

Discrimination Based on Genetic Information: What Was Once Overlooked Should Now Be A Serious Concern For Employers

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More and more employees are returning to in-person work as the world continues to transition back to pre-pandemic normalcy. As a consequence of ensuring a safe return to the workplace, some employers have asked employees to provide their family members' medical examination results, including COVID-19 test results, prior to returning in-person to the office. Although the workplace may be safer, employers face potential liability if they base employment decisions on such personal information. In this post-pandemic world, employers should be aware that discrimination based on genetic information is illegal in New Jersey and at the federal level.

The Basics

At the federal level, the [Genetic Information Nondiscrimination Act](#) (GINA), 42 U.S.C. § 2000ff et seq. prohibits discrimination by employers based on genetic information, using language that is similar to the prohibitions on employment discrimination found in [Title VII of the Civil Rights Act of 1964](#), 42 U.S.C. § 2000-2(a). GINA specifically prohibits the use of genetic information in making employment decisions, restricts employers from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information. 42 U.S.C. § 2000ff-1.

New Jersey's version of GINA is contained in the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. 10:5-1 to -50. Under the NJLAD, an employer commits an "unlawful employment practice" if it discriminates on the basis of an "atypical hereditary cellular or blood trait of any individual," or an individual's "refusal to submit to a genetic test or make available the results of a genetic test to an employer." N.J.S.A. 10:5-12(a).

GINA Has Shown To Be Costly For Employers

One case that highlights how costly a claim of employment discrimination based on genetic information is *Lowe v. Atlas Logistics Group Retail Services, LLC*, 102 F.Supp.3d 1360 (N.D.Ga. May 5, 2015). In *Lowe*, a United States District Court for the Northern District of Georgia held the employer had violated GINA by obtaining DNA samples from two employees it had suspected of repeatedly defecating in a company warehouse. Ultimately, a jury awarded the plaintiffs \$2.23 million in damages, consisting of \$475,000 in emotional distress damages and \$1.75 million in punitive damages based on the employer's reckless indifference to their federally protected rights.

Asking Employees To Provide Their Family Members' Medical Examination Results

The United States Equal Employment Opportunity Commission ("EEOC") recently updated its [guidelines](#) on disability-related inquiries and medical exams. In response to "[m]ay an employer ask an employee who is physically coming into the workplace whether they have family members who have COVID-19 or symptoms

associated with COVID-19,” the EEOC said “[n]o. [GINA] prohibits employers from asking employees medical questions about family members.” The EEOC further explained “GINA prohibits employers from asking employees to provide their family members’ medical examination results, including COVID-19 test results.” Interestingly, the EEOC acknowledged “GINA . . . does not prohibit an employer from asking employees whether they have had contact with ‘anyone’ diagnosed with COVID-19 or who may have symptoms associated with the disease.”

Recently, the EEOC found Brandon Dermatology, a Tampa Bay-based medical practice, had violated GINA by collecting COVID-19 test results of its employees’ family members. As a result, the EEOC and Brandon Dermatology entered into a conciliation agreement whereby Brandon Dermatology agreed to cease collecting COVID-19 test results. In addition to compensating affected employees through the restoration of leave time or back pay, the conciliation agreement required Brandon Dermatology to pay compensatory damages, review its COVID-19 policies, conduct training on EEO laws as they pertain to COVID-19, and post a notice. Even Chelsae J. Ford, a systemic coordinator for the EEOC’s Miami District, recognized that “[a]lthough GINA charges compromise a small portion of the EEOC’s charge receipts each year, employers nonetheless need to be aware of the law’s prohibition on collecting genetic information.”^[1]

TAKEAWAY: The COVID-19 pandemic has made it more likely than ever for an employer to be liable for discrimination based on genetic information. Some employers have taken measures to ensure a safe return to the workplace, including asking employees to provide their family members’ medical examination results. That kind of employer conduct has been found to constitute discrimination based on genetic information. Therefore, New Jersey employers should be aware that discrimination based on genetic information is actionable under State and federal law.

If you are an employer and need assistance with claims of discrimination based on genetic information under GINA or NJLAD, contact any member of the Wilentz [Employment Law](#) Team.

^[1] United States Equal Employment Opportunity Commission, [Brandon Dermatology Resolves EEOC Genetic Discrimination Finding](https://www.eeoc.gov/newsroom/brandon-dermatology-resolves-eeoc-genetic-discrimination-finding), <https://www.eeoc.gov/newsroom/brandon-dermatology-resolves-eeoc-genetic-discrimination-finding> (July 6, 2022).

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