

Supplemental e-Alert Regarding GINA: How Employers Can Protect Themselves Regarding Workers' Compensation Requests for Medical Information

For more information regarding the regulations or any other employment-related issue, please contact your Vorys attorney or a member of the Vorys Labor and Employment Group by calling 614.464.6400.

The impact of the Genetic Information Nondiscrimination Act ("GINA") of 2008 upon workers' compensation requests for medical information is not entirely clear from the regulations in Title II and the explanatory notes in the Preamble to the regulations.

However, employers can protect themselves from liability under GINA by modifying their workers' compensation requests for medical information. GINA provides an exception for the "inadvertent" acquisition of genetic information through a lawful request for medical information, but only if the employer directed the individual and/or health care provider from whom it requested medical information not to provide genetic information. This can be accomplished by modifying the employer's request for medical information, including notifying the medical examiner not to collect genetic information, including family medical history, as part of a medical examination.

In order to avoid liability for disclosure of protected information under GINA, best practices require the inclusion of the following EEOC model language in workers' compensation requests for medical information (i.e. releases) and in

correspondence to medical provider or examiners:

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.

The employer should be mindful that the failure to make this simple modification of the employer's requests for medical information,

whether issued directly by the company or through a third party administrator, could result in the disclosure of protected information. Remedies available to the employee under Title II of GINA for such a disclosure include compensatory and

punitive damages up to the maximum caps. In addition, employers should recognize that the unlawful acquisition of genetic information may also be used by the employee as evidence to support a claim for discrimination or retaliation in violation of GINA.

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