

## LAW

# Keep an eye out for GINA

## Law and Medical History

BY KAREN S. AFRAME



On Nov. 9, 2010, the Equal Employment Opportunity Commission published its final regulations implementing portions of the Genetic Information Non-Discrimination Act of 2008, or GINA, which applies to private, state and local employers who employ 15 or more people.

Like Title VII and the New Hampshire anti-discrimination law, which prohibit employment discrimination and harassment on the basis of protected characteristics, GINA prohibits discrimination and harassment on the basis of genetic information. And, like those previous laws, GINA also prohibits retaliation against an individual for participating in a discrimination investigation or suit, or otherwise opposing discrimination.

However, GINA includes an additional prohibition – it bars employers from acquiring and/or disclosing genetic information. The rules implementing this aspect of the law

become effective Jan. 10, 2011, and require immediate attention by employers.

New Hampshire has had a genetic testing non-discrimination law on the books since 1996, but GINA is much broader, since it covers both genetic testing and “genetic information,” which includes information regarding an employee’s family members and includes the prohibition against acquiring or disclosing “genetic information.”

Under GINA, genetic information includes, but is not limited to the following:

- Information about an individual’s genetic tests
- Information about the genetic tests of a family member
- Family medical history
- Requests for, and receipt of, genetic services by an individual or a family member
- Genetic information about a fetus carried by an individual or family member, or about an embryo legally held by the individual or family member using assisted reproductive technology.

Under GINA’s final rules, the term “family members” is defined broadly to include spouse, children (natural and adopted), siblings and half-siblings, aunts, uncles, nieces and nephews, grandparents and grandchildren, great- and great-great-grandparents and

grandchildren and first cousins and first cousins once removed.

### Employers beware

Under GINA, an employer may not request, require or purchase genetic information of an individual or the individual’s family member. Under GINA’s regulations, a “request”

## *New regulations bar wrongful acquisition and disclosure of employees’ genetic information*

may be as informal as “actively listening to third-party conversations for the purpose of obtaining genetic information” or “conducting an Internet search on an individual that is likely to yield a result containing genetic information.”

The final rules do provide exceptions to this broad prohibition. However, employers must be cautious because the final rules make it clear that the exceptions are intended to be narrow.

For instance, EEOC regulations provide an exception from the general prohibition of acquiring genetic information for an employer that inadvertently acquires genetic information by overhearing a conversation, receiving an unsolicited e-mail about the health of an employee or the employee’s family member, or receiving genetic information directly from an employee or third party in response to an expression of ordinary concern, such as “How are you?” or “Did they catch it early?”

However, the EEOC clarifies that the inadvertent acquisition exception will not apply when a manager follows up a casual conver-

sation about an employee’s illness or the illness of an employee’s family member with a question such as “Does cancer run in your family?” or, “Has your cousin been tested for BRAC1?” This is because these sorts of probing questions, by their nature, will likely yield genetic information.

GINA also provides an exception if the employer acquires the genetic information from a publicly available source, such as a newspaper, television or the Internet. However, the final rules specify that GINA prohibits conducting an Internet search on an individual in a way that that is likely to result in the employer obtaining genetic information. GINA also excludes, in most cases, information that an employer learns through Facebook or another social networking site in which access has been restricted to those with permission.

Employers that offer voluntary wellness programs or health risk assessments also must consider GINA’s restrictions. The EEOC specifies that the authorization and program meet certain criteria in order to meet the standards of the exception. In addition, the final rules clarify that an employer may offer a financial inducement to participate in a health risk assessment only if the inducement is available irrespective of whether questions about family medical history/genetic information are answered.

Remedies available for wrongful acquisition of genetic information include reinstatement, injunctive relief, back pay, compensatory and punitive damages and attorney’s fees and costs, as well as monetary fines of up to \$100 per day per individual.

To comply with GINA, employers must be sure that they post the revised version of the “EEO is the Law Poster” which is available at [eoc.gov/employers/upload/eeoc\\_self\\_print\\_poster.pdf](http://eoc.gov/employers/upload/eeoc_self_print_poster.pdf). **NHR**

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