

# The Bennett Law Firm

## *Client Update*

Trusted Advisor to Management for Over 50 Years  
Labor Relations ~ Employment Law ~ Business Litigation  
Portland, ME (207) 773.4775 / Boston, MA (617)973.1550



### **EMPLOYER REQUIRED TO PAY SIX FIGURE SETTLEMENT TO RESOLVE THE EEOC'S FIRST GINA LAWSUIT ALLEGING SYSTEMIC VIOLATIONS**

On January 9, 2014, the Equal Employment Opportunity Commission (“EEOC”) settled its first systemic lawsuit ever filed alleging genetic discrimination under the Genetic Information Non-Discrimination Act (“GINA”). GINA prohibits discrimination against applicants and employees on the basis of genetic information. More specifically, it “prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by the statute from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.” Genetic information broadly includes an individual’s genetic tests, family medical history and the genetic tests of employees’ family members.

The settlement of the case, EEOC v. Founders Pavilion, Inc., highlights the practice of a company that improperly collected and used family genetic and personal health information. The EEOC claimed that Founders Pavilion, a nursing home and rehabilitation center, violated GINA by seeking family medical history data in pre-employment and post-offer exams of applicants. The complaint also claimed that the Founders Pavilion fired one employee after refusing to provide her with an accommodation in violation of the Americans With Disabilities Act (“ADA”), refused to hire two women because of a perceived disability, and either refused to hire or fired three women because they were pregnant, violating Title VII of the 1964 Civil Rights Act (“Title VII”).

Since 2009, the EEOC has noted its intent to pursue employers who violate GINA. Ten months after the EEOC filed its complaint, the parties reached a \$370,000 settlement agreement. The settlement fund is divided into two groups: Founders Pavilion will provide \$110,400 for distribution to the 138 individuals who were asked for their genetic information, and Founders Pavilion will pay \$259,600 to the five individuals that the EEOC claimed were fired or denied employment for alleged violations of the ADA or Title VII.

Founders Pavilion recently sold its facility to another company and as part of the settlement, denied the allegations. If Founders Pavilion resumes business, then it will have to abide by the restrictions prescribed in the settlement agreement. Specifically, Founders Pavilion will have to

post notices to employees regarding the lawsuit and consent decree, adopt a new anti-discrimination policy and distribute it to all employees, provide antidiscrimination training to all employees, and provide periodic reports to the EEOC regarding internal complaints of discrimination. The settlement agreement is binding for five years.

In the Commission's press release, it reminded employers that "when illegal questions are required as part of the hiring process, the EEOC will be vigilant in ensuring that no one is denied employment opportunities on a prohibited basis." This case highlights the EEOC's focus on the National Priorities laid out in its Strategic Enforcement Plan, including "eliminating barriers in hiring and recruitment" and "emerging and developing issues" such as enforcement of GINA.

Under certain circumstances, an employer may receive genetic information that it did not request. Such inadvertent acquisition of genetic information is not a violation of GINA. To help establish that genetic information was acquired inadvertently, an employer should take advantage of flexibility provided in the EEOC's GINA regulations. For example, when an employer needs to request health-related information, such as to support a request for sick leave or a reasonable accommodation under the ADA, the employer should warn the employee and the health care provider not to provide genetic information. The regulations suggest the following language to accompany the request for health-related information:

"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."

Employers that are in the practice of requiring medical exams should take note, because it may take a good deal of training to alter the practice of asking for family medical history in a medical exam for employment. Although exceptions exist and there may be ways to restructure the process to reduce risk, the statute's prohibition does create potential liability as the Founders Pavilion settlement illustrates. In this case, the employer has a 5-year consent decree, had to pay a six-figure settlement to job applicants, and will be featured in EEOC press releases, publications and speeches for the foreseeable future.

The Bennett Law Firm is your resource to avoid costly litigation and to protect your company's reputation. Please contact Peter Bennett ([pbennett@thebennettlawfirm.com](mailto:pbennett@thebennettlawfirm.com)) or Rick Finberg

([rfinberg@thebennettlawfirm.com](mailto:rfinberg@thebennettlawfirm.com)) with any questions you may have.