

## Have You Met GINA?

As you prepare to baste (or just consume!) another turkey this year, we wanted to give you a little pre-Thanksgiving feast regarding the Genetic Information Non-Discrimination Act (GINA).

First, the basics. The GINA applies to all employers who have at least 15 employees as well as employment agencies and labor organizations. It prohibits employers not only from using genetic information to discriminate against or harass employees or applicants, but from even requesting such information, except in the limited circumstances described below. In the specific instances where it is "OK" to request genetic information, it still must be kept confidential and cannot be used to discriminate against or harass the individual.

The GINA provides the same damages for violation as the ADA and Title VII (including recovery of punitive damages and attorney fees!). It also has a posting requirement like the FMLA. The GINA poster can be obtained on the EEOC's website at [http://www.eeoc.gov/employers/upload/eeoc\\_gina\\_supplement.pdf](http://www.eeoc.gov/employers/upload/eeoc_gina_supplement.pdf).

Although the GINA took effect for employers back in November of 2009, many have been waiting to "digest" it until the EEOC's final regulations were published, because the law itself did not define several key terms -- like "genetic information!" After considerable delay, these final regulations were published on November 9, 2010 and will become effective on **January 1, 2011**. Unlike the hundreds of pages which usually make up such regs, the GINA regulations are only eight pages long with twenty additional pages of comments. So, if your family starts to get on your nerves this holiday season, you can download the GINA regulations to review in their entirety in a cozy corner of your favorite in-law's house at <http://edocket.access.gpo.gov/2010/pdf/2010-28011.pdf>.

(For those few with functional families), here is a brief summary of the major provisions,

"Genetic information" is defined as information about an individual's genetic tests; the genetic tests of the individual's family members; the manifestation of disease or disorder in the individual's family members (i.e., family medical history); an individual's request for or receipt of genetic testing, counseling, education or other services or the participation in genetic research by the individual and/or his/her family members; or the genetic information of a fetus carried by or an embryo legally held by the individual or the individual's family member who is using assisted reproductive technology.

"Genetic information" does not include merely asking the age, gender, race or ethnicity of the individual or a covered family member. It also does not include asking generic "compassion" questions such as "How are you?" "Did they catch it early?" "How is your mom doing?" "Will your son be OK?" It also does not include information concerning the manifestation of a particular disease or disorder of the employee/applicant which is not based on genetic testing. For instance, asking or otherwise obtaining information regarding an employee/applicant's current illness does not violate the GINA (but be aware of ADA restrictions on such inquiries). It also does not include drug/alcohol testing results.

Interestingly, "family member" is defined far more broadly in the GINA than in the FMLA, ERISA or any other federal law currently on the books, as it includes "first through fourth degree relationships." This range includes not only children, siblings and parents but grandparents, grandchildren, uncles/aunts, nephews/nieces, half-siblings, great-grandparents and grandchildren, great uncles/aunts, first cousins, great-great-grandparents and the children of your first cousins. These relationships can be created by blood, adoption, placement for adoption or marriage. "Family members" also include anyone who is defined as a "dependent" under ERISA. Better buy more turkey to feed all these people!

So, now that we know what information we're not supposed to be asking for or using and who it concerns, let's look at the exceptions the new GINA regulations provide to this general rule.

(1) Regarding the FMLA, employers may obtain medical certification forms describing a family member's serious health condition without violating the GINA.

(2) A distinction is made regarding FMLA medical certification forms which relate to an employee's own serious health condition, however. These are not covered by the "family member information" exception described in (1). There are two ways employers can continue to obtain employee FMLA medical certification forms without violating the GINA. First, the employer can simply attach the following notice to the DOL medical certification form when giving it to the employee (to forward to his/her health care provider):

The Genetic Information Non-Discrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Employers also have the option of showing that based on the nature of the information requested in the form (e.g., relating to a request for leave when the employee has a temporary, non-genetic condition like a broken leg or the flu) they could not reasonably anticipate that the form was going to result in obtaining genetic information.

Out of an abundance of caution, and/or to simplify their administration of the FMLA medical certification process, many employers are simply choosing to include the above notice language with all medical certification forms which are related to an employee's own serious health condition effective January 1, 2011.

(3) Regarding any type of medical examination the employer is requesting or requiring, whether pre-employment or as part of a fitness-for-duty or accommodation request assessment exam, the employer must use the notice language provided above to try to avoid obtaining genetic information. If such information is revealed despite providing this notice (again, making sure the employee or applicant is specifically instructed to pass this notice on to his/her health care provider), the exam still will not be deemed a GINA violation.

(4) Regarding voluntary wellness programs, employers can obtain genetic information if the employee signs an authorization permitting the same. (Note that while employers can offer financial or other incentives to encourage participation in such voluntary programs, they cannot offer such incentives specifically in exchange for the employee to sign this authorization or otherwise provide genetic information.) Even with this authorization, the genetic information obtained as part of such programs cannot be accessible to anyone

involved in making employment decisions relating to the employee and may not be disclosed to the employer, except as part of group information from which individual information cannot be readily ascertained. (Note also that the "authorization" referred to above has very specific components laid out in the new regulations.)

(5) Genetic monitoring of employees relating to the biological affects of toxic substances in the workplace also is an exception to the GINA's proscriptions. The same authorization and "group information only" parameters apply to this exception as to (4) above.

(6) Finally, there is the exception which probably has received the most "press" regarding the GINA – "the water cooler exception." As the name implies, this exception provides that the employer does not violate the GINA if co-workers or even managers obtain genetic information by inadvertently overhearing conversations at work, receiving unsolicited e-mail or Face Book messages or through unintentional internet searches of public websites. The word "unintentional" here refers to the purpose as well as the format and focus of the search. Searching the employee/applicant or a family member's name and "cancer," or getting on the Mayo Clinic website to "learn more about" the clinical trials an individual says he/she needs time off for, or reviewing a newspaper's website to find out an employee's family member's "cause of death" is not going to be considered "unintentional," even if only public websites or other on-line databases are accessed.

If you are a hospital or other health care provider or a provider of health or disability insurance benefits, there are specific instructions in the new regulations as to how you are to deal with medical information you receive concerning your employees and/or their family members in the course of treating them as patients/customers so as to not run afoul of the GINA.

Well, that's it in a nutshell. As always, if you have any questions regarding the GINA or any other labor or employment law issue, please feel free to contact [Stacie Caraway](#) or any other [Miller & Martin Labor and Employment law attorney](#).

*The opinions expressed in this bulletin are intended for general guidance only. They are not intended as recommendations for specific situations. As always, readers should consult a qualified attorney for specific legal guidance. Should you need assistance from a Miller & Martin attorney, please call 1-800-275-7303.*

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