

Genetic Information Nondiscrimination Act of 2008 (GINA)

GINA was signed into law on May 21, 2008. Title I amends the Employee Retirement Income Security Act (ERISA), the Public Health Services Act, and the Internal Revenue Code and addresses the use of genetic information in health insurance. Title I takes effect for group health plans at the start of the plan year beginning after May 21, 2009. Title II relates to employment and prohibits the use of genetic information in employment, prohibits the intentional acquisition of genetic information about applicants and employees, and imposes strict confidentiality requirements. Title II takes effect for covered entities on November 21, 2009.

GINA was enacted to address concerns raised in part by recent developments in the field of genetics and the ability of genetic tests to determine individuals' risk for developing specific diseases or disorders. The law prohibits discrimination based on genetic information and restricts the acquisition and disclosure of such information so that individuals need not fear adverse employment or health coverage related consequences for having genetic testing completed or for participating in research studies that examine genetic information.

Who Must Comply: Title I applies to health insurers, group health plans, individual plans, and Medicare supplemental plans. Title II applies to private, state and local government employers with 15 or more employees, employment agencies, labor unions, joint labor-management training programs, Congress and federal executive branch agencies.

What is Genetic Information:

- Information about an individual's or an individual's family member's genetic tests
- Genetic tests of any unborn child of an individual or family member who is pregnant and genetic tests of any embryo legally held by an individual or family member utilizing assisted reproductive technology
- Family medical history
- Any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling or education) by an individual or family member.
- Genetic information does not include information about the sex or age of an individual or the individual's family members, information that an individual currently has a disease or disorder, or tests for alcohol or drug use.

What does GINA Prohibit: GINA prohibits covered entities from the following: the use of genetic information in making decisions related to any terms, conditions, or privileges of employment; intentionally acquiring genetic information; prohibits retaliation; and requires confidentiality with respect to genetic information. Since health benefits provided through a covered entity are included in compensation, terms, conditions, or privileges of employment, covered entities will be liable for actions taken regarding health benefits that violate Title II of GINA. For example, an employer that fires an employee because of anticipated high health claims based on genetic information remains subject to liability.

Title II of GINA limits an employer's ability to obtain genetic information after making a job offer. Although the ADA AA currently permits a covered entity to obtain family medical history or conduct genetic tests of job applicants once an offer of employment has been made, provided this is done for all new employees in the same job category, this is prohibited under GINA.

GINA prohibits health plans and insurers from using genetic information in enrollment restrictions and premium adjustments, requesting or requiring genetic testing, and applies to all health insurance plans including those under ERISA, state-regulated plans, and private individual plans. These prohibitions do not apply to cases where an individual currently has a disease or disorder. GINA also amends the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and provides that genetic information must be treated as health information and that improper use or disclosure is not permitted.

Exceptions to the Prohibition on Acquiring Genetic Information: Although covered entities may not request, require, or purchase genetic information of an employee/applicant or family member of an employee/applicant, inadvertent acquisitions of genetic information are not prohibited. Inadvertent acquisitions may occur in situations, for example, where a supervisor overhears a conversation between coworkers, receives genetic information in response to a questions about the general health of an employee or family member, or where the employer receives genetic information as part of the documentation an employee submits in support of a request for reasonable accommodation under the Americans with Disabilities Act Amendments Act (ADA AA) or other similar law.

Genetic information may be requested where health or genetic services are offered by the employer under a bona fide wellness program, the employee provides voluntary written consent, only the employee and health care professional receive the information, and the information is not disclosed to the employer in a way that would identify any specific employee. Genetic information may also be requested if the information is to be used to monitor the effects of hazardous substances in the workplace only if the employer provides advance written notice, the employee consents, the monitoring is required by law, the employee is informed of the specific results, and the employer receives the information in a way that does not disclose the identity of a specific employee.

What does GINA Allow:

- Employment provisions in Title II of GINA do not apply to employers with fewer than 15 employees.
- Employers may request or require family medical history from employees to comply with the certification provisions of the Family and Medical Leave Act (FMLA) or state family and medical leave laws.
- GINA's health coverage nondiscrimination protections do not apply to life, disability, or long-term care insurance.
- GINA does not mandate coverage for any particular test or treatment.
- Health insurers are not prohibited from determining eligibility or premium rates for an individual based on the current manifestation of a disease or disorder in an individual.

- For employment-based coverage provided by group health plans, GINA permits the overall premium rate for an employer to be increased due to the current manifestation of a disease or disorder in an individual enrolled in the plan, but the manifested disease or disorder of one individual cannot be used as genetic information about other group members to further increase the premium.
- Health insurers and health plan administrators are not prohibited from obtaining and using genetic test results in making health insurance payment determinations.

Confidentiality: Genetic information acquired or possessed by covered entities about applicants or employees must be treated the same way medical information is treated. This information must be kept confidential and separate from other personnel information in separate medical files. Genetic information may be kept in the same file as medical information subject.

Effect on State and Local Laws: GINA does not preempt any state or local law that provides greater protections from discrimination or greater privacy protections.

Penalties for Non-Compliance: Individuals may seek reinstatement, hiring, promotion, back pay, injunctive relief, compensatory and punitive damages, and attorney's fees and costs. The cap on combined compensatory and punitive damages (excluding past monetary losses) are the same as those for Title VII and range from \$50,000 for employers with 15-100 employees to \$300,000 for employers with more than 500 employees.

An individual may bring a civil action under ERISA to enforce his or her rights under GINA without being required to exhaust administrative remedies after showing that exhausting administrative remedies would cause irreparable harm to his or her health. The court may order retroactive reinstatement of health coverage and penalties up to \$100 per day per individual for each day of noncompliance.

The Department of Labor may also sue to enforce GINA with possible penalties up to \$100 per day per individual, with a minimum penalty of \$2,500 for de minimis violations and \$15,000 for significant violations. Maximum penalties for unintentional violations are capped at the lesser of 10% of the amount paid by the employer for group health plans during the prior year or \$500,000. There is no cap on the penalty for violations resulting from willful neglect or intentional misconduct.

What Employers Should Do:

- Review all policies and practices to ensure no genetic information is requested or required from any employee or applicant.
- Review privacy policies and practices to ensure all confidentiality and privacy rules are met.