

Genetic Information Nondiscrimination Act Enacted

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On May 21, 2008, President signed the Genetic Information Nondiscrimination Act (GINA). This Act will prevent employers and insurers from taking adverse action against an employee based on his or her genetic makeup. Congress has recognized that advances in genetic testing have given rise to the potential misuse of genetic information to discriminate in both employment and health insurance. In its findings, Congress noted that this country's history of sterilization laws by the States, based on early genetic science, compels Congressional action in this area. The statute also reflects the fact that many genetic conditions and disorders are associated with particular racial and ethnic groups and gender, members of a particular group may be stigmatized or discriminated against as a result of that genetic information.

GINA specifically prohibits discrimination against employees based on genetic information. Genetic information includes information about

- 1) the employee's genetic tests,
- 2) the genetic tests of family members of an employee, and
- 3) the manifestation of a disease or disorder in family members of an employee

Generally, under GINA, it is an unlawful employment practice for an employer or an employment agency to do any of the following:

- (1) refuse to hire or to discharge any employee because of genetic information of the employee;
- (2) to otherwise discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee because of his or her genetic information
- (3) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of the genetic information of that employee.

Employers and employment agencies are also prevented under GINA from acquiring genetic information regarding an employee or a family member of the employee, with certain narrow exceptions. Exceptions include situations where:

- (1) an employer inadvertently requests or requires family medical history of the employee or family member of the employee;
- (2) the information is needed in connection with health or genetic services offered by the employer, and the employee provides authorization for access
- (3) family medical history is requested for the certification provisions of the Family and Medical Leave Act or state family and medical leave laws; OR
- (4) an employer purchases documents that are commercially and publicly available that include family medical history

The first exception suggests that an employer may not be liable if mistakenly asks an employee for medical information that could include genetic information. Similarly, an employer would not be liable under the fourth exception if the genetic information of an employee's family is published and the employer obtains that publication.

In addition to these four exceptions, employers may be allowed to request, require, or purchase genetic information with respect to an employee or a family member of the employee where the information is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, with certain restrictions on such monitoring. Genetic monitoring is defined as the periodic examination of employees to evaluate acquired modifications to their genetic material, such as chromosomal damage or evidence of increased occurrence of mutations.

GINA supplements the protections offered to applicants and employees under the Americans with Disabilities Act (ADA). The ADA prohibits medical inquiries and examinations until after a "real" job offer is made. The employer cannot deny employment based on information revealed in such an examination unless it shows that the applicant is not capable of performing the duties of the position, with or without reasonable accommodation. In addition, employees can only be required to undergo medical examinations under the ADA if the examination is "job related and consistent with business necessity."

In addition to prohibiting discrimination in employment decisions, GINA amends Section 702(b) of the Employee Retirement Income Security Act of 1974 (ERISA) to prevent a group health plan, or a health insurance issuer,¹ from adjusting premium or contribution amounts for the group covered under such plan on the basis of genetic information. An insurer can continue to adjust premiums based on the manifestation of a disease or disorder of an individual who is enrolled in the plan. The Internal Revenue Code has also been amended to reflect these prohibitions.

Section 702 is also amended to prevent a group health plan or a health insurance issuer from ***requesting or requiring*** a covered individual or a family member of such individual to undergo a

¹ This section applies to health insurance issuers offering group health insurance coverage in connection with a group health plan.

genetic test.² Similarly, a group health plan or a health insurance cannot request, require, or purchase genetic information with respect to any individual prior to such individual's plan enrollment or coverage. A group health plan or a health insurance issuer may still request, but not require, that a participant or beneficiary undergo a genetic test for certain research purposes. Similar changes were made to the Public Health Service Act, covering other types of insurance.

GINA also amends the Health Insurance Portability & Accountability Act (HIPAA) to ensure that genetic information will be treated as health information. This means that genetic information cannot be disclosed by an employer unless the disclosure fits within one of HIPAA's narrow exceptions.

GINA will protect the interests of employees whose genetic makeup could be relied upon in an employer's decision about their employment, or in decisions about the cost of a health care plan. Employers need to treat this prohibition against discrimination as seriously as they treat other protected categories of employment under Title VII. Like decisions with respect to members of other protected classes, decisions about employees with potentially derogatory genetic information should be based on legitimate business reasons.

To prepare for the implementation of GINA, employers are advised to do the following:

- Update non-discrimination policies to include genetic information as a protected category (similar to protection against discrimination based on disability, sex or race)
- Educate supervisors and managers that they cannot take an adverse action against applicants and employees based on genetic information
- Inform both managers and health care providers that they cannot require applicants or employees to submit to genetic testing (unless a specific exception applies)
- Review group health plans to ensure that genetic information is not used to deny enrollment or coverage

² The term 'genetic test' means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.