

## **New Law to Prohibit Discrimination Based Upon Genetic Information**

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*GR Review*

*What is the Genetic Information Nondiscrimination Act?*

This newly enacted law, signed by President Bush on May 21, 2008, will prohibit discrimination by employers based on an individual's genetic information. Legislators believe the new law, being referred to by its acronym "GINA," will protect Americans' right to privacy and encourage them to take advantage of potentially life saving genetic screening, counseling, testing, and therapies, without the fear that such genetic information will cost them their jobs. The law, which does not become effective until November 21, 2009, will be enforced by the Equal Employment Opportunity Commission or EEOC. GINA will not preempt more protective state or federal laws, including the ADA and the Rehabilitation Act of 1973.

*Prohibited employer practices*

Under GINA, an employer cannot refuse to hire, discharge, or otherwise discriminate against an employee because of that employee's "genetic information." Moreover, it is unlawful for an employer to limit, segregate, or classify employees in a manner that would deprive an employee of employment opportunities or negatively impact an employee's status, as a result of genetic information.

GINA broadly defines "genetic information" as any information about an employee's genetic tests, the genetic tests of an employee's family members, and the manifestation of disease or disorder in an employee's family members. Therefore, the genetic information relating to an employee's spouse, biological or adopted child, parent, grandparent, and great-grandparent is protected. Additionally, genetic information about a fetus or embryo is protected under GINA. The definition of the term "genetic test" could come straight out of a high school chemistry text: any test that analyzes human DNA, RNA, chromosomes, proteins, or metabolites and any test that detects genotypes, mutations, or chromosomal changes.

In addition to prohibiting discrimination, GINA prohibits an employer from requesting, requiring, or purchasing an employee's genetic information or genetic information of the employee's family member. There are, however, particular circumstances which allow an employer to possess an employee's genetic information. Under GINA, an employer is permitted to request or require genetic information from employees or from their family members if one of the following conditions is met: 1) the employer "inadvertently" requests or requires family medical history of the employee or the employee's family member; 2) the information requested is part of a wellness program offered by the employer *and* meets certain conditions; 3)

the employer requests or requires family medical history from the employee to comply with the certification provisions of the Family and Medical Leave Act or requirements under state law; or 4) the employer receives family medical history through documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not medical databases or court records).

#### *Confidentiality requirement*

GINA also protects the confidentiality of employee genetic information obtained by employers. To comply with the confidentiality requirements, employers must keep genetic information on separate forms and in medical files separate from employee personnel records (similar to the handling of medical records under the Americans with Disabilities Act). Additionally, this confidential information can only be disclosed under limited circumstances, including: 1) to the employee upon the employee's written request; 2) during the course of a government investigation of an employer's compliance with GINA; 3) if necessary to allow an employee to comply with the medical certification requirement of the Family and Medical Leave Act; or 4) to a public health agency about a contagious disease in a family member of an employee that presents "an imminent hazard of death or life-threatening illness."

#### *Enforcement*

GINA adopts the enforcement mechanisms of a statute employers know well: Title VII of the Civil Rights Act of 1964. Accordingly, lost wages and benefits, compensatory and punitive damages and attorney's fees are all potentially recoverable.

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