Armstrong Teasdale

Client Alert

November 22, 2010

New Genetic Information Nondiscrimination Act Regulations Present Pitfalls

At first glance the Genetic Information Nondiscrimination Act appeared to have limited application to today's workplace, but regulations enacted this month by the EEOC show that its reach is actually much broader.

The Act, which became effective last year, in part prohibits employers from requesting genetic information about applicants or employees. It also bars employers from discriminating on the basis of genetic information.

When first passed, it appeared that the Act would have little impact because, presumably, very few employers genetically test their employees or are contemplating doing so. However, the EEOC regulations show that there's much more at stake. Nothing prevents an employee from claiming an adverse action was the result of the employer's knowledge of genetic information about the employee, regardless of how it was obtained. This is made clear by the "genetic information" box that can now be checked as a protected category on Charge of Discrimination forms.

Here are a few important points to keep in mind:

- "Genetic information" is defined not only as genetic tests of an employee or an employee's family member, but also family medical history. For example, knowledge that Alzheimer's runs in an employee's family may be considered knowledge of genetic information about the employee as defined under the Act.
- Employers cannot be held liable for intentionally acquiring genetic information if the information is passively obtained. This would occur if an employee volunteers the information after simply being asked "How are you?" Information can also be passively obtained if an employee posts it on Facebook or if a supervisor inadvertently hears two employees discussing their own or family medical history.
- However, even a casual conversation with an employee can result in a violation of the Act. Once an employee reveals any potentially protected information, the Act prohibits asking the employee "probing" follow up questions. These situations would include asking if a family member has a certain condition or whether the employee has been tested for a condition. The Act also prohibits employers from actively listening to third party conversations and making requests for information about the individual's current health status in a way that is likely to result in learning genetic information. Similarly, an Internet search on the employee can constitute a "request" for genetic information prohibited by the Act - if it is done in a way "likely to result in obtaining genetic information about the employee."
- Employers can also be exposed to liability through inadvertent receipt of genetic information in connection with pre- and post-employment medical exams and fitness-for-duty exams. The regulations include specific language for employers to include in medical inquiry forms. This disclaimer provides a safe harbor from liability should employers accidentally receive protected genetic information in response to lawful medical information requests.

These are just a few examples of how even innocent violations can easily occur. As with all laws, familiarity with legal restrictions should form the first line of defense. If you need assistance in developing policies or have any questions, the Armstrong Teasdale Employment and Labor practice group invites you to contact:

Daniel O'Toole / 314.552.6612
dotoole@armstrongteasdale.com

Narcisa Symank / 314.342.4176
nsymank@armstrongteasdale.com

Joan Cohen / 314.342.4101
jcohen@armstrongteasdale.com

Vance Miller / 314.342.4179
vmiller@armstrongteasdale.com

Jovita Foster / 314.552.6698
jfoster@armstrongteasdale.com

John Vering / 816.221.3420
jvering@armstrongteasdale.com

Meredith Rund / 816.472.3102
mrund@armstrongteasdale.com

Robert Kaiser / 314.342.4153
rkaiser@armstrongteasdale.com