

GINA II: Cautions for Employers on the Inadvertent Obtaining of Genetic Information

by Bob Gregg and Jennifer Mirus

The final regulations under Title II of the Genetic Information Nondiscrimination Act (GINA) became effective in January 2011. GINA II prohibits employers, unions, and employment agencies from gathering, using, and disclosing genetic information about applicants and employees in most situations. However, employers may wonder how GINA would affect them, as most employers do not seek out genetic information about employees. GINA II defines genetic information broadly: it is not limited to information regarding an individual's chromosomes, or information we typically think of as "purely scientific." Instead, genetic information under GINA II includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and the genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

An employer can obtain genetic information through simple questions about family health history. Does or did anyone in your family have certain medical conditions? At what age did they die? This type of information has been used to deny insurance coverage, and to deny jobs to able people on the premise that they may have a genetic susceptibility to conditions that would cause future high medical claims or workplace injury.

The impermissible gathering of "family information" extends to the individual's *fourth degree relatives*! The law is almost Biblical in its visitation of liability from generation to generation, and most Americans likely have no idea what "fourth degree relatives" means or who these are. However, employers should now become aware of the term "first cousin, twice removed," as well as "great, great grandparents." Obtaining genetic information about an employee's seemingly remote relatives potentially violates GINA II.

GINA has narrow exceptions, which allow an employer to gather and use genetic information about employee exposure to toxic chemicals and radiation for workplace health and wellness programs, and for verification of Family Medical Leave Act leave. However, an employer can run afoul of GINA II without any intent to gather genetic or family medical information—in fact, the inadvertent collection and disclosure of genetic information may pose the greatest risk under GINA II to employers.

There are two major areas of inadvertent collection of genetic information: (1) information from medical professionals and insurance companies, and (2) workplace discussions.

Information from medical professions and insurance companies. Employers request and are often required to obtain medical excuses and certifications, information regarding disability accommodations, and return-to-work and fitness-for-duty reports. Employers also regularly communicate with insurance companies, worker's compensation administrators, EAP providers and other sources of information about employee health and welfare. Information about an employee's own current medical condition is not genetic information. However, health providers often give more information than was asked for, including a family medical history. If an employer obtains such information, it can constitute a violation of GINA.

GINA II regulations provide a "safe harbor" for the inadvertent receipt of genetic information if, and only if, the employer has used specific language to discourage the provision of genetic information. All requests for medical information about an employee should carry the disclaimer. The EEOC has provided this suggested "safe harbor" language:

> The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entitles covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

To have the protection of the safe harbor, this or very similar wording should be included on *all* FMLA certification forms, fitness-for-duty forms, and any other request for a medical excuse or verification. The language should be conspicuously included as standard language in any cover letter to a medical professional, worker's compensation insurer, EAP provider, and to the employee who is requested to provide information.

Many employee handbooks state that employees must bring a doctor's note for a sickness to be considered an excused absence. However, there is no other guidance, and until now, there was no need for any. It is up to the employee and doctor to figure out what to put into the note. Some doctors' excuse notes provide unsolicited genetic information (for example: "Joan Smith was absent due to

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available at http://www.state.nj.us/health/documents/medical_marijuana_proposal.pdf.
36. Me. Rev. Stat. Ann. tit. 22 §558-C (West 2011).
37. Ken Hibl, *Agenda Report re: Ordinance 2010-009*, City of Clare, MI (Nov. 10, 2010) at http://tinyurl.com/3av4u93 (last visited May 09, 2011), citing *White Paper on Marijuana Dispensaries*, California Police Chiefs Association's Task Force on Marijuana Dispensaries, 2009.
38. *White Paper*, *supra* note 37, available at http://tinyurl.com/42u74qh (last visited May 09, 2011).
39. Sonu Munshi, *Peoria City Council approves medical-marijuana regulations*, The Arizona Republic, Feb. 17, 2011.
40. A recipe for marijuana-laced brownies appears in the Alice B. Toklas Cook Book (1954).
41. On April 5, 2011, the City Council approved Text Amendment (TXT10-04) Medical Marijuana Ordinance, including changes to the home occupation provision.
42. The City of Los Angeles has a highly detailed ordinance which may prompt your thinking on what to include—see Article 5.1, Medical Marijuana Collective, at http://tinyurl.com/2dvuvv (last visited May 09, 2011). ML

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26. Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 284 (1946).
27. 38 U.S.C. § 4302 (West 2011).
28. 20 C.F.R.§ 1002.7 (2005).
29. Thirty-seven states have enacted laws mandating military leave for local government employees.
30. For example, Kansas mandates 12 days of annual leave; West Virginia mandates 30 days of annual leave.
31. Arkansas, Florida, Georgia, North Dakota, Pennsylvania, South Carolina, Tennessee, and West Virginia mandate some form of paid military leave for municipal employees in *addition* to regular annual leave.
32. Connecticut, Delaware, Illinois, Nebraska, and Ohio mandate additional compensation ("gap" pay) for municipal employees who incur a loss of income based upon military service.
33. "The current reliance on the reserve components as an operational force, however, is something entirely new, unforeseen, and unplanned." *Operational Force Report*, *supra* note 10 at 51.
34. *Id.* at 1.
35. In FY 2001, the National Guard and Reserve performed 12.7 million man-days of service; in FY 2006, the number had increased to 61.3 million man-days.
36. *Operational Force Report*, *supra* note 10 at 5.
37. *Id.* at 67.
38. *Id.* at 5.
39. U.S. Dept. of Defense, *Quadrennial Defense Review Report* (Feb. 6, 2006), iv, available at http://www.defense.gov/qdr/report/report20060203.pdf (last visited May 09, 2011).
40. *Id.*
41. *New World Coming: American Security in the 21st Century: Major Themes and Implications*, The Phase I Report on the Emerging Global Security Environment (U.S. Commission on National Security/21st Century, 1999), 3,4.
42. In my home state of Arkansas, police officers are required to take 12 weeks (480 hours) of training to meet certification requirements.
43. 38 U.S.C. § 4312 (West 2011).
44. Nichols v. Dep't of Veterans Affairs, 11 F.3d 160 (Fed. Cir. 1993).
45. An audit of the 2008 fiscal year of the City of North Little Rock, Arkansas showed outlays exceeding $48,000 for *additional* military leave of mobilized employees.
46. Ohio has developed an interesting statute that provides up to $500 of monthly gap compensation for mobilized municipal employees, unless the municipality affirmatively opts to pay a greater amount. Ohio Rev. Code Ann. § 5923.05 (West 2011).
47. In my military experience, I have crossed paths with many professionals and executives who choose to serve in lower enlisted ranks because of the camaraderie of friends and their personal commitment to assume more dangerous missions. While I have always respected their dedication, their choice could result in excessive liability for gap compensation, absent limitations.
48. The mission statement of the United States Department of Veterans Affairs quotes a phrase from the closing paragraph of President Abraham Lincoln's second inaugural address: "With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, *to care for him who shall have borne the battle and for his widow and his orphan*, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations."
49. It should be mentioned that the wars in Iraq and Afghanistan are distinctive in that they are the only wars conducted in history while federal taxes were *reduced*.
50. S. 568, 112th Cong. (1st Sess. 2011).
51. *Id.* at § 2(a) (proposed sec. 2401(a)(2)).
52. *Id.* at § 2(a) (proposed sec. 2401(b)(3)).
53. Funding for S. 568 is capped at $5,000,000. *Id.* at § 2(a) (proposed sec. 401(e)). Further, the title of S. 568 identifies it as a pilot program.
54. Noting the military advantage of employing National Guard and Reserve servicemembers with civilian skills, the Commission on the National Guard and Reserves stated, "... [t]he complementary value of their military and civilian skills ... add significant value to the nation ... Reservists are city planners, power plant operators, waterworks directors, computer specialists, fire chiefs, and police chiefs." *Operational Force Report, supra* note 10 at 70. ML

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heart palpitations. She reports a family history of heart problems. Mom died at age 43. Placed on aspirin regime."). Employers should preempt overly detailed doctor's notes and include the "safe harbor" language in their employee handbook. The language should be included in any section that covers sick leave, FMLA, fitness-for-duty, light duty, short-

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term disability verification, or other policies that may require employees to present medical or family health information.

The "safe harbor" language provides employers with protection from liability in the event of the inadvertent receipt of genetic information. However, if genetic information is inadvertently obtained, the employer must ensure that the information is maintained as confidential and not improperly used or disclosed.

Workplace discussions. Another risk area is management inadvertently becoming aware of family medical information through workplace discussion. Such "water cooler" talk regularly includes discussions of health issues, including family history. Technically, this is genetic information under GINA II, and when a supervisor hears such information, that supervisor's knowledge is imputed to the employer.

GINA II recognizes that casual conversations in the workplace are both common and generally outside the control of the employer. Therefore, it recognizes that a supervisor's innocent question, "How is your family?" to an employee is *not* a request for genetic information and does not violate GINA, even if the employee launches into a litany of how sick everyone in the family has been (for four generations!). Casual conversation does not trigger the law, nor does voluntary conversation or revelations. Talk about issues of common knowledge (i.e., "I hear Betty's mom is in the hospital for lumbago") does not trigger the law.

Then how *can* casual conversation morph into a GINA II violation? At times, social conversations which include an employee's genetic information can proceed to become a matter of ongoing discussion among the employee's managers. It can take on a life and significance: a supervisor may make a note of the conversation, and that note may find its way into the employee's file (or, more commonly, into an email to other managers). At this point, the information is no longer part of casual conversation and is now a part of the company *records*; it may be viewed as information used by the employer in making work-related decisions.

Supervisors can also run afoul of GINA II through follow-up questioning. Certain managers want to engage in further conversation about a family member's medical problems and may, for purely sympathetic motives, probe for details and more family history. Managers may even share stories of their own family members' similar medical traumas to show compassion. Nonetheless, it is a supervisory probe into genetic information. Even if the employee seems engaged and appreciative of the supervisor's caring inquiries, things can change. When that employee later receives a poor evaluation, is disciplined, is not given a promotion or is discharged, that conversation may be re-characterized as "invasive" and an "improper interrogation about genetic information." In short, be sympathetic, but don't probe.

Unfortunately, some employers have used genetic information to discriminate. There are numerous Americans With Disabilities Act cases in which casual pieces of office conversation led management to perceive that an employee is disabled and should not be doing a particular job. Often, these have been erroneous perceptions that resulted in adverse action. The courts are sensitive to this issue and it was one of the reasons leading to the passage of GINA II.

It is important to note that the rules regarding discovery of electronic communication force the revelation of all notes, emails and records when there is litigation. Once a supervisor's notes and emails about an employee's family medical situation surface, there may be a legal presumption that management was "keeping track" of, or "giving significant weight to," the genetic information. It may be difficult to prove that the genetic information did not play a role in the negative decisions made about that employee.

Inadvertent disclosure. Many other laws require confidentiality of medical, financial, personal identity and other sensitive information (e.g., ADA, HIPAA, FMLA, Rehabilitation Act). GINA II is similar. Any information must be carefully and securely kept, and shared only on a proper need-to-know basis. Confidentiality is inadvertently breached in the same way many other laws are violated (carelessness, loose talk, lax care of records, a supervisor in a small town discussing workplace concerns at home, followed by her 11-year-old spreading the medical information all over school and church).

Pay attention to the line between sympathy and improper probing, and avoid creating improper documentation. Emphasize supervisory confidentiality, and the need to avoid careless conversation and emails about sensitive information. Provide training for management and administrative staff about GINA II and other confidentiality laws in which inadvertent use and disclosure of information create liability.

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a policy or practice of requiring all employees to do so. The Directive was, in fact, a "universal sick-leave policy applicable across the board" to all employees, disabled or not, who used sick leave. There was, moreover, no requirement in either the ADA or the Rehabilitation Act that differentiated between employers based on the existence of a separate human resources department.

What guidance is available to employers from this ruling? First, make sure your doctor's note/medical documentation policy is, in fact, universally applicable to employees. Consider implementing a standard form that the doctor's office can fill out, so as to reduce the likelihood that disclosure goes beyond the employer's need for verification. Further, some commentators note that asking whether the employee is able to perform essential job functions makes it more likely that the inquiry will be seen as a job-related business necessity. ML