



# BENEFIT *Advisor*

## In This Issue

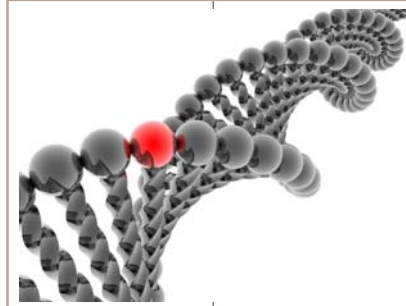
*In this seventh issue of the McGrawWentworth Benefit Advisor for 2009, we review the Genetic Information Non-Discrimination Act (GINA). GINA has two sections. One section addresses group health plan requirements that will impact plans as of the first day of the first plan year following May 21, 2009. The second section addresses employment requirements and will impact employers on November 21, 2009.*

*GINA requirements may not be too difficult to implement because many of the health plan requirements are very similar to situations addressed by HIPAA non-discrimination rules. The employment rules will likely be more difficult as many of your employment practices will need to be reviewed.*

*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 website at [www.mcgrawwentworth.com](http://www.mcgrawwentworth.com).*

## “Genetic Information Non-Discrimination Act”

President Bush signed the *Genetic Information Non-Discrimination Act (GINA)* into law on May 21, 2008. GINA protects job applicants, current and former employees, labor union members, and apprentices and trainees from discrimination based on their genetic information.



The health plan regulations will become effective on the first day of the first health plan year following May 21, 2009. For calendar year health plans, GINA regulations become effective January 1, 2010. Employment regulations will affect employers as of November 21, 2009.

The Equal Employment Opportunity Commission (EEOC) was to issue final guidance to help employers comply with GINA by May 20, 2009. The EEOC issued proposed guidance on March 2 and it requested comments from the public. It has not yet issued the final guidance. Even if the EEOC does not release final regulations, employers and their health plans must comply with GINA.

This *Advisor* discusses the following GINA issues:

- Background: Need to Prevent Misuse of Genetic Information
- Health Plan Requirements
- Employment Requirements
- Action Plan

### Background: Need to Prevent Misuse of Genetic Information

Advances in medicine have been amazing over the last several decades. Now that scientists have managed to decode the human genome, one of the primary areas of medical research is genomic medicine. Genomic medicine will allow pharmaceutical companies to design better, more specific therapies geared to the patient’s specific genetic makeup. These advances should result in more effective therapies with fewer side effects.

However, these advancements have brought attention to the fact employers and health plans may have access to very detailed genetic information that may result in the potential misuse of this information in employment decisions and health plan decisions.

It may seem unreal to think about this information and its effect on employers, but these therapies are right around the corner, so employers will need to consider how they use this information. Medical experts are predicting we will see tremendous strides in genomic medicine and it will soon be a part of mainstream treatment.

In addition, many existing genetic tests can determine whether a person is at risk for developing a specific disease or disorder. This information can be invaluable, especially if people can be treated early. The information can also affect health care decisions and costs.

Although genetic treatments are an important step forward, they may also reveal confidential data. GINA is meant to protect this personal genetic information.



### Health Plan Requirements

Title I of GINA applies to employer, union, and even government sponsored group health plans. These regulations also directly affect health insurance issuers, including group and individual insurance carriers, and carriers issuing Medicare supplement policies.

Title I provides:

- **Insurance carriers and employers cannot increase group premiums because of genetic information.** Since the Health Insurance Portability and Accountability Act (HIPAA) also prohibits discrimination based on genetic

information, most employers and health insurance carriers have already removed discriminatory provisions from their contracts.

Employers should review any plan that charges different premiums or contributions for coverage. They need to make sure the difference in cost cannot be construed as being based on genetic information.

- **Insurance carriers and employers cannot use genetic information to determine eligibility or set premiums in the individual and Medigap markets.** This provision is not likely to affect employers; however,

they may need to review eligibility provisions. Since current HIPAA non-discrimination rules already prohibit group health plans from tying health plan eligibility to health factors, most health plans have already removed evidence of insurability and actively at work provisions. Review your eligibility provisions to make sure they do not consider genetic information.

- **Group health plans, individual insurance carriers and Medigap markets may use genetic data only under certain specified conditions.** In general, they cannot request or require genetic testing. The health plan may, however, request genetic test results to determine whether the test is a covered service. In this case, the plan can request only the

minimum results necessary. The law does include exceptions to this provision for research studies.

- **The HIPAA Privacy Rules apply to genetic information addressed by GINA rules.** GINA does not override HIPAA in use and disclosure situations. Group health plans can still use health information for the reasons specified by HIPAA, including plan administrative functions. However, employers must protect genetic information in the same manner they secure Protected Health Information (PHI).

To comply with the requirements, employers need to be familiar with the following key terms:

- **Genetic information:** Genetic information is a person's genetic test data, the genetic test data of a family member or a genetic disease or disorder in that person or a family member has or that is disclosed as a part of their medical history. It also includes genetic data requested to receive genetic services or to participate in a clinical study involving this information.
- **Genetic tests and genetic monitoring:** A genetic test is an analysis of human DNA, RNA or metabolites that detects genotypes, mutations or chromosomal changes. Genetic monitoring refers to periodic examinations of genetic materials to evaluate changes.

Continued on Page 3

- **Family members:** A family member is a dependent or a first, second, third or fourth degree relative. A dependent is an IRS defined dependent.
- **Manifested:** A condition or disease is manifested when a health care expert in a medical specialty diagnoses an individual with that condition or disease. Although genetic tests may determine a genetic predisposition for certain conditions, a patient is not considered to have that condition until it is manifested and diagnosed.

The health plan aspects of these regulations may be fairly easy to implement. However, the EEOC has not issued any clarifying guidance as it relates to the health plan requirements. The latest round of proposed regulations focused primarily on the employment requirements.

Employers would welcome more practical guidance on plan provisions that may be an issue due to GINA.

### **Employment Requirements**

Title II prohibits employers from using or deliberately acquiring genetic information as a condition of employment. It also requires them to keep genetic information confidential and strictly limits certain entities from disclosing genetic information on employees as well as applicants.

Title II of GINA defines covered entities to include private employers, state and local governments, federal or civil service employers, or the executive branch of the government. Also included are employment agencies, labor organizations,

and joint labor-management training and apprenticeship programs.

GINA establishes a wide range of prohibited discriminatory practices in the work place. Employers cannot discriminate based on genetic conditions in:

- Hiring, promotion, and demotion
- Seniority
- Discipline and termination
- Compensation and the conditions and privileges of employment

GINA also applies to specific discrimination issues in non-traditional employment situations:

- Employment agencies – failing or refusing to refer for employment
- Labor unions – excluding or expelling from membership
- Training, retraining and apprenticeship programs – denying admission or employment in these programs

Employers cannot segregate or classify employees because of genetic information, such as a family history of serious heart conditions. Let's say an employee with a family history of heart conditions has a stressful job and the employer is concerned that the stress may seriously affect the employee's health. The employer could not reassign the employee to a less stressful position without risking being charged with genetic discrimination.

Employers cannot ask other entities to discriminate; for example, they cannot require an employment agency to ask applicants for genetic information then tell that agency not to forward any candidates with family histories of specific conditions. In these cases, both the employers and the employment agencies would be violating GINA.

Like most other anti-discrimination laws, GINA has rules against retaliation. In other words, employers cannot take action against employees who have either filed a complaint under GINA or are providing testimony for another employee's complaint. This provision protects employees from employer conduct that may dissuade a worker from making or supporting a charge of discrimination.



GINA does allow employers access to genetic information in the following six instances. Even in these situations, the law makes it clear an employer cannot use the

information to discriminate against employees:

- **Inadvertently Requesting or Requiring Genetic Information:** Congress did not want casual "water cooler" conversations about genetic information or information relating to the family health history to trigger federal discrimination litigation. This exception also applies to information an employee reveals in a casual inquiry or genetic information the employer receives inadvertently.

If an employer or covered entity asks for family history or other genetic information as part of an inquiry or a medical exam related to an applicant's or employee's manifested disease, disorder, or pathological condition, it will not be deemed as acquiring this information inadvertently. Employers requiring medical exams as part of a hiring process or for fitness for duty determinations may want to know whether applicants have heart disease that would affect their ability to perform a physically demanding job. The Americans with Disabilities Act (ADA) allows employers to conduct these exams. However, GINA would prohibit inquiries about a *family medical history* of heart disease as part of the examination.

All employers should analyze their business practices to determine whether their practices may be construed as requesting genetic information. One area that may be prudent to review is how your organization handles requests for reasonable accommodations under the ADA. The EEOC provides detailed guidance on reasonable accommodation requests at [http://www.eeoc.gov/policy/docs/accommodation\\_procedures.html](http://www.eeoc.gov/policy/docs/accommodation_procedures.html).

- **Health or Genetic Services:** GINA permits employers to offer health and genetic services if the employer meets certain requirements; for example, these services may be offered as part of a wellness program. This is good news for many employers who offer Health Risk Assessments as part of a comprehensive wellness program. The Health Risk

Assessments commonly ask questions about family health histories.

GINA allows these activities as a part of wellness initiatives if the wellness program is voluntary and employees can refuse to participate in it. However, the regulations don't directly define what would be considered voluntary. In fact, according to the EEOC, if an employee must complete a Health Risk Assessment with a biometric screening to be eligible for health insurance, the assessment is not voluntary. Employers are waiting for more details to ensure their wellness plans meet GINA requirements.

- **Family Medical Leave Act:** GINA recognizes that employees may need to provide a family medical history as part of a request for leave. For example, to verify the need for an FMLA leave, an employee requesting the leave to care for an ailing parent may be asked to complete a Serious Health Questionnaire containing genetic information relating to the parent's condition. Because the employer receives this genetic information inadvertently, the employer is not violating GINA rules. However, this information is subject to GINA's confidentiality requirements and, therefore, the information must be treated as a confidential medical record.



- **Commercially and Publicly Available Information:** GINA allows employers to buy commercially and publicly available materials that may include family medical histories. The proposed regulations list a number of sources where employers might obtain this information including newspapers, magazines and periodicals. The list also includes information obtained electronically, for example, on television. Let's say an employee appears on the news to discuss a test for a newly identified breast cancer gene. The news story indicates the employee tested positive for the

breast cancer gene. An employer is not violating GINA if the employer learns this information by watching the news program.

This exception does not include family medical history information housed in a medical database or court records. In addition, restricted medical research databases available only to scientists would not be included.

- **Genetic Monitoring:** GINA does allow employers to monitor the biological effects of toxic substances in the workplace. If employers are monitoring these effects, they must inform employees in writing. If a

federal or state law does not specifically require the monitoring, the employer must obtain the employee's written permission. What's more, the authorization must be worded so that employees will clearly understand it. The monitoring must comply with all applicable laws, such as the Occupational Safety and Health Act (OSHA), the Federal Mine and Safety Health Act and the Atomic Energy Act.

The employee must receive the results of the monitoring and the employer is entitled to view only report summaries, not results specific to an individual employee.

- **DNA Testing for Law Enforcement or Human Remains Identification Purposes:** GINA allows forensic labs running DNA tests for law enforcement or for identifying human remains to use employees' genetic information for quality control. If quality control is conducted properly, the employer would not obtain any employee-specific health-related genetic information under this limited exception.

GINA also includes confidentiality provisions if employers ever have a reason to maintain DNA information. GINA requires employers to treat this information confidentially just as they treat other medical information they must use or maintain. The law specifically refers to the ADA provisions for maintaining the confidentiality of medical information; this information must be kept in a file separate from other personnel records and information. GINA information can be included in the same file as ADA medical information, but the file must be separate from personnel records.

As a rule, GINA prohibits employers from disclosing genetic information. They can reveal this information only in the following situations:

- Employees request their own genetic information.
- An occupational health researcher requests the information if the research complies with federal or state law.
- A court requests the information; the information released must be tailored to the court order. The employer must also notify the employee the information is being released because of a court order.
- Government officials request relevant information to determine compliance with a statute.
- Employers need to disclose the information to comply with FMLA or any similar state leave law.
- Federal, state or local public health officials need the information to deal with a contagious disease that presents an imminent health hazard.

GINA's employer restrictions are more complex than its group health plan restrictions.

### Action Plan

While it would be nice to have more practical examples of how GINA affects employers and health plans, unfortunately, final implementing regulations have not been issued.

The compliance date is approaching and employers need to review their policies and procedures. The good news is that many employers will find that they don't deal with genetic information very often. However, you may want to take the following steps to comply with GINA:

#### 1. **Review your group health plan design, provisions and discuss administrative procedures with your health plan vendor.**

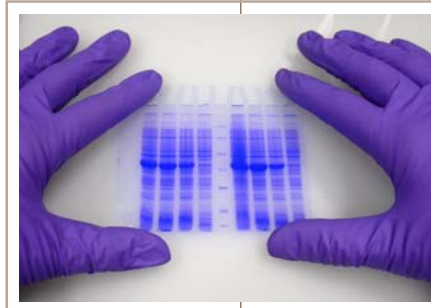
Are there any concerns regarding your health plan coverage or administrative practices? For many employers, in order to comply with

HIPAA non-discrimination rules, the plan has already removed provisions that would violate GINA. However, you should specifically review how your

health plan covers genetic testing and the type of information needed to process a claim for genetic testing services.

#### 2. **Review your wellness plan.**

Does your organization ask questions regarding family health history as part of the Health Risk Assessment? Employers may ask these questions only if the Health Risk Assessment is considered voluntary. The GINA regulations, however, do not formally define what is consid-



ered voluntary. It is believed an employer can offer incentives for employees to participate in wellness plans. However, your organization should be concerned if you require employees to take a Health Risk Assessment (HRA) to participate in the health plan. The EEOC recently indicated if your employee must complete an HRA to be eligible for coverage, the HRA is not considered voluntary.

3. **Review your hiring practices.**

Could any of your current practices be tied to genetic information? Do you require fitness for duty exams or any physical exam as an employment provision? If your organization does require these tests, you need to review any questions asked regarding family health history. You can act if a test result specifically shows someone may not be able to physically handle the job requirements. You can't act merely on a family health history showing that the job



may have a poor effect on anyone with that health history.

4. **Review your human resource practices.** Is it possible for genetic information to influence your employment decisions? It is unlikely employers will discriminate based on genetic information, but they still need to review their process for making various

decisions. Employers must base employment decisions on employee performance; health or genetic information must not

influence these decisions in any way.

5. **Do not request, require or buy genetic information.**

6. **Keep genetic information confidential.** This information must be kept separate from other employment records. It can be kept in a file with other health information, such as information on ADA compliance. In addition, make sure you disclose genetic informa-

tion only when it is permitted by law.

7. **Keep your eyes open.** Additional guidance is expected to clarify these regulations so that employers can effectively comply with GINA rules. Organizations will welcome more practical details on permitted and prohibited activities.

Although you may rarely deal with genetic information, it is a good idea to review your health plan practices and your employment practices to determine whether you need to make any changes. In addition, you may need to review your wellness plan to make sure participation is voluntary.

If you have any questions on GINA rules, please contact your McGraw Wentworth Account Manager. **MW**

Copyright McGraw Wentworth, Inc. Our publications are written and produced by McGraw Wentworth staff and are intended to inform our clients and friends on general information relating to employee benefit plans and related topics. They are based on general information at the time they are prepared. They should not be relied upon to provide either legal or tax advice. Before making a decision on whether or not to implement or participate in implementing any welfare, pension benefit, or other program, employers and others must consult with their benefits, tax and/or legal advisor for advice that is appropriate to their specific circumstances. This information cannot be used by any taxpayer to avoid tax penalties.

McGraw Wentworth, Inc.

3331 West Big Beaver Road, Suite 200  
Troy, MI 48084  
Telephone: 248-822-8000 Fax: 248-822-4131  
[www.mcgrawwentworth.com](http://www.mcgrawwentworth.com)

250 Monroe Ave. NW, Suite 400  
Grand Rapids, MI 49503  
Telephone: 616-717-5647 Fax: 248-822-1278  
[www.mcgrawwentworth.com](http://www.mcgrawwentworth.com)