



Be Prepared To Comply With the Genetic Information Nondiscrimination Act - Effective Saturday

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This Saturday, November 21, 2009, the Genetic Information Nondiscrimination Act (GINA) of 2008 goes into effect. This new federal law addresses employees' concerns about discrimination based on required or voluntary genetic testing. GINA has been referred to as "the most important new anti-discrimination law in two decades." It provides a total ban on using "genetic information" for an employment-related decision.

WHAT IS GENETIC INFORMATION? Genetic information is defined broadly to include information about (i) an individual's genetic tests or the genetic tests of family members; (ii) family medical history; and (iii) any request for genetic services or receipt of genetic services by a participant or family member.

WHAT DOES GINA PREVENT? GINA prohibits: (I) **employers** from requesting genetic testing and considering genetic information in hiring, promoting, and terminating employees; and (II) **health insurers and group plans** from requiring genetic testing or using genetic information in the underwriting process or to establish or alter employee premium or contribution rates.

WHICH EMPLOYERS ARE SUBJECT TO GINA? GINA applies to employers with 15 or more employees, including private employers, employment agencies, labor unions, and joint labor-management training programs. It also applies to government employers with 15 or more employees, including state and local governments, agencies of the federal executive branch, and Congress.

WHAT IS THE IMPACT ON EMPLOYERS? GINA prohibits employers from discharging, refusing to hire, or otherwise discriminating on the basis of genetic information, and from intentionally acquiring genetic information about applicants and employees. As an example, an employer cannot refuse to promote an employee to an executive position based on information indicating a history of stroke in the employee's

family, or information about stroke-related deaths in his family. For the same reasons, a covered employer may not require or request that an employee being considered for promotion submit to genetic testing based on the employee's family history. With respect to enforcement, employees must exhaust administrative remedies before initiating a lawsuit, and damage awards are subject to the same restrictions as those applicable to Title VII.

WHAT IS THE IMPACT ON HEALTH INSURERS? GINA prohibits group health plans and health insurance issuers in the group market from (i) increasing group premiums or contribution amounts based on genetic information; (ii) requesting or requiring an individual or family member to undergo a genetic test; and (iii) requesting, requiring, or purchasing – for underwriting purposes – genetic information prior to or in connection with open enrollment. This prohibition applies even if a group health plan or insurer has lawfully obtained genetic test results. However, it is important to emphasize that GINA does not limit the ability of a group health plan or insurer to increase premiums or contribution rates based on the actual manifestation of a disease or disorder in an individual.

A group health plan or insurer may obtain and use the results of a genetic test to make a determination regarding payment, but may only request the minimum amount of information necessary to make the determination regarding payment.

GINA also impacts wellness programs because wellness programs may provide rewards such as premium discounts, discounted deductibles, waivers of annual deductibles or cash bonus payments in exchange for completing a health risk assessment that requests genetic information – such as family medical history. This will violate GINA regardless of the amount of the reward or incentive. Family medical history collected before or after enrollment, in return for a reward is considered to be the collection of genetic information for underwriting purposes.

Civil penalties of up to \$100 per day per individual can be levied for improper use of genetic information by a group plan. For penalties that remain uncorrected, there are additional penalties ranging from \$2,500 to \$15,000.

RECOMMENDATIONS

Revise Policies. Employers should revise their EEO policies to include prohibitions against discrimination based on genetic information.

Train HR Personnel. Employers should train human resources personnel and managers on GINA's prohibitions and insure that genetic information is not requested and, if inadvertently or otherwise obtained, even if lawfully, that it be kept confidential (see additional detail below).

Limit Medical Examinations and Limit Requests for Medical Information. Employers who require post-offer, pre-employment medical examinations, must ensure sure that the medical examinations do not include any inquiries about family medical history. As most physicians automatically ask for this information, physicians doing examinations for employers must be clearly instructed to avoid questions about family medical history.

Employers conducting fitness-for-duty medical examinations must also instruct the physician to steer clear of requests for family medical history. In addition, employers may not seek genetic information in connection with any portion of the interactive process applicable to a reasonable accommodation of a disability.

Where a physician or other health care provider is rendering treatment to the individual, genetic information is appropriate for him or her to obtain for treatment purposes, but, where such is the case, genetic information must never be supplied to the employer or group health insurance plan or carrier.

Employers may not make overbroad requests for information in connection with requests for leave. The EEOC suggests as a "best practice" that employers who ask employees to have a health care professional provide documentation of a disability to specifically state in the request that family medical history or other genetic information should not be provided. However, where sick leave or FMLA/CFRA leave is requested for care of a family member, it is critical that only the minimum necessary family history information is obtained as strictly required by applicable leave laws.

Employers should not produce genetic information in response to a subpoena, unless the subpoena specifically calls for the production of this information.

What To Do With Inadvertently or Legally Obtained Genetic Information. When employers inadvertently acquire genetic information, or obtain it, for example, as part of a request by an employee for FMLA leave to care for a relative, the employer must keep the information confidential and retain it with other protected medical information. Remember also that much of the same information will be protected by the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), which governs the disclosure, receipt or use of "protected health information."

Post Notices. The law requires an employer to post notices describing the Federal laws prohibiting job discrimination based on race, color, sex, national origin, religion, age, equal pay, disability, and genetic information. The EEOC's poster is available in English, Arabic, Chinese and Spanish. There are several ways for employers to comply with this posting requirement:

- Print the supplement available on the EEOC website at: http://archive.eeoc.gov/gina_supplement.pdf and post it alongside EEOC's September 2002 "EEO is the Law" poster or OFCCP's August 2008 "EEO is the Law" poster.
- Print and post the EEOC's November 2009 version of the "EEO is the Law" poster available on the EEOC website at: http://archive.eeoc.gov/self_print_poster.pdf.
- Order a new poster through the EEOC Clearinghouse:
U.S. Equal Employment Opportunity Commission Clearinghouse
P.O. Box 541
Annapolis Junction, MD 20701

For more information concerning posters, log on to <http://archive.eeoc.gov/posterform.html>.