



## equal employment

**Genetic  
Discrimination**

12/02/2009

---

### **GINA: Ready, Set Go!**

**Maureen Minehan**

*Employers with 15 or more employees are running behind if they're not ready to comply with the Genetic Information Nondiscrimination Act (GINA). Title II of the Act went into effect on November 21st; Title I becomes binding on December 7th.*

Signed into law in May 2008, GINA prohibits discrimination by health insurers and employers based on individuals' genetic information. Genetic information includes the results of genetic tests to determine whether someone is at increased risk of acquiring a condition (such as some forms of breast cancer) in the future, as well as an individual's family medical history.

"GINA affirms the principle central to all employment discrimination laws—that all people have the right to be judged according to their ability to do a job, not on stereotypical assumptions," says Acting EEOC Chair Stuart J. Ishimaru. "No one should be denied a job or the right to be treated fairly in the workplace based on fears that he or she may develop some condition in the future."

Specifically, Title II of the law prohibits the use of genetic information in making employment decisions, restricts the acquisition of genetic information by employers and others, imposes strict confidentiality requirements, and prohibits retaliation against individuals who oppose actions made unlawful by GINA or who participate in proceedings to vindicate rights under the law or aid others in doing so. The remedies available under Title II of GINA are the same as those provided by Title VII of the Civil Rights Act and the Americans with Disabilities Act, including compensatory and punitive damages.

#### **Impact on employers**

According to national employment law firm Littler Mendelson, complying with Title II of GINA may be more challenging than employers realize. "Some of the more obvious violations of this new law occur when an employer requires a worker to take a genetic test or fires the worker based on information about such a test. However, employers can run afoul of GINA in a number of other ways they may not anticipate because the Act broadly defines "genetic information" to include not only genetic test results but also any information about the manifestation of a disease or disorder in a family member, such family medical history," the firm explained in a recent client alert.

"For example, employers should tell health care providers who conduct post-offer, pre-employment medical examinations not to disclose to the employer the results of any family medical history or other genetic information."

#### **Final regulations pending**

The EEOC is charged with issuing regulations implementing Title II of GINA. On March 2, 2009, it published a Notice of Proposed Rulemaking to implement Title II with proposed regulations and received over 40 public comments in response, but it has yet to publish a final

version. "The final regulations implementing Title II are currently under review by the Office of Management and Budget and will be issued as soon as the review process is concluded," the agency says.

### **Steps to take now**

Still, Littler says, there are a number of steps employers should take now to ensure compliance, including:

- Train HR staff, managers and recruiters about compliance with GINA, especially the provisions generally prohibiting deliberate acquisition of genetic information.
- Post a new EEO nondiscrimination poster prohibiting information based on genetic information.
- Revise EEO policies to include prohibitions against discrimination based on genetic information and associated retaliation.
- Discontinue requests to applicants and employees for family medical history except in the limited circumstances permitted in connection with a wellness or disease management program.
- Whenever requesting an employee to have medical professionals provide documentation, such as in connection with a fitness-for-duty exam or a request for a reasonable accommodation or leave, add a statement that family medical history or other genetic information should not be provided.
- Inventory personnel records—such as FMLA certifications seeking leave for the serious illness of a family member—that contain genetic information about an employee, store those records in a confidential medical file, and strictly limit access to those with a need to know.
- Implement procedures to prevent the disclosure of genetic information in response to a subpoena or civil discovery and to permit disclosure only when specifically required to comply with a court order.

### **Title I and HRAs**

Employers also should become familiar with Title I of GINA and its impact on health risk assessment (HRA) and disease management programs. "New rules under GINA restrict group health plans from offering premium reductions or other economic awards for participating in a health risk assessment that asks for genetic information. Employers will need to update their plans to ensure that their HRAs and any associated policies and procedures comply with GINA's prohibition on using genetic information prior to or in connection with enrollment or for underwriting purposes for plan years beginning on or after December 7, 2009," law firm Sonnenschein Nath Rosenthal says in a recent client alert.

In general, Title I of GINA prohibits group health plans or health issuers in the group health market from:

- increasing the group premium or contribution amounts based on genetic information;
- requesting or requiring a person to undergo a genetic test; and

- requesting, requiring, or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes.

For employers with wellness programs and associated HRAs, Title I significantly restricts the information that can be collected if incentives are used to induce participation. "Wellness programs that provide rewards for completing HRAs that request genetic information, including family medical history, violate the prohibition against requesting genetic information for underwriting purposes. The regulations do not provide an exception from underwriting for rewards provided by wellness programs, regardless of the amount of the reward," Sonnenschein says.

Group health plans are also prohibited from requesting genetic information in an HRA prior to the employee's enrollment in the plan. "A plan or issuer can collect genetic information through an HRA as long as no rewards are provided, and if the request is not made prior to or in connection with enrollment. A plan or issuer can also provide rewards for completing an HRA as long as the HRA does not collect genetic information," Sonnenschein explains.

Another option is to offer two different HRAs to employees. "The regulations permit group health plans to offer two different HRAs—one that offers a reward and does not solicit genetic information (and notes if there is an "open" question that the employee should not provide information relating to family history) and one that asks about family history and genetic information," says Sonnenschein.

Given the changes, Sonnenschein recommends employers review their health plan rules and practices to bring them into compliance. "Many group health plans request family medical history information to be provided in response to questions on HRAs that are completed by new employees before enrollment in the plan and as part of open enrollment for current employees. Some group health plans provide rewards and incentives to employees who complete HRAs, such as premium reductions, lower deductibles and cash bonus payments. Compliance review should be conducted for these plans to ensure that the HRAs and any associated policies and procedures comply with GINA's prohibition on using genetic information prior to or in connection with enrollment or for underwriting purposes and to make any necessary changes."

### **The bottom line**

Employers should consult with legal counsel and their health plan, HRA and other benefit providers to ensure their policies and practices comply with GINA's requirements.

### **Resources:**

GINA Full Text: <http://www.eeoc.gov/laws/statutes/gina.cfm>; Sonnenschein Nath Rosenthal e-alert: [http://www.sonnenschein.com/pubs/pub\\_detail.aspx?id=54139&type=E-Alerts](http://www.sonnenschein.com/pubs/pub_detail.aspx?id=54139&type=E-Alerts); Littler Mendelson client alert: <http://tinyurl.com/yjgatkt>.