



# THE WORKPLACE WORD

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## GINA Update

### GINA Is In Effect

The employment sections of the Genetic Information Nondiscrimination Act ("GINA") have been in effect as of November 21, 2009. GINA was enacted as a result of Congress finding that new advances in genetics, including deciphering the sequence of the human genome, have given rise to the potential misuse of genetic information to discriminate in employment. Signed into law on May 21, 2008, Senator Ted Kennedy described GINA as "the first civil rights bill of the new century of the life sciences." The law incorporates many of the familiar definitions, remedies and procedures from Title VII, and similar to Title VII, it covers employers with 15 or more employees.

**Purpose:** Title II<sup>1</sup> of GINA prohibits an employer from discriminating or retaliating against an employee based on genetic information, restricts the acquisition and disclosure of such information, and requires that genetic information be kept confidential.

**What is genetic information?** The term "genetic information" refers to information about an individual's genetic tests, the genetic tests of family members of the individual, and the manifestation of a disease or disorder in family members of such individual. Genetic information does not include information about the sex or age of an individual.

**What are genetic tests?** "Genetic tests" refer to the analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detect genotypes, mutations, or chromosomal changes. Genetic tests are used to detect gene variants associated with a specific disease or condition, such as the genetic variant that evidences a predisposition to breast cancer or Huntington's disease. The results of routine tests that do not measure DNA, RNA, or chromosomal changes, such as complete

<sup>1</sup> This article focuses on Title II of GINA, which addresses the restrictions for the use of genetic information in the employment context; however, there are also restrictions that apply to group health plans that are discussed in Title I of GINA.



blood counts and cholesterol tests, are not protected under GINA.

**What are employers prohibited from requesting or doing?** GINA prohibits employers from requesting genetic information from applicants, employees, or other individuals; from requiring that applicants or employees provide genetic information; or from purchasing genetic information about an applicant or employee. No matter how the information may have been acquired, the use of genetic information to discriminate or retaliate is prohibited. GINA does not cover an individual's manifested disease or condition that the employee is experiencing symptoms, being treated for, or that has been diagnosed.

There are six limited circumstances in which an employer may acquire genetic information:

(1) Where an employer inadvertently requests or requires genetic information. This exception is commonly referred to as the "water cooler problem" in which an employer unwittingly receives otherwise prohibited genetic information in the form of family medical history through casual conversations with an employee or by overhearing conversations among co-workers.

(2) When health or genetic services are offered by the employer, including services offered as part of a voluntary wellness program, and the employee provides prior, knowing, voluntary, and written authorization. Only the employee (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor providing such services may receive the information, and the information may only be disclosed to the employer in aggregate terms that do not disclose the identities of specific employees.

(3) When an employer requests or requires family medical history from the employee to comply with the certification provisions of the Family and Medical Leave Act ("FMLA") or under state

family and medical leave laws. For example, an employee requesting leave to care for a seriously ill relative may disclose family medical history when completing the required FMLA certification. Since this information is still subject to GINA's confidentiality requirements, the information must be placed in a separate medical file and treated as a confidential medical record.

(4) Related to the purchase of commercially and publicly available materials that may include family medical history. For example, an employer would not violate GINA if it learned that an employee had a breast cancer gene by reading a newspaper article profiling the employee and several women living with the knowledge that they have the gene. The exception does not include family medical history contained in medical databases or court records.

(5) To engage in the genetic monitoring of the biological effects of toxic substances in the workplace. Employees must receive written notice of the monitoring, and where the monitoring is not specifically required by federal or state law, the employer must obtain an employee's prior knowing, written, and voluntary authorization. There are specific monitoring and authorization requirements.

(6) For employers that engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification. This is a very limited exception that permits an employer to require genetic information from its employees, but only to the extent that such genetic information is used for the analysis of DNA identification markers for quality control to detect sample contamination and maintained in a manner consistent with such use.

**Example of prohibited discrimination:** GINA makes it an unlawful employment practice for an employer to refuse to hire, to discharge, or otherwise discriminate against any employee with respect to the compensation, terms, conditions,



or privileges of employment, because of the employee's genetic information. For example, if an employee mentions that his father had sickle cell anemia, which is a serious disease passed down through families, the employer may not fire the employee because the employer believes the employee may someday get sick.

**Confidentiality requirements:** Any genetic information that an employer possesses about an individual must be treated as a confidential medical record of the individual and must be maintained in separate form and in a separate file. An employee's genetic information may not be disclosed except for the following reasons: (1) as a result of the employee's written request, (2) to an occupational or health researcher who is conducting research of human subjects in compliance with federal law, (3) in response to a court order, (4) to government officials investigating compliance with GINA if the information is relevant to the investigation, (5) to the extent that such disclosure is made in connection with the employee's compliance with the certification provisions of the FMLA or state family and medical leave laws, or (6) to a federal, state or local public agency regarding information related to an employee's family member's manifestation of a contagious disease, disorder or illness that presents an imminent hazard of death or life-threatening illness, as long as the family member is notified of such a disclosure.

**What should employers do to comply with GINA?** Policies should be modified to include a statement that the company does not discriminate based on genetic information. Additionally, employers should ensure that they do not inquire about an employee's family medical history, un-

less necessary for FMLA or state leave certification, or request any type of genetic testing as part of any medical exams conducted on applicants with conditional job offers or employees taking fitness for duty examinations. Further, employers should ensure that personnel records, such as FMLA certifications that contain genetic information related to employees, are stored in a confidential file. The EEOC has issued an updated poster, which can be located at [http://www.eeoc.gov/employers/upload/eeoc\\_self\\_print\\_poster.pdf](http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf) and poster supplement, which can be located at [http://www.eeoc.gov/employers/upload/eeoc\\_gina\\_supplement.pdf](http://www.eeoc.gov/employers/upload/eeoc_gina_supplement.pdf).

The EEOC has not yet issued its final regulations to clarify the definitions and practical application of GINA. When the final regulations are published, they should provide formal guidance related to the employers' obligations.

**Is Your Office "Atwitter"?**

*Understanding Employment Law Issues Applicable to Social Media in Your Workplace*

**January 20, 2009**

**11:30 a.m. – 1:00 p.m.**

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