



# Changes to the Genetic Information Nondiscrimination Act Coming in 2016!

Insights

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The Genetic Information Nondiscrimination Act (“GINA”), is a federal law enacted in 2008 which prohibits employers from requesting “genetic information” from their employees. Specifically, it prohibits employers with 15 or more employees from discriminating against an employee on the basis of the employee’s genetic information. “Genetic information” 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 six exceptions.

While GINA is still a relatively new law, it has started to catch the eye of plaintiff’s attorneys. In fact, the first jury verdict in a GINA case came this year when a jury awarded two workers a \$2.2 million verdict after their employer asked them to take a DNA swab test in order to determine who had been repeatedly defecating on warehouse property. Additionally, the Equal Employment Opportunity Commission (“EEOC”) settled a lawsuit in 2014 which it brought against a company for requesting family medical information as part of its post-offer, pre-employment process. The EEOC claimed the company used the information gathered to discriminate against some individuals based upon their genetic information.

GINA’s enactment is generally seen as a positive response to employers seeking to rely on genetic information to screen out potentially unhealthy employees and lower healthcare costs. However, GINA has also complicated matters for employers interested in offering “wellness programs” to their employees. Wellness programs include things such as health risk assessments, health screenings, flu shots, health fairs and workshops, exercise groups, fitness classes, smoking cessation classes, and/or participation incentives. Wellness programs have obvious benefits to both employers and employees, but they also frequently involve gathering medical (including genetic) information. However, GINA provides an exception for wellness programs if the employee provides prior, knowing, voluntary and written authorization; there is no penalty for not participating in the part of the program seeking genetic information; only the employee and licensed health care professional or counselor receive individually identifiable information concerning the results of such services; and genetic information cannot be disclosed to the employer except in aggregate terms.

The EEOC has begun to focus on whether employer’s wellness programs comply with these requirements. Due to the lack of guidance in this area, including on whether an employer may

requirements. Due to the lack of guidance in this area, including on whether an employer may request genetic information from an employee's spouse as part of a wellness program, the EEOC issued a Notice of Proposed Rulemaking on October 30, 2015 to address how GINA applies to wellness programs offered as part of group health plans. According to the EEOC, "[t]he 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. Information about current or past health status usually is provided as part of a health risk assessment (HRA), 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."

The EEOC is currently accepting comments on the proposed rule. The initial deadline of December 29, 2015 was recently extended to January 28, 2016. The final rule is expected sometime in 2016.

### ***Related People***

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**Lisa A. McGlynn**  
Partner  
813.769.7518  
[Email](#)