

## ***Covered Employers Must Post New EEOC Poster and Must Familiarize Themselves and Their Managers with the Provisions (and Implications) of the Genetic Information Nondiscrimination Act of 2008 (“GINA”) Which Becomes Effective November 21, 2009***

By Stefan R. Miller

In late October 2009, the United States Equal Employment Opportunity Commission (“EEOC”) released its revised poster for use by employers covered by federal civil rights and anti-discrimination laws: “Equal Employment Opportunity is the Law”. The new version of this poster reflects the requirements of the Genetic Information Nondiscrimination Act of 2008 (“GINA”), which takes effect on November 21, 2009, as well as the changes made by the recent amendments to the Americans with Disabilities Act (“ADAAA”), which took effect on January 1, 2009. The revisions to the EEOC poster include information regarding GINA’s ban on employment discrimination based on an individual’s genetic information as well as updates that broaden the definition of “disability” under the ADAAA.

This EEOC posting change is mandatory for all covered employers and the new poster should replace any older versions presently posted in your workplace. Failure to properly post this new notice exposes employers to penalties, could result in a court extending the applicable statute of limitations for filing discrimination complaints and could potentially impact employer liability. The new law – GINA – takes effect November 21, 2009. (As a practical matter, while GINA itself only applies to employers with 15 or more employees, the “Equal Employment Opportunity is the Law” poster covers various federal civil rights and anti-discrimination laws, including the Equal Pay Act of 1963 (“EPA”) which applies to employers with one or more employees. Accordingly, all employers should post the “Equal Employment Opportunity is the Law” poster in their workplace.)

- The new poster can be downloaded and printed here: [http://www.eeoc.gov/self\\_print\\_poster.pdf](http://www.eeoc.gov/self_print_poster.pdf)
- In addition, the poster is available in Spanish, Arabic and Chinese from the EEOC website: <http://www.eeoc.gov/posterform.html>

### **Fast Facts About GINA**

GINA has two very distinct titles to the legislation. Title I of GINA addresses the use of genetic information by health insurers and health insurance plans in connection with issues of eligibility, premium and other pricing determinations, and exclusions from coverage. On the other hand, Title II directly impacts employers by prohibiting covered employers from:

- Requesting, requiring or otherwise acquiring genetic information from applicants, employees and former employees (with limited exceptions);
- Using genetic information in making decisions related to any terms, conditions, or privileges of employment; and
- Retaliating against employees for opposing or complaining about unlawful employment practices and/or filing a claim pursuant to GINA.

In addition, Title II of GINA requires that employers maintain confidentiality with respect to genetic information (with limited exceptions).



GINA defines genetic information to include information about an individual's genetic tests, genetic tests of a family member, and family medical history. In addition, GINA presently also defines genetic information to include information about "the manifestation of disease or disorder in family members of the individual." This significantly expands the scope of medical information that will meet GINA's definition of genetic information. For example, if an employer learns that a particular form of cancer runs in an employee's family, that information may trigger GINA's protections against employment discrimination – even if there is no information disclosed about the actual employee's genetic makeup – because oftentimes cancer is believed to have a genetic basis. Accordingly, as more and more diseases are determined to have a genetic basis, the greater the amount of medical information will meet GINA's definition of genetic information.

### **Exceptions to GINA's Prohibitions Against Acquiring Employee Genetic Information**

Among the exceptions to the prohibition against acquiring an employee's genetic information include when an employer inadvertently receives otherwise prohibited genetic information during casual conversations with employees, overhears conversations between coworkers, or receives unsolicited e-mail that includes genetic information. Another exception applies in the event an employer receives such information either as part of the "interactive process" following a disabled employee's request for reasonable accommodation or in connection with documentation submitted in support of a leave of absence pursuant to the federal Family and Medical Leave Act or other similar state law. Genetic information that is acquired from newspapers, magazines, electronic media and other sources of commercially and publicly available information also is deemed to be an inadvertent disclosure.

However, in any case where an employer inadvertently receives genetic information, employers must keep the information strictly confidential and, if in writing, must still maintain such information – like all medical information – in a *confidential medical file* which is *separate* from other personnel information and which is *properly secured* by restricted access. In addition to the other exceptions, GINA does allow employers to offer health or genetic services, provided that they are part of a voluntary wellness program. Finally, in addition to a few other narrow exceptions, it is also not the intent of GINA to interfere with or apply to uses and disclosures of protected health information ("PHI") governed by regulations under Health Insurance Portability and Accountability Act (HIPAA). If an employer (*e.g.*, a hospital) is subject to the HIPAA privacy rule, it must continue to follow the HIPAA privacy rule requirements and not the requirements under GINA for genetic information that is also PHI.

### **New Limitations on Employers' Post-Offer Medical/Physical Examinations**

Notwithstanding the limited exceptions noted above, employers must remember that, although current state and federal disability discrimination laws generally permit covered employers to obtain family medical history or conduct genetic tests of job applicants once an offer of employment has been made – provided the information sought is job related and is requested for all entering employees in the same job category – ***such action will be prohibited upon the effective date of GINA.*** This is because GINA does not contain an exception allowing employers to obtain genetic information in cases where the employer has a legitimate reason to make employment-related decisions based on "protected" information (*e.g.*, genetic information might arguably be relevant to determining whether an individual is able to perform the essential functions of his/her position and, in particular, in a manner which will not endanger the health and safety of either the individual or others.)

While the prohibition against conducting genetic tests on job applicants might seem obvious given the stated purpose of GINA, the rationale for prohibiting inquiries about an individual's family medical history in



connection with a medical examination might seem less obvious. However, because genetic information has been broadly defined to include information about "the manifestation of disease or disorder in family members of the individual", asking about an individual's family medical history poses a significant risk that the employer will receive information about a family history of a genetically-based disease.

### **Conclusion: What Is the "Take Away" for Employers?**

If your Company has not already done so, you should immediately do the following not only to ensure compliance with GINA and related obligations but also to minimize risks associated with employee "self-disclosure" and other inadvertent disclosures of genetic information:

1. **Posting:** Post the new "Equal Employment Opportunity is the Law" in all Company facilities.
2. **Employee Handbooks:** Review your Company's policies relating both to equal employment opportunity as well as to discrimination, harassment and retaliation. If necessary, revise these policies to state that your Company does not tolerate discrimination on the basis of one's genetic information.
3. **Record-Keeping:** Review your Company's record-keeping procedures, and make sure that any and all genetic or other medical information is maintained in a **confidential medical file** which is: a) **separate** from an employee's other personnel information; and b) **properly secured** (preferably under lock/key) in such a way to restrict access.
4. **Employment-Related Forms:** Review the employment forms used by your Company – particularly as it relates to leaves of absence, work and non-work related injuries and illnesses – to ensure they do not request genetic information and to limit the risks of employee "self-disclosure".
5. **Medical/Physical Examinations:** Ensure that if your Company requires applicants or employees to submit to medical/physical examinations, those examinations not only are job related and requested for all entering employees in the same job category but also refrain from inquiring about one's family medical history or requiring individuals to undergo genetic testing (except for employers engaging in DNA testing for law enforcement purposes).
6. **Wellness Programs:** Review any wellness programs to ensure they comply with GINA.
7. **Training:** Provide training to both management and non-management employees not only about GINA's prohibitions and related provisions but also about any changes to Company policies, forms, practices or procedures due to GINA. Management employees in particular should be trained about how to limit the risk of employee "self-disclosure" and to address and respond to inadvertent disclosures of genetic information in order to minimize your Company's legal exposure.

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