The ADAAA, the ADA, and the Genetic Information Non-Discrimination Act

By **Robin E. Shea** on May 16, 2011

A few weeks ago, I posted my thoughts about how the expanded definition of "disability" under the Americans with Disabilities Act Amendments Act will affect administration of the Family and Medical Leave Act. I promised to follow up with a post about the impact of the ADAAA on the Genetic Information Non-Discrimination Act "unless more pressing news intervene[d]."

As expected, I got distracted by Friday the 13th, and "common misconceptions." So, I'm a little behind schedule.

As with my ADAAA/FMLA post, this is a work in progress, and I'd love to get feedback as to whether my ideas are right on target, so-so, or completely misguided.

The GINA, to grossly oversimplify, prohibits the disclosure, use, acquisition or attempted acquisition of "genetic information" as defined in the law, as well as discrimination because of "genetic information" or retaliation, etc.

The regulatory definition of “genetic information” includes not only the individual’s genetic testing information but also that of his or her family members as well as the “manifestation of a disease” in family members *(e.g.*, “Has anyone in your family ever had cancer?”).

It also includes information about the individual’s or family member’s request for genetic services, genetic information of a fetus carried by the individual or family member, and genetic information of an embryo “legally held by the individual or family member using an assisted reproductive technology” *(e.g., in vitro* fertilization).

Thankfully, the statute and regulation specifically exclude sex and age from the definition of “genetic information.” The regulation also excludes race and ethnic characteristics if that information is “not derived from a genetic test.”

For the most part, it has been believed that the ADA and the GINA do not overlap, which is the reason that we supposedly needed the GINA. The ADA was intended to apply to existing disabling medical conditions. (But not really, because the ADA also protects individuals with "histories" of disabilities and "perceived" disabilities. But anyway.) The GINA, on the other hand, has more of an emphasis on *information* about an individual's *predisposition* to certain medical conditions.

For example . . . sometimes a "preventive" mastectomy is recommended for women who have a significant history of breast cancer in their families. The woman undergoing this surgery probably does not have a "disability," even within the liberal meaning of the ADAAA, because she does not actually have breast cancer or a history of breast cancer, and may not be regarded as having an "impairment" that is not "transitory and minor." However, if her employer terminated her, she might very well have a GINA discrimination claim. The theory would be that the employer terminated her because of her family history of breast cancer, and because family history is "genetic information," the employer violated the GINA.

(Caution: The standard for a finding of "regarded as" disabled under the ADAAA -- requiring that the employer only perceive an impairment that is not transitory and minor -- may mean that the mastectomy surgery itself could give rise to an ADAAA "regarded as" claim.)

The ADA also protects individuals who have "associations" with individuals with disabilities. I see the possibility for a lot of overlap between the ADA and the GINA on "association" claims.

For instance . . . Mary is pregnant with a child who has been prenatally diagnosed with Down Syndrome, a genetic condition. First, to avoid any liability for sex/pregnancy discrimination, the employer may not take any action against her based on whether she decides to go through with the pregnancy. But, let's say the employer strongly "encourages" Mary to have an abortion and fires her when she refuses. Clearly, Mary would have a valid pregnancy discrimination claim under Title VII. Would she have an ADA claim? She doesn't have a disability, but if I were a plaintiff's lawyer, I would include an ADA "association" claim. In other words, I'd allege that Mary's employment was terminated because of her association with an individual with a disability (*i.e.*, her baby). Would she have a GINA claim, as well? I would say so -- this seems to be exactly the kind of situation that the GINA was enacted to address. The baby's condition would be "genetic information" about Mary.

And how about this classic ADA-association scenario? Joe's son has a congenital heart defect, and the company refuses to hire Joe because it is afraid that Joe's son will make the company's health insurance premiums skyrocket. Now, Joe would have an ADA "association" claim and a GINA discrimination claim, too.

On the other hand, if Joe's son is disabled in an automobile accident, and the company refuses to hire Joe because it's afraid Joe's son will make the company's health insurance premiums skyrocket, Joe would have an ADA "association" claim but (if I'm interpreting the GINA correctly) not a GINA claim. In this example, the son does not have a congenital health condition that could be considered "genetic."

So, these are the key areas where I see ADAAA/GINA overlap:

*Associational claims under the ADA and GINA discrimination based on family history.

*Discrimination claims based on an individual's "history" of a disability or actual disability where the condition is a congenital one.

*Discrimination claims based on an individual's being "regarded as" having a disability based on preventive surgery, genetic testing, association with a family member with a congenital disability.

Employment-related medical examinations, the ADA, and the GINA. The GINA will also overlap with some of the "old ADA" provisions, particularly concerning medical examinations. As most readers know, the ADA allows post-offer medical examinations if the examinations are required of all offerees in the job category.

Employers are also allowed to send current employees for medical examinations as long as the examinations are "job-related and consistent with business necessity."

The ADAAA has not changed these rules. But the GINA has. Now, the employer must provide the GINA "safe harbor" language to the health care provider when sending an employee for any medical examination, even when the medical examination is legal. The "safe harbor" language is designed to prevent the health care provider from asking for family history. Even if the health care provider slips up and asks for it, the employer will be protected from liability if it provided the safe harbor language to the health care provider.

Voluntary wellness programs. The ADA also allows employers to get medical information from employees as part of a voluntary wellness program. The GINA allows questions related to the genetic background of employees in connection with voluntary wellness programs if the employer first gets a written authorization from the employee that includes certain specific content.

Confidentiality of medical information. Finally, the ADA is responsible for the well-known rule that requires employers to keep employee medical information confidential and separate from personnel files. Some of this medical information may also be covered by the GINA and, one would think, has already been purged from personnel files. But if it hasn't, the EEOC has said that it is not necessary for the employer to go back through old personnel files and remove GINA-protected information . . . as long as the information was put in the files before the effective date of the law (November 21, 2009). Of course, even the old genetic information cannot be used or disclosed, and genetic information cannot be put in a personnel file after November 21, 2009.

Next up: the interaction of the ADAAA with the HIPAA privacy rule. Does the fun ever start?