



# BENEFIT *Advisor*

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## In This Issue

*In this eighth issue of the McGrawWentworth Benefit Advisor for 2008, we will discuss the recently passed Genetic Information Non-Discrimination Act or GINA. The goal of GINA is admirable - prohibiting discrimination in health plan coverage or employment based on genetic information.*

*However, the legislation does not provide any clear guidance on the action steps employers should take to comply with this Act. It is expected that additional guidance will be issued over the next year to provide employers more details and practical examples to help comply with the provisions of GINA.*

*We welcome your comments and suggestions regarding this issue of our technical bulletin. For more information on this Benefit Advisor, please contact your Account Manager or visit the McGrawWentworth web site at [www.mcgrawwentworth.com](http://www.mcgrawwentworth.com).*

## “Genetic Information Non-Discrimination Act”

President Bush recently signed the *Genetic Information Non-Discrimination Act (GINA)* into law. While employers may not think this Act affects them, it certainly does. GINA was passed to prevent discrimination based on information revealed through genetic testing. It has two specific sections that prohibit such discrimination. One section concerns discrimination in health insurance and health plans. The other section concerns discrimination in employment.

This Act applies to group health plans, health insurance carriers and employers. All employers will need to understand how GINA affects their health plans and hiring practices.

This *Advisor* reviews the following key provisions:

- Genetic Information Defined
- Non-Discrimination in Health Insurance
- Non-Discrimination in Employment Practices
- Penalties for Non-Compliance

The provisions have different effective dates. The health plan requirements, for example, will take effect starting

with the first day of the first plan year following May 21, 2009. For calendar year plans, that date will be January 1, 2010. The employment practice section of the regulations will take effect on December 21, 2009.



The regulations state the requirements for employers, insurers and group health plans. The rules spell out clearly what practices are prohibited and

what practices are acceptable when genetic information and genetic testing is involved. Unfortunately, the regulations do not offer much detail. Expect the government to issue more practical guidance to explain how employers, insurance carriers and group health plans can be certain they are taking appropriate action to comply with these new rules.

### Genetic Information Defined

GINA is not the only law covering non-discrimination requirements in health plans. The *Health Insurance Portability and Accountability Act (HIPAA)* also includes a section on non-discrimination requirements. The HIPAA rules prohibit a number of health plan-related practices, such as conditioning enrollment on the employee’s health

or charging higher premiums or employee contributions because of an existing health factor. Genetic information is considered a health factor. GINA does not negate or change any of the HIPAA non-discrimination requirements. You can learn about the HIPAA non-discrimination requirements by reading our *Benefit Advisor* at [http://www.mcwent.com/Benefit\\_Advisor/2007/BA\\_Issue\\_1.pdf](http://www.mcwent.com/Benefit_Advisor/2007/BA_Issue_1.pdf).

GINA expands the list of prohibited activities related to use and handling of the genetic information. It defines *genetic information* as:

- Information discovered through a genetic test. A genetic test analyzes human DNA, RNA, chromosomes, proteins or metabolites to detect genotypes, mutations or chromosomal changes. An analysis of proteins or metabolites not designed to identify genotypes, mutations or chromosomal changes is not considered a genetic test. Also not considered a genetic test is an analysis of proteins or metabolites directly related to a manifested disease, disorder or pathological condition that a health care professional with expertise in the appropriate field could reasonably detect.
- Information related to a genetic disease or disorder in a family member.

Genetic information does not include an individual's gender or age. Employers need to understand the definition of genetic information in order to determine what information this Act impacts.

## Non-Discrimination in Health Insurance

GINA amends ERISA (Employee Retirement Income Security Act of 1974), the PHSA (Public Health Service Act) and the IRC (Internal Revenue Code) to include all employers, insurers and group health plans as covered entities. Following are those amendments:

- A group health plan or group health insurance company may not adjust employee premiums or contributions because of information revealed through genetic testing. However, the insurance carrier may increase an *employer's* premiums because of an employee's disease or disorder.
- A group health plan or group health insurance company may not request or require genetic testing for underwriting purposes. This provision, however, does allow the health plan to obtain and use the results of a genetic test if they are necessary to determine whether the test is a covered service. In this case, the plan can request only the minimum results necessary to determine whether the test is covered. The law does include exceptions to this provision for research studies.
- A group health plan or group health insurance company may not request, require or purchase any specific genetic information before allowing an



employee to enroll in the plan or before agreeing to cover the employee. If a health plan or employer obtains genetic information incidentally, they are not considered to be violating this requirement.

- The genetic information this law covers applies to a fetus as well.
- Carriers in the individual health insurance market cannot establish rules for eligibility or continued eligibility based on genetic information.

These are the rules affecting health insurers and group health plans. Organizations are hoping that in the next year and a half, the government will offer more

details on company policies that may violate these requirements and will recommend the steps companies need to take to comply with the law.

## Non-Discrimination in Employment Practices

The non-discrimination in employment practices provisions will likely have a greater impact on many organizations. The law sweepingly applies to most employers in the United States, including public employers, private employers, employment agencies, and labor organizations. This section becomes effective 18 months after GINA was signed into law. Therefore, employers need to make any necessary changes by December 21, 2009.

This new law prohibits employers from discriminating against employees based on genetic information. Discriminatory practices include:

- Failing to hire, refusing to hire, or discharging an employee based on the employee's genetic information.
- Discriminating against an employee in pay or terms and conditions of employment because of the employee's genetic information.
- Limiting, segregating or classifying employees so as to deprive or tend to deprive them of employment opportunities or adversely affect the employee's status based on the employee's genetic information.



- If the employer obtains information when an employee is complying with the medical certification requirement of the Family Medical Leave Act.
- If the employer purchased commercial, publicly available documents that include family medical history information.
- If the employer needs the genetic information to monitor the biological effects of toxic substances in the workplace but only if:
  - The employer notifies the employee in writing.
  - The employee voluntarily

signs a document authorizing the employer to obtain such information, and the genetic oversight

is required by law. The monitoring must meet all federal and state requirements.

- The employee must be given the results of the genetic monitoring.
- The monitoring results the employer receives must apply only to the group as a whole. Individual genetic information should not be evident.

The law includes the following additional provisions:

- An employer cannot use genetic information to discriminate against employees in apprenticeships, training or retraining programs.

- The employer must keep genetic information about an employee or family member in a separate file and treat it as a confidential medical record.
- An employer cannot disclose anyone's specific genetic information except:
  - Directly to the person involved, if it is requested.
  - To a health researcher or occupational researcher in response to a court order.
  - To a government official investigating whether an entity is complying with GINA rules but only if that information pertains to the investigation.
  - To comply with federal or state law.
  - To a public health agency.

Employers will need to review their employment practices and policies over the next year and a half to determine whether they need to make any changes in order to comply with GINA.

### Penalties for Non-Compliance

The Secretary of Labor will take responsibility for enforcing GINA requirements. The Department of Labor will have the authority to impose penalties for violations. The penalties may be significant:

- A penalty of \$100 a day applies if an entity fails to meet GINA requirements.
- The \$100 applies to each participant affected. A minimum penalty of \$2,500

for each participant can apply if the Secretary discovers a violation before it is corrected. A grievous and perhaps, intentional violation of the act could result in up to a \$15,000 penalty for each participant affected.

However, penalties will not apply in situations where a reasonably diligent entity can't identify the violation. The Secretary of Labor can waive the penalty if the failure was due to reasonable cause and not willful neglect, as long as the entity corrects the failure within 30 days after it is identified.

Penalties shall not exceed \$500,000. In cases where the violation is due to a reasonable cause, the penalty can be 10% of the total amount the plan sponsor paid for the group health plan during the preceding year if that amount is less than \$500,000.

If employees feel their rights have been violated, they can seek remedies under the civil rights legislation that applies, such as:

- Title VII of the Civil Rights Act of 1964
- Government Employee Rights Act of 1991
- Congressional Accountability Act of 1995
- Chapter 5 of Title 3 of the United States Code

For the most part, reasonable attorney fees may be awarded to the prevailing party and in the case of intentional discrimination, punitive damages may also apply.



### Concluding Thoughts

The penalties for violating GINA rules are steep. Most organizations and even health plans rarely deal with genetic information. However, your organization should make time to review summary plan descriptions, human resource policies and practices to determine whether you need to make changes to comply with the new law.

The GINA legislation summarizes many employment and health plan requirements. However, organizations will need more information to really understand what practices and information GINA covers. Over the next year the government is likely to release more information and examples to help employers comply with these new regulations.

Because your organization may have to make only a few changes to policies and procedures to comply with GINA, it makes sense to wait until the government clarifies the new requirements.

If you have any questions regarding this legislation, please contact your McGraw Wentworth Account Director. **MW**

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