

Fresh Attention On Genetic Bias Law May Spark More Claims

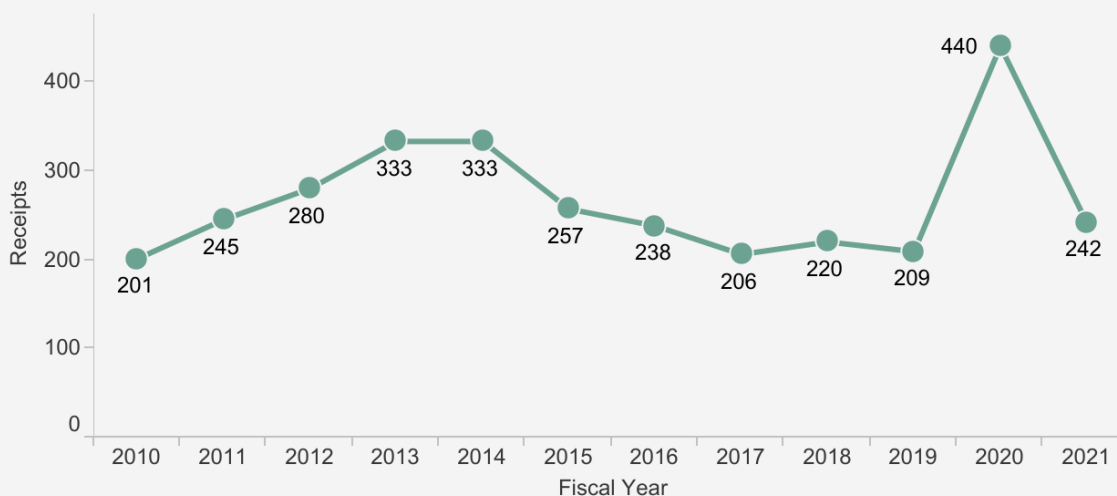
By Anne Cullen

Law360 (July 27, 2022, 9:13 PM EDT) -- The COVID-19 pandemic has generated more awareness of the Genetic Information Nondiscrimination Act and its protections for workers and job applicants, a spotlight that some experts believe will lead to a rise in GINA litigation.

The anti-discrimination law garnered unprecedented attention during the health crisis, as workers brought a record-high number of charges citing GINA to the U.S. Equal Employment Opportunity Commission in 2020. And in July, the commission made headlines when it went after a Florida medical practice that it said violated GINA by requesting COVID-19 test results from employees' family members.

Aside From 2020 Spike, GINA Charges Hold Steady

The complaints of GINA violations filed each year with the EEOC have hovered between 200 and 350 since the law came into effect, save for a bump amid COVID-19.



Source: EEOC

GINA, which was enacted in 2008, bars employers from using a worker's or job candidate's genetic information — including family medical history — when making employment decisions. It also restricts employers from requesting these details, limits their ability to disclose them and sets rules for storing them.

Charges alleging genetic discrimination make up only a small fraction of the EEOC's docket. Even at their peak amid the health crisis they represented less than 1% of the total charges the agency received that year. Agency enforcement and employee lawsuits invoking GINA are also rare.

However, some legal experts believe the pandemic set the stage for a potential uptick in GINA activity that could linger past the crisis.

"The legal protections of GINA remain the same, but the circumstances are changing," said Elizabeth Pendo, a Saint Louis University School of Law professor who specializes in disability and bioethics law. "There are more circumstances in which they apply."

"This was brought on by the COVID-19 pandemic, but it goes beyond that," Pendo said.

'Sleeper Issue'

There hasn't been any consistent rise in genetic discrimination claims yet. The 2020 bump in GINA charges with the EEOC leveled off in 2021, and a commission spokesperson said the agency can't provide the number of GINA charges filed so far in 2022.

However, employment attorneys say they're preparing for an eventual increase.

"It is inevitable," said Jackson Lewis PC principal Joseph J. Lazzarotti, who specializes in privacy and employee benefits.

"It's still kind of a sleeper issue, but people are getting more aware of how it's defined, and that it's not just DNA," he said. "Once that seeps in, it will become something that's more actively looked at."

The definition of genetic information under the law covers information about an individual's genetic tests and the genetic tests of an individual's family members, plus information about "the manifestation of a disease or disorder in an individual's family members."

Family medical history is considered genetic information because it can be used to determine whether someone has an increased risk of getting a disease, disorder or condition in the future, the EEOC has explained.

Morgan Lewis & Bockius LLP senior attorney and EEOC veteran E. Pierce Blue said the extension of GINA's protections to the medical background of a worker's family serves as the basis for the majority of claims under the law.

"GINA's true import at this moment is its broad definition of what constitutes genetic information," Blue said. "It's the main driver of charges under the act."

This aspect of the law landed on more workers' radars as a result of the health discussions the pandemic brought into the workplace, a trend Blue said will prompt more claims.

"As more and more employees are being sensitive to what medical information they're being asked for, they're becoming more aware of their rights under GINA, they're then going to potentially file more claims, or at least attempt to file more claims," Blue said.

Lasting Impact

There are several ways GINA can come into play in the workplace unrelated to the health crisis, and legal experts say these types of claims may rise even as the pandemic fades.

"This has the potential to extend beyond COVID," Blue said. "As employees are more aware of that limitation, they will apply that to other situations."

Technology is one avenue, said Jackson Lewis' Lazzarotti. As technology becomes more ubiquitous in the office, he said it creates additional pathways for an employer to end up in possession of GINA information.

"The increased use of technology and information gathering in various workplace contexts enables, either intentionally or inadvertently, the collection of family medical history," he said. "That's one way I see this becoming more of an issue."

A team member may use a company-monitored work laptop to relay information to their doctor, for example, or they might use an office copier with a shared, companywide drive to scan a medical document.

The EEOC has made it clear that inadvertent acquisitions of genetic information don't run afoul of GINA, but employers still have a responsibility to safeguard those details even if they didn't seek them out. Under the law, an employer can't disclose genetic information about job candidates or employees, they can't factor them into any employment decisions, and they are required to keep genetic information in a separate medical file.

A corporate wellness program could also serve as a springboard for GINA allegations.

Two Chicago employees recently got the green light to move ahead with their GINA claims over a city wellness initiative that sought medical information from their covered spouses.

The Chicago Lives Healthy Wellness Program used biometric screenings to gather health information from employees and required participants and covered spouses who joined to submit medical questionnaires, according to case filings. The workers said those who skipped it had \$50 deducted per paycheck, plus another \$50 if they had a covered spouse who didn't partake.

According to the EEOC, it's legal to seek out a worker's family medical history as part of a wellness program only if that initiative is "voluntary," though that qualifier is largely undefined in the law's regulations.

U.S. District Judge Virginia M. Kendall ruled on Monday that it was too early in the case to tell if that financial penalty made the program "involuntary," and she upheld two workers' GINA allegations to move ahead to the discovery phase of the case.

Saint Louis University's Pendo added that GINA can also crop up in the myriad health-related workplace policies that aren't specific to COVID-19, like protocols for employees to take sick time, request an accommodation under the Americans with Disabilities Act, or use leave allotted by the Family and Medical Leave Act.

She said the light COVID-19 shined on GINA also illuminated employers' responsibility to manage the medical data it receives at large.

"It's brought attention to what kind of health information employers collect under a range of these policies, and how they store it," Pendo said. "COVID has brought all these kinds of issues to the fore, but GINA concerns can apply to all sorts of family and medical conditions that people might experience."

Her recommendation is that employers get their houses in order now, before there's an issue.

"Once the awareness is there, it will become an increasing trend," Pendo said. "If employers have not done this already, this would be a great time to review their policies."

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