



# You May Be Discriminating Based On Employee Genetics

FEDERAL ANTI-DISCRIMINATION LAW LIKELY TO BE STRENGTHENED IN 2016

## Insights

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The Genetic Information Nondiscrimination Act (GINA) is one of the newer federal anti-discrimination laws in the country, and one that requires employers to tread carefully when it comes to employee medical information. If you are not familiar with the law, the time is now to get caught up, especially because the coming year is bound to see important changes impacting your employment practices.

### Have You Met GINA?

GINA was enacted in 2008, and it prohibits employers from requesting genetic information from their employees. Specifically, it prohibits employers with 15 or more employees from discriminating against any employee on the basis of genetic information. This includes information from genetic tests, the genetic tests of the employee's family members, and family medical history.

GINA also prohibits employers from retaliating against an employee who has opposed a practice made unlawful by GINA. Finally, GINA prohibits employers from requesting an employee's genetic information, subject to several business-related exceptions.

### Some Employers Have Not Enjoyed Meeting GINA

While GINA is still a relatively new law, it has started to catch the eye of plaintiffs' attorneys. In fact, the first jury verdict in a GINA case came late last year when two workers prevailed at trial and were awarded a \$2.2 million verdict. In that case, the employer asked them to take a DNA swab test in order to determine who had been repeatedly defecating on warehouse property (read more [here](#)).

Additionally, in early 2016, the Equal Employment Opportunity Commission (EEOC) settled a GINA lawsuit which it had brought against a company for requesting family medical information as part of its post-offer, pre-employment process. The company asked whether applicants had a family medical history of tuberculous, cancer, diabetes, epilepsy, and heart disease. The EEOC claimed the company used the information to discriminate against some individuals based upon their genetic information.

### GINA Complicates Wellness Programs

Worker advocates have seen GINA's enactment as a positive response to those employers seeking to rely on genetic information to screen out potentially unhealthy employees in an effort to lower

vey, or genetic information to discern and potentially identify employees in an effort to lower

healthcare costs. However, GINA has also complicated matters for employers interested in offering wellness programs to their employees.

Wellness programs include initiatives such as health risk assessments, health screenings, flu shots, health fairs and workshops, exercise groups, fitness classes, smoking cessation classes, and participation incentives, all with the design of incentivizing a healthier lifestyle. These programs have obvious benefits to both employers and employees, but they also frequently involve gathering medical (including genetic) information.

Fortunately, GINA provides an exception and allows this gathering of information if used for wellness program purposes. In order to receive GINA's protection, the employee must provide prior, knowing, voluntary, and written authorization, and you cannot mandate a penalty for employees who choose not to participate in the part of the program seeking genetic information. Further, only the employee and licensed health care professional or counselor can receive individually identifiable information concerning the results of such services, and any genetic information gathered cannot be disclosed to you except in aggregate terms.

### **EEOC Seeks To Enhance GINA**

The EEOC has begun to focus its attention on whether employer wellness programs comply with these requirements. Due to the lack of guidance in this area, including on the issue of whether an employer may request genetic information from an employee's spouse as part of a wellness program, the EEOC recently issued a Notice of Proposed Rulemaking to address how GINA applies to wellness programs offered as part of group health plans.

According to the EEOC, the proposed rule "clarifies that an employer may offer, as part of its health plan, a limited incentive (in the form of a reward or penalty) to an employee whose spouse (1) is covered under the employee's health plan; (2) receives health or genetic services offered by the employer, including as part of a wellness program; and (3) provides information about his or her current or past health status."

The proposed rule notes that information about current or past health status is usually provided as part of a typical health risk assessment, which may include a questionnaire or medical examination, such as a blood pressure test or blood test to detect high cholesterol or high glucose levels.

### **Employers Play Waiting Game**

The EEOC accepted comments on the proposed rule from more than 90 individuals and organizations, including politicians and employer representatives, each of whom had opinions on how the final version of the regulation should appear. Now, employers must wait for the final rule to be published, which is expected sometime this year. Once the final regulation is issued, you will need to get introduced to GINA once again.

*A version of this article originally appeared on Fisher Phillips' Employment Privacy blog, which can be found [here](#) or at [www.privacy-fp.com](http://www.privacy-fp.com). For more information, contact the author at [Lmcglynn@fisherphillips.com](mailto:Lmcglynn@fisherphillips.com) or 954.847.4723.*

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