



A Law Firm in the People Business

NONDISCRIMINATION IN EMPLOYMENT

In addition to prohibiting genetic discrimination by health plans and insurers, GINA also prohibits employers, with 15 or more employees, from discriminating against an employee with respect to compensation, terms, conditions, or privileges of employment based on the genetic information of the employee or the employee's family members.

The law prohibits employers from requesting, requiring, or purchasing genetic information about an employee or the employee's family members, unless certain requirements are met. Employers that possess genetic information must maintain it in a separate file and treat it as a confidential medical record consistent with the terms of the Americans with Disabilities Act.

GINA's employment provisions take effect November 21, 2009.

Protecting Employees' Genetic Information: The Genetic Information Nondiscrimination Act of 2008

Genetic testing provides individuals with a powerful opportunity to acquire information about the potential risk of various diseases and health conditions for themselves and their families. This information can be utilized to protect health, enhance well-being, and lower health care costs. The enormous promise of genetic testing, however, is not being realized due to growing concerns that employers and health insurance companies will use genetic information to deny individuals access to employment or health insurance coverage.

The Genetic Information Nondiscrimination Act of 2008 (GINA), which was recently signed into law, is intended to address these concerns by (i) prohibiting discrimination on the basis of genetic information in health insurance and employment, and (ii) protecting the confidentiality of genetic information.

Nondiscrimination in Health Care. GINA prohibits discrimination based on genetic information by group health plans and group health insurance issuers. The law amends the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (Code), the Social Security Act and the Public Health Services Act.

The term "genetic information" is defined broadly and includes information relating to genetic testing (*e.g.*, DNA analysis) of individuals or members of that individual's extended family. Genetic information also includes an individual's family history of a disease or disorder.

Prohibited Actions. GINA prohibits group health plans and group health insurance issuers from:

- adjusting premium or contribution amounts for the group covered under the plan based on genetic information;
- requiring or requesting that an individual or family member take a genetic test; and
- requiring, requesting, or purchasing genetic information for underwriting purposes (*e.g.*, rules for eligibility for benefits and pre-existing conditions) or with respect to any individual before the individual enrolls in the plan.

Permitted Actions. GINA allows group health plans and health insurance issuers to use genetic information in limited circumstances. The law permits group health plans and issuers to:

- obtain genetic information incidental to the collection of information concerning an individual prior to enrollment, provided the information is not used for underwriting purposes;
- obtain and use the results of a genetic test to make payment determinations, provided only the minimum amount of information necessary to make the determination is requested and used;

- increase group health plan premiums based on the manifestation of a disease or disorder of an individual enrolled in the plan, but plans and issuers cannot use the individual's disease or disorder as genetic information for other individuals enrolled in the plan (*e.g.*, a health insurance issuer can increase premiums for the entire plan based on an enrollee's manifestation of cancer, but it cannot increase premiums by assuming a higher risk for the group based on the enrollee's dependent child's predisposition to cancer); and
- request that an individual undergo a genetic test for research purposes, provided certain requirements are satisfied and the results are not used for underwriting purposes.

Penalty for Noncompliance. Failure to comply with GINA's health care provisions contained in ERISA, the Code, and the Public Health Services Act could result in a penalty of \$100 per day for each individual to whom the failure relates, beginning on the day the failure first occurs and ending on the date the failure is corrected.

HIPAA Privacy Standards. GINA also amends the definition of "protected health information" under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to include genetic information. This will prevent covered entities that are group health plans or health insurance issuers from using or disclosing protected genetic information for underwriting purposes. Failure to comply with this HIPAA Privacy Standard could result in an annual penalty of up to \$25,000 for unintentional failures or up to \$250,000 and 10 years of imprisonment for intentional failures.

Steps toward Compliance. GINA's health care provisions will apply to plan years beginning on or after May 21, 2009. Thus, for calendar year plans, the law will apply beginning January 1, 2010. GINA's HIPAA provisions will be effective when final regulations are issued. The regulations are expected to be issued within 60 days of the law's May 1, 2009 effective date.

Although the full implications of GINA's health care provisions will not be known until the final implementing regulations are issued, sponsors of group health plans may want to begin reviewing their group health plans, policies, and procedures to ensure compliance with the law and encourage employees to utilize genetic testing. Plan sponsors may also need to revise their HIPAA privacy notices, procedures, business associate agreements and group health plan documents to reflect the new nondisclosure of genetic information rules.

For further information or assistance determining your obligations under GINA, please contact either Nicole Bogard at 404 888-8830 or Kelly Scott at 404 888-8838.

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