

## Are You Taking Advantage of the GINA Safe Harbor?

**By: Gregory P. Kult\***  
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By now, employers with at least 15 employees should know about Title II of the Genetic Information Nondiscrimination Act of 2008 (“GINA”). Among other things, GINA prohibits covered employers from requesting an employee’s genetic information, which includes an employee’s family medical history.

So, if you send applicants or employees to a doctor that you choose (for example, for a post-offer, pre-employment medical exam), consider instructing the doctor that he or she must not ask about family medical history. If you request medical information from the employee’s doctor (for example, for an FMLA certification for the employee’s own serious health condition or for an ADA employee medical inquiry), consider instructing the doctor not to provide you with family medical history.

The EEOC, which enforces Title II of GINA, has created a safe harbor for employers who inadvertently receive an employee’s family medical history in response to a legitimate FMLA or ADA inquiry. To take advantage of the safe harbor, attach the notice that follows to your medical inquiry:

### **IMPORTANT NOTICE CONCERNING MEDICAL INFORMATION**

The Genetic Information Nondiscrimination 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.

#### Practice Tip:

- Use the safe harbor notice with an FMLA certification for the employee’s own serious health condition, an FMLA fitness for duty certification, and/or a lawful ADA medical inquiry.

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- You do not have to use the EEOC's exact language. If you choose not to, consider working with legal counsel in your effort to come up with language that helps you reduce the risk of liability for inadvertent receipt of family medical history.
- You do not have to send the safe harbor notice if the FMLA certification relates to the serious health condition of the employee's spouse, child or parent, as it is understood that the very purpose of the certification is to give you family medical history to support the need for leave.
- There are limited exceptions that apply to voluntary wellness programs.
- Keep all family medical history that you receive in confidential medical files separate from the employee's personnel file. You may keep the information in the same file in which you maintain employee medical information in compliance with the ADA.

If our labor and employment attorneys can be of assistance in helping you comply with GINA, please let us know.

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\*Current contact information:

[Gregory P. Kult](#)  
317.860.5341 (direct)  
317.639.6151 (firm)  
888.639.6151 (toll free)  
[gkult@woodmclaw.com](mailto:gkult@woodmclaw.com)

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