

Healthcare Employment Law

IN Brief

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Since the most recent edition of *Healthcare Employment Law IN Brief*, questions have arisen concerning **Title II of the Genetic Information Non-Discrimination Act of 2008 ("GINA")**. Highlights and tips follow.

Effective Date: November 21, 2009

Covered Employer: With certain exceptions, employers with 15 or more employees.

"Employee": "Employee" includes applicants and former employees.

"Genetic Information": "Genetic information" means information relating to:

- An individual's genetic tests or requests for genetic counseling/education;
- Genetic tests of an individual's family members;
- The manifestation of a disease or disorder in family members of an individual (**family medical history**).

"Genetic Test": A "genetic test" is an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

Prohibitions: **Employers may not:**

- **Discriminate** on the basis of genetic information;
- **Retaliate** against an employee for opposing actions prohibited by GINA or participating in an investigation, proceeding, or hearing under GINA;
- **Request, require, or purchase an employee's genetic information** (See "Exceptions", below).

Exceptions: With important limitations not addressed here, the general prohibition against acquiring genetic information does not apply to:

- Inadvertently acquired information;
- Aggregate information relating to voluntary wellness programs;
- Requests for family medical history to comply with the certification provisions of the FMLA;
- Commercially and publicly available information;
- Aggregate information used in the genetic monitoring of the biological effects of toxic substances in the workplace; and
- Certain law enforcement uses.

Confidentiality: Genetic information must be kept in confidential files separate from personnel files. With important limitations not addressed here, the information may be disclosed:

- To the subject employee;
- To an occupational or other health researcher;
- In response to a court order;
- To government officials investigating compliance;
- To comply with the FMLA certification provisions;
- To a public health agency with regard to contagious diseases.

Notice Posting: Employers must post a GINA notice. See http://archive.eeoc.gov/self_print_poster.pdf.

Tips:

- Post the required notice by November 21, 2009.
- Update equal employment opportunity, workplace harassment, and related policies to prohibit discrimination based on genetic information.
- Audit your practices with respect to applicant and employee medical inquiries/exams to **ensure that individuals are not asked for family medical history**. If applicants/employees must explain identified medical conditions, consider this instruction: **"Please do not include any family medical history or any genetic information about you."**
- When requesting employee medical information, consider an instruction that **the employee and healthcare provider should not include family medical history or other genetic information**.
- If you receive family medical history or other genetic information as a result of the reasonable accommodation process and/or FMLA certification process, maintain that information in a confidential file separate from the individual's personnel file.
- Do not disclose family medical history or other genetic information in response to a court order unless the order expressly covers such information. Ensure the employee knows about the order and the genetic information disclosed.

***This briefing does not constitute legal advice. Please see an attorney about any particular matter.**

Greg is a partner and a member of the firm's Employment and Labor and Healthcare Groups. Since 1994, he has represented Indiana hospitals, physician practices, long term care facilities, and other healthcare employers and human services organizations in dealing with a wide variety of employment matters. A substantial part of his practice involves counseling and training management teams on compliance with the various employment laws that impact operations.