

# Protections Against Discrimination Based On Genetic Information: New Rules Impact Group Health Plans, Health Insurers and Employers

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Posted By: Daniel T. Dennehy & Timothy C. McDonald & Kenneth A. Hoogstra  
& Kyle J. Gulya & Doris E. Brosnan

Practice Area: Compensation and Benefits/ERISA & Labor and Employment

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On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA). The purpose of GINA is to prevent discrimination in health insurance and employment based on genetic information. GINA imposes new restrictions on group health plans (including both large and small group plans, church plans and non-federal government plans), insurance issuers, employers, employment agencies, labor organizations, and joint labor-management committees. Genetic information is defined as information regarding an individual's own genetic tests, the genetic tests of the individual's family members, and the manifestation of a disease or disorder in the individual's family members. The term "genetic test" is defined in the statute as "an analysis of human DNA, RNA, chromosomes, proteins or metabolites that detects genotypes, mutations, or chromosomal changes." A genetic test is used to predict whether an individual has a predisposition to a disease, disorder, or pathological condition, and does not include a genetic analysis that is performed after a disease is manifested. The term "family member" is defined very broadly to include an individual's dependents and any other individual who is a first, second, third or fourth-degree relative of the individual.

## **Group Health Plans and Health Insurance**

Title I of GINA amends the Employee Retirement Income Security Act (ERISA) to prohibit genetic discrimination in employer-sponsored group health plans. Title I also amends the Public Health Service Act to parallel the changes to ERISA for plans that are not subject to ERISA, such as church plans and non-federal government plans, and to create similar prohibitions against genetic discrimination in the individual health insurance market. Title I amends the Social Security Act (SSA) to apply the genetic nondiscrimination rules to Medicare supplemental policies, and it amends the SSA to require the modification of the regulations under the Health Insurance Portability and Accountability Act so that genetic information is treated as protected health information under the privacy rules.

### *Prohibited Practices*

GINA prohibits group health plans and insurance issuers in the group and individual markets from using genetic information to discriminate with respect to premium or contribution amounts. GINA also generally prohibits group plans and issuers from requesting or requiring that individuals or their family members undergo genetic testing. Limited exceptions are allowed for using the information to make payment determinations, allowing voluntary participation in research, and for health care professionals who request testing from the individuals for whom they provide services. GINA generally prohibits group plans and issuers from collecting (by requesting, requiring, or purchasing) genetic information for underwriting purposes and from collecting genetic information with respect to any individual prior to enrollment or coverage under the health plan. Additionally, individual health insurance issuers are prohibited from using genetic information to determine eligibility for coverage or to impose pre-existing condition exclusions.

### *Penalties*

The Secretary of Labor is empowered to impose penalties against plan sponsors and issuers for failing to comply with GINA. Violations corrected by the plan sponsor or issuer before they are discovered by the Secretary may result in penalties of \$100 per day for each participant or beneficiary affected by the failure. If problems are not corrected before receiving notice from the Secretary, minimum penalties increase to \$2,500 per person (\$15,000 for more serious failures). However, no penalty will be imposed if: 1) the person liable, exercising reasonable diligence, did not know that the failure existed; or 2) the failure was due to reasonable cause and not willful neglect and was corrected within 30 days after the failure was discovered. Additionally, penalties are capped at the lesser of \$500,000 or ten percent of the annual amount paid or incurred by the group health plan in the preceding year. The Secretary also has the power to waive penalties for failures due to reasonable cause and not willful neglect.

### *Effective Date*

These provisions become effective for group health plans in plan years beginning after May 21, 2009 (twelve months after enactment). For individual plans, GINA applies to coverage "offered, sold, issued, renewed, in effect, or operated" after that date.

## **Employment Discrimination**

Title II of GINA prohibits genetic discrimination by employers, employment agencies, labor organizations, and joint labor-management committees.

### *Prohibited Practices*

GINA prohibits employers from using genetic information to discriminate in employee hiring, termination, and with respect to "compensation, terms, conditions, or privileges of employment." Employers may not use genetic information to "limit, segregate or classify" employees in a way that would deprive them of employment opportunities or adversely affect their status as employees. Employers are also prohibited from requesting, requiring, or purchasing genetic information with respect to employees or their family members, with limited exceptions. The rules do not apply, for example, to inadvertent requests, requests related to health and wellness programs where the information is only available to the employee and the health care professional involved in providing the wellness services, and to information needed to certify a health condition for purposes of the Family and Medical Leave Act (FMLA) or a state family and medical leave law. When an employer is in possession of genetic information about an employee, the information must be maintained in a separate file and treated as a confidential medical record of the employee. An employer shall be considered to be in compliance with these requirements if the genetic information is maintained with, and treated as, a confidential medical record under the Americans with Disabilities Act (ADA). The employer may not disclose an employee's genetic information except in limited situations, such as a disclosure to the employee at his or her written request, a disclosure in response to a court order, or to comply with certain government orders or the FMLA.

GINA also places similar restrictions on employment agencies, labor organizations, and joint labor-management committees with respect to their treatment of employees, individuals, or members.

### *Enforcement*

Where an employee alleges an unlawful employment practice in violation of GINA, the employee is provided certain powers, procedures, and remedies prescribed under the Civil Rights Act of 1964 and other federal statutes that prohibit discrimination. The prevailing party may be awarded reasonable attorney's fees and, if the discrimination is intentional, punitive damages.

### *Effective Date*

In contrast to the group health plan and health insurance rules described above that are effective for plan years that begin 12 months after enactment, the employment discrimination rules become effective on November 21, 2009 (18 months after enactment).

### **Preparing for GINA**

Health plan sponsors and employers should review their current policies, practices, procedures, plan descriptions, and training materials to determine whether changes are needed to comply with GINA. Care should be taken to avoid inappropriate requests for genetic information and to screen incoming employee records for information that will need special confidential treatment. Contact one of the attorneys listed below if you have any questions regarding GINA or if you would like our assistance in bringing your health plan or employment practices into compliance with the new rules.

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