



**Kansas State Council
Society for Human Resource Management
Legislative Update**



New Genetic Discrimination Laws Apply to Employers

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The Genetic Information Nondiscrimination Act (GINA) was signed into law on May 21, 2008, and its requirements now apply to employers. GINA has two parts: Title I applies to group health plans and health insurers and prevents them from using genetic information for underwriting purposes, from requesting or requiring genetic information prior to health insurance enrollment, and from requiring employees to take genetic tests. Title II prohibits employment discrimination based on genetic information, and is enforced under the Equal Employment Opportunity Commission (EEOC), similar to Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and other employment discrimination litigation. Both parts of GINA can have significant impacts on employers and employers should be aware of GINA's requirements.

Genetic Information Defined

Under GINA, genetic information is broadly defined to include: (1) an employee's genetic tests; (2) the genetic tests of the employee's family members; and (3) "the manifestation of disease or disorder in family members of such individual."¹ Information about the sex or age of an individual is specifically excluded from the definition of genetic information.² A "family member" is also broadly defined, including up to fourth-degree relatives.³ Due to the breadth of these definitions, family medical history, which may not immediately appear to be genetic information, is included in the definition and protected by GINA's requirements.

GINA's Application to Health Insurers and Group Health Plans

Title I applies to group health plans and health insurers and has been in effect since May 21, 2009. However, recent regulations were jointly issued by the Internal Revenue Service, the Department of Labor, and the Department of Health and Human Services (the three departments tasked with enforcing Title I of GINA) on October 1, 2009. These regulations will be effective for any group health plan for any plan year that begins on or after December 7, 2009. Employers should be aware of

¹ 42 U.S.C. § 2000ff(4)(A).

² 42 U.S.C. § 2000ff(4)(C).

³ 42 U.S.C. § 2000ff(3).

the requirements of Title I, as it is possible that an employer, if it is collecting certain health information about employees, can violate Title I of GINA.

An employer's biggest risk for violating Title I of GINA will most likely stem from the collection of information by employers who engage in wellness programs. These wellness programs often utilize "health risk assessments" which gather information about the employee, including family medical history. Depending on the employee's answers to the questions, the employer may reward or penalize the employee, for example by decreasing the employee's premiums in exchange for healthy behaviors. However, the regulations prohibit group health plans from using genetic information for purposes of underwriting prior to the individual's enrollment in the plan. Thus, if an employer adjusts premiums, co-pays, or deductibles, or takes any other actions "for the purposes of underwriting" – even to give the employee a discounted rate – based on the completion of a health risk assessment *that includes family medical history*, the employer would be in violation of Title I. The mere fact that the employer requires the employee to complete a health risk assessment would be a violation of GINA, regardless of whether the employer otherwise uses the information. The exception would be if the health risk assessment clearly makes the family medical history questions (or any other questions pertaining to genetic information) completely voluntary.

Employers can be subject to significant fines for failure to comply with these regulations. If the violation is unintentional, damages will be capped at \$500,000 or 10% of the amount paid for the group health plan the prior year, whichever is less. However, there is no cap for any violation that is the result of willful neglect or intentional misconduct.

GINA's Application to Employers

Title II of GINA, which directly applies to employers, became effective November 21, 2009. Employers are prohibited from discriminating against an employee based on the employee's genetic information. Title II makes it unlawful for an employer to use genetic information in decisions related to any terms, conditions, or privileges of employment.⁴ It also prohibits covered entities from intentionally acquiring genetic information and requires confidentiality with respect to genetic information.⁵ While GINA does not protect an employee from discrimination related to a manifested disease or condition for which the employee is experiencing symptoms, it does protect against discrimination or retaliation for a manifested disease of a family member. Lastly, an employer may not retaliate against an employee for exercising his or her rights under GINA.⁶

GINA partially borrows its definition of employer from Title VII, thus, an employer who is covered by Title VII (which requires that the employer have 15 or more employees), will similarly be covered by Title II of GINA. However, Title II's scope is broader than Title VII and applies to public sector employers as defined by the Government Employee Rights Act of 1991.⁷ The term "employee" under this Act is also similar to the definition under other EEO laws and explicitly includes job applicants.⁸

The enforcement procedures of GINA are the same as those provided under current civil rights laws. For an employee to bring a suit under GINA, the employee must first exhaust his or her administrative

⁴ 42 U.S.C. § 2000ff-1(a).

⁵ 42 U.S.C. § 2000ff-1(b).

⁶ 42 U.S.C. § 2000ff-6.

⁷ 42 U.S.C. § 2000ff(2)(B).

⁸ 42 U.S.C. § 2000ff(2)(A).

remedies by filing a charge of discrimination with the EEOC or state agency.⁹ If the employee initiates a lawsuit, that employee can recover the same types of damages as those in other types of employment discrimination cases. GINA allows the employee to recover compensatory and punitive damages, as well as attorneys' fees and costs. While compensatory damages are capped depending on the number of the employer's employees, punitive damages are not capped.

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⁹ 42 U.S.C. § 2000ff-6.