

Genetic Information Non Discrimination Act of 2008



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President Bush signed into law an act considered by many to be the first civil rights act of the 21st century. The Genetic Information Non Discrimination Act (GINA) provides protection to a persons' genetic predisposition. Enacted to assuage fears of reprisal by employers and insurers, GINA creates regulations regarding employment and health insurance.

Studies have shown that many people fear genetic testing due to the potential repercussions with their employers and insurance carriers. The testing, however, can often provide useful information to assist a person preemptively deal with a potentially life threatening condition. For the Act, genetic information is defined as:

- An individual's genetic tests
- The genetic tests of family members of the individual
- The occurrence of a disease or disorder in family members of the individual

The definition does not include information about the sex or age of the individual.

The regulations are outlined in Titles I and II of the Act. Title I addresses the use of genetic information as it relates to health insurance while Title II outlines new employment practices employers and employment agencies must use, effective immediately.

The law amends current ERISA wording to include new prohibitions regarding the usage of genetic information and imposes penalties against employers and insurance carriers when employees and family members experience discrimination based on genetic factors. It also prohibits health insurance companies from using genetic data to set premiums or determine enrollment eligibility.

Title I: Genetic Nondiscrimination in Health Insurance

Prohibition of Health Discrimination on the Basis of Genetic Information or Genetic Services:

Section 101 amends ERISA wording to include the prohibition of enrollment restriction for genetic services. It also adds wording forbidding discrimination in group premiums based on genetic information. These amendments to the ERISA language protect health plan participants from an increase in premiums or contributions based solely on the genetic information of an employee or employee's family member.

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The updated language also prohibits a health insurer or health plan from requesting or requiring a genetic test. Please note: this does not in any way stop licensed health professionals from utilizing genetic testing when used to diagnose or treat patients.

Also included in the section is additional wording surrounding Section 502 of ERISA: the “Remedies and Enforcement” section. The new wording provides Injunctive Relief for Irreparable Harm and Equitable Relief for Genetic Nondiscrimination. The Injunctive Relief can be used by participants whose health would suffer irreparable harm. Equitable Relief provides reinstatement of benefits (back to the date on which the participant or beneficiary was denied eligibility for coverage) and the recovery of benefits under a civil action that was based on a violation of the aforementioned misuse of genetic information.

Wording is also being added which imposes penalties upon the administrator (personal liability) for each day the plan is not in compliance. The penalty of \$100 per day begins on the date the failure occurs and ends on the date the failure is corrected. Additional penalties may be assessed against the group health plan in the amount of \$100 per day, per individual affected. If a violation is discovered, and not corrected before the Secretary sends notice, or “occurred and continued during the period involved”, the penalty shall not be less than \$2,500. Higher penalties may be imposed when a violation is considered “more than de minimis”. The penalty of \$2,500 is then substituted with \$15,000.

Employers and group health plans are protected in certain scenarios. The protection covers employers and administrators, who, while exercising ‘reasonable diligence’ have errors occur. When it is determined, to the satisfaction of the Secretary, that the errors were not willful, and the employer/plan was exercising reasonable diligence, no penalty shall be imposed (if the error is corrected within 30 days).

Title II: Prohibiting Employment Discrimination on the Basis of Genetic Information

Use of Genetic Information:

It is illegal for an employer “to fail or refuse to hire or discharge and employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions or privileges of employment of the employee...”, or, “to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee...”

Acquisition of Genetic Information:

An employer may not “request, require or purchase genetic information with respect to an employee or a family member” unless the employer “inadvertently requests or requires family medical history of the employee or family member of the employee”. For example, health or genetic health services are offered by the employer, or an employee voluntarily provides the authorization. Other situations, such as FMLA certification requests (family medical history) or genetic testing for biological effects of toxic substances in the workplace are also possible exceptions. Regardless of these exceptions, it is imperative to note that the information may not be used in a manner that violates Section 206 of the Act (Confidentiality of Genetic Information).

For more information on this topic, as well as other services we can provide to you and your company, please contact your WGA Employee Benefits Account Executive.

