

PUBLICATION

"Di-GINA" Know? GINA is Effective November 21, 2009

November 23, 2009

The Genetic Information Non-Discrimination Act, or "GINA," becomes effective November 21, 2009. GINA generally prohibits discrimination based on genetic information by health plans, insurance issuers, and employers, and is comprised of two separate Titles. Employers may be impacted by the provisions of both Title I and Title II of GINA, and should be prepared to make certain changes in anticipation of its effective date.

What Is "Genetic Information?"

Genetic information, for the purposes of GINA, includes information about an individual's genetic tests, the genetic tests of the individual's family members, the manifestation of genetic illnesses in an individual's family members, and participation by the individual and/or her family members in research that involves genetic testing, counseling, or education. It does not include information related to age or sex, or test results related to drug or alcohol use.

Title I

Title I of GINA prohibits discrimination based on genetic information by group health plans and health insurance issuers. Specifically, Title I prohibits these entities from "requesting, requiring or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes." "Underwriting purposes" has been broadly defined by the GINA regulations to include the development of rules for eligibility for benefits and computation of premium or contribution amounts. Employers who currently sponsor wellness plans that include the use of health risk assessments should pay particular attention to this provision. Many health risk assessments inquire about the medical history of an employee's family members and provide financial rewards to employees for providing this information, often in the form of a premium reduction. Such inquiries seek "genetic information" under GINA (i.e., the medical history of the employee's family members), and if used to reduce premiums, are considered under the regulations to be for underwriting purposes.

Employers who wish to continue using health risk assessments as part of their wellness program may consider several options to comply with GINA's provisions:

- They may modify their assessment forms to eliminate any request that could be interpreted as seeking genetic information, including requests about the medical history of the employee's family members;
- They may leave their health risk assessments in place, and discontinue the use of financial incentives to encourage employees to complete them; or
- They may separate the assessment into two separate forms – one that does not include requests for genetic information, and a second one that does. Employers must be sure to clarify that any financial incentives offered will be given based on the completion of the first assessment only, and that the completion of the second form is optional.

Title II

Title II of GINA applies to private and state and local government employers with fifteen or more employees, labor unions, employment agencies, and certain labor-management training programs. Subject to certain exceptions, these employers are prohibited from intentionally acquiring or using genetic information about their employees. In addition, covered entities are required to maintain the confidentiality of employees' genetic information.

Like Title VII and similar laws prohibiting workplace discrimination, GINA prohibits employers from basing employment decisions such as hiring, firing, promotion, or compensation on an employee's genetic information. It also contains a provision prohibiting retaliation. Additionally, employers may not inquire about an employee's genetic information. Exceptions to this prohibition apply to information learned through casual conversation, in response to a general question about an employee's well-being, or as part of a request for accommodation under the ADA or other laws. Any genetic information an employer does possess, however, must be kept confidential in the same manner as other medical information pertaining to employees, and should be maintained in a file separate from the personnel file.

Employers covered under GINA should also obtain and post a copy of the EEOC's revised "Equal Employment Opportunity Is the Law" poster or the supplement to that poster.

Baker Donelson stands ready to assist you with these and other labor and employment-related challenges. Contact any one of our nearly 70 Labor & Employment attorneys located in *Birmingham, Alabama; Atlanta, Georgia; Baton Rouge, Mandeville and New Orleans, Louisiana; Jackson, Mississippi; and Chattanooga, Johnson City, Knoxville, Memphis and Nashville, Tennessee.*

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