GINA Recordkeeping Requirements are Coming

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The Genetic Information Nondiscrimination Act of 2008 (GINA) took effect for employers on Nov. 21, 2009. GINA prohibits the use of genetic information in making employment decisions, restricts employers from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information. GINA's enforcement procedures and remedies are identical to those found in Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). However, unlike Title VII and the ADA, no record retention requirements currently exist under GINA. That is about to change.

In a notice published in the Federal Register on June 2, 2011, the Equal Employment Opportunity Commission (EEOC) proposed to extend existing recordkeeping requirements under Title VII and the ADA to entities covered by GINA, which include both private sector and state and local government employers. In seeking to extend its recordkeeping requirements to GINA, the EEOC is not attempting to require employers to create any documents that do not otherwise exist. However, records made or kept by employers must be retained under GINA in accordance with the same requirements currently in existence for records preserved under Title VII and the ADA.

Specifically, Title VII and the ADA require any personnel or employment record made or kept by an employer (including requests for reasonable accommodation, application forms submitted by applicants and other records having to do with hiring, promotion, demotion, transfer, layoff or termination, rates of pay or other terms of compensation, and selection for training or apprenticeship) to be retained for a period of one year from the date of the making of the record or the personnel action involved, whichever is later. In the case of involuntary termination of an employee, the personnel records of the individual terminated must be kept for a period of one year from the date of termination. Please note that although federal law only requires a one-year retention period for these records, the statute of limitations under Michigan's employment laws is longer. Thus, it is recommended that personnel records be kept for at least 6 years following

termination, unless a charge of discrimination or lawsuit has been filed.

Where a charge of discrimination or lawsuit has been filed, the employer must preserve all personnel records relevant to the charge or action until its final disposition. Thus, a "litigation hold" must be placed on the destruction of all relevant documents, including electronic documents and files, so they are not destroyed under the employer's normal document destruction schedules or policies. Documents considered to be relevant are not limited to personnel records relating to the aggrieved person, but include personnel records for all employees holding positions similar to that held or sought by the aggrieved person. Similarly, the employer must preserve application forms or test papers completed by both an unsuccessful applicant and by all other candidates for the same position as that for which the aggrieved person applied and was rejected.

If you have any questions about GINA or recordkeeping requirements, please contact a member of the Foster, Swift Employment, Labor and Benefits Group.