

Alerts and Updates

COMPLIANCE WITH THE GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

December 9, 2009

The U.S. [Genetic Information Nondiscrimination Act](#) (GINA) took effect on November 21, 2009. This *Alert* provides a reminder of the general provisions of GINA for employers and a discussion of the U.S. Departments of Labor, Treasury and Health and Human Services' joint interim final regulations for GINA provisions related to employee benefit plans, which generally apply to plan years that start on or after December 7, 2009.

Overview of GINA's Employment-Related Provisions

The employment provisions (Title II) of GINA prohibit discrimination based on the genetic information of employees (or applicants) and their family members.

"Genetic information" is defined under GINA to include information about: (i) an individual's genetic tests; (ii) the genetic tests of an individual's family members; or (iii) the manifestation of a disease or disorder in an individual's family members. Further, "genetic test" is defined by GINA as "an analysis of human DNA, RNA, chromosomes, proteins or metabolites, that detects genotypes, mutations or chromosomal changes."

In addition to prohibiting discrimination in employment, GINA generally prohibits (except in limited circumstances, such as to comply with federal or state medical leave laws) an employer from requesting, requiring or purchasing the genetic information of an employee or an employee's family member. Similarly, GINA generally prohibits (except in limited circumstances, such as with employee authorization, by court order or to comply with federal or state leave laws) an employer from disclosing the genetic information of an employee.

Should an employer obtain genetic information, GINA requires that employers maintain such information in a separate, confidential medical file. The requirements are similar to those under the Americans with Disabilities Act (ADA).

Similar to other federal nondiscrimination laws, alleged violations of GINA are filed with the EEOC before an individual can pursue a claim in federal court. Damages available to an individual who succeeds in a GINA-related charge or action include back pay, front pay and compensatory and punitive damages, as well as attorneys' fees.

Interim Final Regulations Concerning Group Health Plans Under GINA

On October 7, 2009, the U.S. Departments of Labor, Treasury and Health and Human Services jointly released interim final regulations concerning the provisions of GINA which govern group health plans (Title I). These interim final regulations apply generally for plan years beginning on or after December 7, 2009 (as of January 1 for calendar year plans), and prohibit discrimination based on genetic information in health insurance coverage and group health plans.

Primary Importance to Group Health Plans

GINA and the interim final regulations expressly prohibit a group health plan from engaging in the following activities:

- Increasing group premiums or contributions based on an individual's genetic information.
- Mandating the completion of a health risk assessment (HRA) that requires an individual to provide genetic information to qualify for a reward (such as reduced premiums or contributions under a group health plan).
- Requesting genetic information prior to or in connection with an individual's initial enrollment in a group health plan.
- Requesting or requiring an individual or family member to undergo genetic testing, with certain exceptions (such as the right of the plan to condition payment for a medical service on medical appropriateness, the determination of which may require an individual's genetic information).

These restrictions translate into three practical implications for employers that sponsor group health plans:

- **Increased HIPAA Restrictions on Increased Premiums or Contributions.** GINA and the interim final regulations expand existing restrictions under the Health Insurance Portability and Accountability Act (HIPAA) against discrimination based on health factors (which include, but are not limited to, an individual's medical condition, claims history or genetic information). Prior to these regulations, HIPAA prohibited group health plans from adjusting an individual's contribution or premium based on a health factor. GINA now prohibits plans and issuers from adjusting premium or contribution amounts for plans or a group of similarly situated individuals based on genetic information.
- **Restrictions on HRAs in Conjunction with Employee Wellness Programs.** A wellness program sponsored by employers that provide rewards to participants for completing health risk assessments may run afoul of GINA if the HRAs *request* genetic information, including family medical history. The inclusion of these questions violates the prohibition against requesting genetic information for underwriting purposes. Moreover, unlike the prior HIPAA

rules governing discrimination in the wellness program context, there is now no exception from underwriting for rewards provided by wellness programs, regardless of the amount of the reward provided for completing an HRA.

- **Inability to Gather Genetic Information at Enrollment.** A group health plan may also violate GINA and the interim final regulations if it requests genetic information at or prior to initial plan enrollment. This prohibition applies whether or not the plan uses this information.

Employer Action Steps

If employers have not already done so, they may want to immediately take the following steps to comply with GINA:

- **Replace EEOC Poster.** Replace their prior version of the EEOC's "EEO Is the Law" poster with the recently revised poster that reflects the changes made for GINA. The revised poster can be found at http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf.
- **Protect Genetic Information.** Ensure that any genetic information or test results currently in their possession are treated as confidential, placed in a confidential medical file and kept separate from the employee's personnel file.
- **Review Forms.** Revise any application or other employment-related forms or questionnaires that may seek genetic information, where such information is not needed to comply with federal or state laws.
- **Review Policy.** Review and revise their EEO policy and procedures to include "genetic information" as a prohibited basis for discrimination.
- **Training.** Provide training to managers and supervisors to alert them of this change in law and the company's policies and procedures.

Group Health Plan Sponsors

Employers who sponsor group health plans may want to immediately take the following steps to comply with GINA and the interim final regulations:

- **Discontinue Increased Premiums or Contributions.** Review existing group health plan premium and contribution structures to ensure that groups of participants are not paying adjusted premiums or contributions based on health factors (*i.e.*, medical conditions, genetic information or claims history).

- **Review and Modify Wellness Programs.** Review and remove any incentives from wellness programs associated with completion of an HRA that requires a participant to provide genetic information, or simply remove the questions requiring genetic information.
- **End Collection of Genetic Information at Enrollment.** Review the plan's current enrollment process to ascertain whether genetic information is collected. If so, discontinue this practice.
- **Verify Practices of Vendors.** Most employers that sponsor calendar-year group health plans are in the process of reviewing and negotiating insurance contracts and administrative service agreements for 2010. Employers may wish to talk with vendors to ensure that any needed adjustments have been made to these agreements for the upcoming plan year. Although insurance companies are obligated to comply with GINA for insured products, the group health plan could also be responsible for any impermissible practices which impact its provision of benefits.

For Further Information

If you have any questions about this *Alert* or would like more information, please contact any [member](#) of the [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.