Callier, S. L., Huss, J., & Juengst, E. T. (2010). GINA and preemployment criminal background checks. *Hastings Center Report,* 40 (1), 15-19. doi:10.1353/hcr.0.0219

Clifton, J. M., VanBeuge, S. S., Mladenka, C., & Wosnik, K. K. (2010). The Genetic Information Nondiscrimination Act 2008: What clinicians should understand. *Journal of the American Academy of Nurse Practitioners*, 22 (5), 246-49. doi:10.1111/j.1745-7599.2010.00504.x

Cohen, R. B. (2014, January 13). *United States: EEOC Settles First Systemic GINA Class Action.* Retrieved from http://www.mondaq.com/unitedstates/x/285842/EEOC+Settles+First+Systemic+GINA+Class+Action

Colaizzi, B. A. (2013, July 9). *EEOC attacks post-offer medical exams in GINA lawsuits.* Retrieved from http://www.lexology.com/library/detail.aspx?g=50e3df63-decb-47f0-8819-8f15871d0642

Conner-Goodgame v. Wells Fargo Bank, N.A., No. 2:12-cv-03426-IPJ, S. Div. N.D. Ala. (2013).

Corbett, W. R. (2011). What is in GINA's genes? The curious case of the mutant-hybrid employment law.. *Oklahoma Law Review*, 64 (1), 1-16.

Dressler, L. G., & Terry, S. F. (2009). How will GINA influence participation in pharmacogenomics research and clinical testing? *Clinical Pharmacology & Therapeutics,* 86 (5), 472. doi:10.1038/clpt.2009.146

EEOC v. Fabricut, Civ. Case No. 13-CV-248-CVE-PJC (N.D. Okla., settlement approved May 7, 2013).

EEOC v. Founders Pavilion, Inc., Civ. Case No. 6:13-cv-06250 (W.D.N.Y, settlement approved January 9, 2014).

Elefant, C. (2011). The "power" of social media: Legal issues & best practices for utilities engaging social media. *Energy Law Journal,* 32 (1), 1-56.

Equal Employment Opportunity Commission. (2009, May 12). Background information for EEOC Notice of Proposed Rulemaking on Title II of the Genetic Information Nondiscrimination Act of 2008. Retrieved from http://www.eeoc.gov/policy/docs/qanda_geneticinfo.html

Equal Employment Opportunity Commission. (2013, May 16). *EEOC Files Class Genetic Information Discrimination Suit Against Corning Rehab Center.* Retrieved from http://www.eeoc.gov/eeoc/newsroom/release/5-16-13a.cfm

Equal Employment Opportunity Commission. Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008. Retrieved March 31, 2014 from http://www.eeoc.gov/laws/regulations/gina_qanda_smallbus.cfm

Erwin, C. (2009). Behind the Genetic Information Nondiscrimination Act of 2008. *The American Journal of Nursing,* 109 (12), 45-46.

Francis, L. P. (2010). You are born with your genes: Justice and protection against discrimination in the use of genetic information. *The Mount Sinai Journal of Medicine, New York,* 77 (2), 188-96. doi:10.1002/msj.20170

Genetic Information Nondiscrimination Act (2008). Pub. L. No. 110-233; 122 Stat. 881, § 201 (4). Retrieved from http://www.eeoc.gov/laws/statutes/gina.cfm

Greaves, M. B., & Smith, A. E. (2009). The new Genetic Information Non-discrimination Act. *Defense Counsel Journal,* 76 (1), 137-140.

Guarnieri, W. P. (2011). Prince Harry and the honey trap: An argument for criminalizing the nonconsensual use of genetic information. *American Criminal Law Review,* 48 (4), 1789-1818.

Health law - genetics - Congress restricts use of genetic information by insurers and employers. (2009). *Harvard Law Review,* 122 (3), 1038.

Herzfeld, J. (2014, January 13). *Nursing Center Settles Charges by EEOC For Asking About Family Medical History.* Retrieved from http://about.bloomberglaw.com/law-reports/nursing-center-settles-charges-by-eeoc-for-asking-about-family-medical-history/

Hillstrom, E. M. (2009). May an employer require employees to wear "genes" in the workplace? An exploration of title II of the Genetic Information Nondiscrimination Act of 2008. *The John Marshall Journal of Computer & Information Law,* 26 (4), 501-546.

Huang, M., Huston, S. A., & Perri, M. (2013). Awareness of the US Genetic Information Nondiscrimination Act of 2008: An online survey. *Journal of Pharmaceutical Health Services Research,* 4 (4), 235. doi:10.1111/jphs.12030

Klautzer, L., Mattke, S., & Greenberg, M. (2012). Can we legally pay people for being good? A review of current federal and state law on wellness program incentives. *Inquiry: A Journal of Medical Care Organization, Provision and Financing,* 49 (3), 268-277.

Klitzman, R. (2010). Views of discrimination among individuals confronting genetic disease. *Journal of Genetic Counseling,* 19 (1), 68. doi:10.1007/s10897-009-9262-8

Kostecka, B. E. (2009). GINA will protect you, just not from death: The Genetic Information Nondiscrimination Act and its failure to include life insurance within its protections. *Seton Hall Legislative Journal,* 34 (1), 93-118.

Kostiuk, S. A. (2012). After GINA, NINA? Neuroscience-based discrimination in the workplace. *Vanderbilt Law Review,* 65 (3), 933-977.

LaCroix, K. (2014, February 13). *Closer Look at the EEOC's 2013 Enforcement and Litigation Statistics.* Retrieved from http://www.dandodiary.com/

Langford, M. (2012). Dancing with GINA: What should employers know about the Genetic Information Nondiscrimination Act of 2008? *Southern Journal of Business and Ethics,* 4, 47-55.

Leone v. North Jersey Orthopaedic Specialists, P.A., et al., Civ. Action No. 11-3957 (ES), D. N.J. (2012).

Levin, N. (2013). A defense of genetic discrimination. *The Hastings Center Report,* 43 (4), 33-42.

Markel, K. S., & Barclay, L. A. (2007). Discrimination and stigmatization in work organizations: A multiple level framework for research on genetic testing. *Human Relations,* 60 (6), 953-980. doi:10.1177/0018726707080082.

Maroney, K. (2010). Prognosis negative? GINA's interim incentives ruling a concern for wellness programs. *Compensation & Benefits Review,* 42 (2), 94-101. doi:10.1177/0886368709360951.

McDevitt, W. J. (2009). I dream of GINA: Understanding the employment provisions of the Genetic Information Nondiscrimination Act of 2008. *Villanova Law Review,* 54 (1), 91-115.

Peebles, K. A. (2012). Negligent hiring and the information age: How state legislatures can save employers from inevitable liability. *William and Mary Law Review,* 53 (4), 1397-1433.

Perry, W., Payne, J., Goldstein, M. M., Jarawan, H., & Rosenbaum, S. (2009). Law and the public's health: Health insurance and the Genetic Information Nondiscrimination Act of 2008: Implications for public health policy and practice. *Public Health Reports,* 124 (2), 328-331.

Poore v. Peterbilt of Bristol, LLC, 852 F.Supp.2d 727, Abingdon Div. W.D. Va. (2012).

Quick, H. R. (2012). Privacy for safety: The NCAA sickle-cell trait testing policy and the potential for future discrimination. (National Collegiate Athletic Association). *Iowa Law Review,* 97 (2), 665-691.

Regulations Under the Genetic Information Nondiscrimination Act of 2008. 29 CFR § 1635 (2010). Retrieved from https://www.federalregister.gov/articles/2010/11/09/2010-28011/regulations-under-the-genetic-information-nondiscrimination-act-of-2008.

Relland, S. (2009). Compliance requirements and what more to expect for health and welfare plan sponsors in 2009. *Compensation & Benefits Review,* 41 (3), 29-41. doi:10.1177/0886368709334551.

Roberts, J. L. (2010). Preempting discrimination: Lessons from the Genetic Information Nondiscrimination Act. *Vanderbilt Law Review,* 63 (2), 437-490.

Rothstein, M. A. (2013). Genetic discrimination in employment is indefensible. *Hastings Center Report,* 43 (6), 3-4. doi:10.1002/hast.219

Rubel, A. (2012). Justifying public health surveillance: Basic interests, unreasonable exercise, and privacy. *Kennedy Institute of Ethics Journal,* 22 (1), 1-33. doi:10.1353/ken.2012.0001

Schlein, D. (2009). New frontiers for genetic privacy law: The Genetic Information Nondiscrimination Act of 2008. *George Mason University Civil Rights Law Journal,* 19 (2), 311-369.

Schrimsher, M. & Fretwell, C. (2012). What small business owners should know about employment law. *American Journal of Management,* 12 (2/3), 3-39.

Smith v. Donahue, et al., No. 1:12CV790 JCC/TRJ., E.D. Va. (2013).

Smith, B. (2009). The EEOC's brave new world. *ABA Journal,* 95 (6), 22-23.

Steck, M. B., & Eggert, J. A. (2011). The need to be aware and beware of the Genetic Information Nondiscrimination Act. *Clinical Journal of Oncology Nursing,* 15 (3), E34. doi:10.1188/11.CJON.E34-E41

Tan, M. H. (2009). Advancing civil rights, the next generation: The Genetic Information Nondiscrimination Act of 2008 and beyond. *Health Matrix (Cleveland, Ohio : 1991),* 19 (1), 63-119.

Tate v. Quad/Graphics Inc., Case No. 3:10CV00296 BSM, Jonesboro Div., E.D. Ariz. (2011).

Tovar v. United Airlines, Inc., Civ. Action No. 11 CV 9137, E. Div. N.D. Ill. (2013).

United States of America v. Baltimore County, Maryland, No. WOQ12CV2327, D. Md. (2012)

Varner, A. (2011). Title II of the Genetic Information Nondiscrimination Act and its promulgating regulations: Analyzing employer acquisition of employee genetic information in the context of fairness and privacy. *Labor Law Journal,* 62 (4), 202-216.

Wagner, J. K. (2012). Sidelining GINA: The impact of personal genomics and collective bargaining in professional sports. *Virginia Sports and Entertainment Law Journal*, 12 (1), 81-125.

Wagner, J. K. (2013, May 13). *EEOC Files and Settles Its First GINA-based Employment Discrimination Lawsuit on May 7, 2013.* Retrieved from http://www.genomicslawreport.com/index.php/2013/05/13/eeoc-files-and-settles-its-first-gina-based-employment-discrimination-lawsuit-on-may-7-2013/ .

Wilson, D. B., & Woodard, D. L. (2014, January 21). *EEOC settlement reminds employers that GINA prohibits requesting family medical history.* Retrieved from http://www.lexology.com/library/detail.aspx?g=eaef6e25-e1ce-4db1-a3ec-9033d9be5263.

Wright v. Stonemor Partners LLP, No. 3:12-cv-380., Charlotte Div., W.D.N.C. (2012).

Ziskind, S. (2009). The Genetic Information Nondiscrimination Act: A new look at an old problem. *Rutgers Computer & Technology Law Journal*, 35 (2), 163-202.