

GINA Final Regulations for Employers

The Genetic Information Nondiscrimination Act of 2008 (GINA) was signed into law by President Bush on May 21, 2008. Final regulations for Title II of GINA (the part of GINA applicable to employers and group health plan sponsors) were published by the Equal Employment Opportunity Commission (EEOC) on November 9, 2010, and take effect on January 1, 2011. **GINA prohibits employers from requesting, requiring or purchasing the genetic information of an individual or an individual's family member. The final regulations outline 6 exceptions to this general prohibition.**

Important Definitions:

Genetic Information includes information about an individual's genetic tests, the genetic tests of an individual's family members, or the manifestation of a disease or disorder in an individual's family members.

Employee includes current employees as well as applicants and former employees.

Family Member includes persons who are or who become related to an individual through marriage, birth, adoption or placement for adoption.

Exceptions to the General Prohibition

1. *Requests for Medical Information*

Employers that inadvertently acquire genetic information pursuant to lawful requests for medical information will not violate Title II if they direct the health care provider NOT to provide genetic information. The final regulations include specific language employers may use to demonstrate that the acquisition of genetic information was inadvertent:

"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 as 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."

Although failure to use this "safe harbor" language will not automatically prevent an employer from establishing that the acquisition of genetic information was inadvertent, employer's not using the language must be able to demonstrate that the request for medical information was specifically tailored but the health care provider's response was overly broad.

2. *The "Water Cooler" Exception- Probing Questions Prohibited*

An employer does not violate Title II where a manager or supervisor overhears a conversation about genetic information between the individual and others. Similarly, if a manager or supervisor learns of genetic information in casual conversation directly with the individual or a third party, the employer will not violate Title II. However, if the manager or supervisor probes further and asks questions that are likely to result in the acquisition of genetic information this exception no longer applies.

3. Social Media

An employer is not liable under Title II where a manager or supervisor inadvertently learns of genetic information from a social media platform to which he or she was given access by the creator of the profile at issue (typically the employee). Such acquisitions must be inadvertent- a supervisor who returns to an employee's social media page with the intent of discovering additional medical information violates Title II.

GINA prohibits employers from accessing any informational sources (such as newspapers or internet search engines) for the purpose of obtaining employees' genetic information. Conducting an internet search in a manner likely to result in the acquisition of genetic information is prohibited.

4. Voluntary Wellness Programs

The acquisition of information pursuant to a voluntary wellness program will not violate Title II if: (a) genetic information is provided voluntarily by the individual; (b) the individual provides prior knowing, voluntary and written authorization; and (c) individually identifiable genetic information is provided only to the individual or qualified health personnel, as applicable, and not to the employer. Further, although an employer may not offer a financial inducement to employees to provide genetic information, it may offer inducements for health risk assessments that include questions about family medical history so long as the employer makes clear that the inducement is available regardless of whether the questions about family medical history are answered.

5. Medical Exams Relating to Employment

The rules clearly establish that the prohibition against acquiring family medical history applies to medical examinations related to employment. Therefore, employers must specifically advise health care providers not to collect genetic information, including family medical history, as part of a medical examination intended to determine the individual's ability to perform a job. Employer forms used in requesting medical information should expressly advise health care providers that genetic information is not requested by the employer.

6. Storage and Disbursement of Medical Information

Genetic information must be stored in a confidential medical file separate and apart from the employee's personnel file. Both GINA and the EEOC regulations prohibit disclosure of genetic information in litigation EXCEPT in response to a valid court order. Even with a valid court order employers must be careful to only disclose the information specifically authorized by the court. If a situation arises where a court order to release genetic information is obtained without the employee's knowledge, the regulations further require the employer to provide notice to the affected employee.

Penalties for Violations

Penalties include compensatory and punitive damages, reasonable attorney and expert fees, and injunctive relief such as reinstatement, hiring and back pay.

Bottom Line for Employers:

- Revise equal employment opportunity (EEO) statement to include genetic information as a protected category.
- Review/revise policies and procedures to ensure compliance any time medical information may be acquired.
- Revise medical request forms to include the Title II "safe harbor" language for requests for medical information, including FMLA or other medical leave documents, disability accommodation and fitness-for-duty certification.
- Train managers and supervisors on the vast scope of GINA and the dangers involved.