

# Human Resources Recommendations

## Hiring and Regulatory Compliance

Employment law and regulation is a very complex and litigious area employers face in human resources management. Failure to comply can result in serious financial consequences in the form of fines, litigation and costs to achieve compliance. Employers should consider the impact of employment regulations during the hiring process.

The Genetic Information Nondiscrimination Act of 2008 (GINA) and the Americans with Disabilities Act Amendments of 2008 (ADAA) both became effective in 2009 and have significant impact on the hiring process.

### Genetic Information Discrimination

Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which prohibits genetic information discrimination in employment, took effect on November 21, 2009.

Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, labor organizations and joint labor-management training and apprenticeship programs - referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

The EEOC enforces Title II of GINA (dealing with genetic discrimination in employment). The Departments of Labor, Health and Human Services and the Treasury have responsibility for issuing regulations for Title I of GINA, which addresses the use of genetic information in health insurance.

### Definition of "Genetic Information"

Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. Genetic information also includes an individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual, and the genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

### Discrimination Because of Genetic Information

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment. An employer may never use genetic information to make an employment decision because genetic information is not relevant to an individual's current ability to work.

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## Hiring and Regulatory Compliance (Continued)

### Harassment Because of Genetic Information

Under GINA, it is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee. Although the law doesn't prohibit simple teasing, off-hand comments, or isolated incidents that are not very serious, harassment is illegal when it is so severe or pervasive it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area of the workplace, a co-worker, or someone who is not an employee, such as a client or customer.

### Retaliation

Under GINA, it is illegal to fire, demote, harass, or otherwise "retaliate" against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination.

### Rules Against Acquiring Genetic Information

It will usually be unlawful for a covered entity to get genetic information. There are six narrow exceptions to this prohibition:

- Inadvertent acquisitions of genetic information do not violate GINA, such as in situations where a manager or supervisor overhears someone talking about a family member's illness.
- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.
- Family medical history may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member with a serious health condition.
- Genetic information may be acquired through commercially and publicly available documents like newspapers, as long as the employer is not searching those sources with the intent of finding genetic information or accessing sources from which they are likely to acquire genetic information (such as websites and on-line discussion groups that focus on issues such as genetic testing of individuals and genetic discrimination).
- Genetic information may be acquired through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.
- Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted, but the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

### Confidentiality of Genetic Information

It is also unlawful for a covered entity to disclose genetic information about applicants, employees or members. Covered entities must keep genetic information confidential and in a separate medical file. (Genetic information may be kept in the same file as other medical information in compliance with the Americans with Disabilities Act.) There are limited exceptions to this non-disclosure rule, such as exceptions that provide for the disclosure of relevant genetic information to government officials investigating compliance with Title II of GINA and for disclosures made pursuant to a court order.

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## Hiring and Regulatory Compliance (Continued)

### Americans with Disabilities Act Amendments of 2008 (ADAA)

The Americans with Disabilities Act (ADA) applies to employers with 15 or more employees and prohibits discrimination in all employment practices including recruiting, interviewing, hiring, discharge, advancement and training. Effective January 1, 2009, the ADAA expanded the scope of individuals covered under the law restoring protections through court rulings. Now the focus is on whether discrimination occurred rather than on the question of who has a disability.

ADA prohibits discrimination against "qualified individuals with disabilities." This includes job applicants and employees with a mental or physical impairment that limits a major life activity or a history of such impairment.

They are considered "qualified" if they meet the established job requirements (such as skills, experience, education, certification) and are capable of performing the essential functions of the job, with or without reasonable accommodation.

Employers should be prepared to respond to applicant and employee requests for accommodations. A "reasonable accommodation" is a modification to the job or work environment that allows a qualified individual with a disability to perform the essential functions of the job with access to the rights and privileges of persons without disabilities.

Such accommodations often involve little or no cost to the employer. Employers should work with the individual and consult with available resources to identify a solution.

### Assessing Your Compliance with ADAA

Examine company policies and procedures and update or establish as necessary.

Review the functions of each job and update job descriptions as necessary. Review hiring processes to verify advertising and job applications do not contain prohibited pre-employment questions and that facilities, interviews and testing methods are accessible for disabled applicants.

Identify internal and external resources and advisors, including ergonomists, rehabilitation specialists, occupational therapists, risk managers, human resources, physicians or other clinicians.

Identify roles for applicants and employees, and how they will participate in the job accommodation process (i.e. in-person discussions, share ideas, review essential job duties).

Examine procedures with human resources for response to requests for accommodations, including alternative job placement processes and routines to accommodate employees who cannot return to their regular jobs, even with accommodations (does not apply to applicants).

Provide training for managers, supervisors, human resources, and risk managers; communicate with legal advisors and share policies and procedures with other external and internal business partners.

Verify that internal and external communications support nondiscrimination and maintain and promote a culture of accommodation.

Staying focused and up to date on employment regulation is indeed a challenge, but it's critical that you continually update your employment practices, policies and procedures to comply with these evolving regulations. Effective communication and coordination throughout your organization is the best way to help promote compliance among management, human resources, benefits, employee relations, and other employer representatives.