

# Akerman Practice Update

LABOR & EMPLOYMENT

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## Genetic Information Nondiscrimination Act Effective November 21, 2009

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Beginning November 21, 2009, employers with 15 or more employees will be prohibited from discriminating against individuals based on their genetic information pursuant to the Genetic Information Nondiscrimination Act (“GINA” or the “Act”). The information that follows concerns how Title II of GINA will impact employers.

### Proposed Regulations

On March 2, 2009, the Equal Employment Opportunity Commission (“EEOC”) issued a proposed rule and requested public comment regarding regulations to implement Title II of GINA, which protects job applicants, current and former employees, labor union members, and apprentices and trainees from discrimination based on their genetic information. The comment period concluded on May 1, 2009. Although Title II of GINA is effective on November 21, 2009, the final rules are pending publication as they are in their final clearance stage.

### Overview of GINA and its Regulations

GINA protects applicants and employees from discrimination based on their genetic information in hiring, promotion, discharge, pay, fringe benefits, job training, classification, referral, and other aspects of employment. GINA also restricts employers’ acquisition of genetic information and strictly limits disclosure of genetic information. Genetic information includes information about genetic tests of applicants, employees, or their family members; the manifestation of

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diseases or disorders in family members (family medical history); and requests for or receipt of genetic services by applicants, employees, or their family members.

There are six exceptions to this prohibition:

- Where the employer inadvertently obtains genetic information on the employee (the EEOC refers to this as the “water cooler” exception)
- Where the employer offers qualifying health or genetic services for employees, such as a voluntary wellness program
- Where the employer requests family medical history to comply with the certification provisions of the Family and Medical Leave Act (“FMLA”) or state equivalent leave laws
- Where the employer acquires family medical history from public or commercially available documents, such as newspapers, magazines and books (but not medical databases or court records)
- Where the employer acquires genetic information to monitor the adverse effects of hazardous workplace exposures
- Where an employer that conducts DNA analysis for law enforcement purposes requires genetic information for quality control purposes to detect sample contamination

GINA also prohibits the disclosure of genetic information. There are six exceptions:

- Disclosing information relating to the employee upon the employee’s written request
- Disclosure to an occupational or other health researcher for research conducted in compliance with Department of Health and Human Services regulations
- Disclosure in response to a court order
- Disclosure to a government official investigating compliance with GINA
- Disclosure in connection with compliance with the FMLA or state equivalent leave laws
- Disclosure to a public health agency concerning a contagious disease that presents an imminent hazard of death or life-threatening illness

Employers are also prohibited from retaliating against employees who oppose an act or practice prohibited under GINA. GINA makes clear that it does not preempt any state or local law that provides equal or greater protections than GINA. Also, Title II of GINA does not limit the rights or protections under federal, state, local or tribal laws that provide greater privacy protection to genetic information. The regulations largely track the language of the Act but serve to clarify certain

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requirements under GINA. The law incorporates by reference many of the familiar definitions, remedies, and procedures from Title VII and other anti-discrimination statutes.

### **The EEOC's Position on GINA's Impact on the ADA and the FMLA**

Of great significance is GINA's impact on how employers operate under the Americans with Disabilities Act (“ADA”) and the Family and Medical Leave Act (“FMLA”). An employer that asks for family medical history or other genetic information as part of an inquiry or medical examination related to an applicant's or employee's manifested disease, disorder, or pathological condition will not be considered to have acquired such information inadvertently. While the ADA permits employers to obtain medical information, including genetic information, from post-offer job applicants, the EEOC takes the position that this will change as of the effective date of Title II of GINA. Employers, therefore, will no longer be permitted to obtain any genetic information, including family medical history, from post-offer applicants or even for the purpose of determining continuing fitness for duty.

The proposed regulations note that when a covered entity seeks information from an individual who requests a reasonable accommodation under the ADA or other law, the acquisition of genetic information the individual provides in support of the request is considered inadvertent, as long as the request for documentation was lawful (e.g., was not overly broad).

In assessing entitlement to leave under the FMLA, state or local leave or disability law, the EEOC notes that a request for an employee's entire medical record is likely to include family medical history. An employer who receives family medical history or other genetic information in response to such a broad request would violate GINA.

### **Immediate Action for Employers**

- Ensure that all equal employment opportunity statements and related policies include “genetic information” as a protected class.
- Train HR professionals and managers on employee rights concerning genetic information.
- Implement policies to maintain the confidentiality of employee genetic information in separate confidential medical files.
- Assess how any state laws that concern or protect genetic bias are impacted by GINA.
- Ensure that any medical inquiries made or any medical examinations required are modified so as to comply with the requirements of GINA.

A copy of the “Equal Employment Opportunity is The Law” poster containing language regarding GINA may be found at [www1.eeoc.gov/employers/poster.cfm](http://www1.eeoc.gov/employers/poster.cfm). General information regarding GINA may be found at [www.eeoc.gov](http://www.eeoc.gov).

Sherica Bryan is a Labor & Employment lawyer in the firm's Miami office. She provides employers with day-to-day preventive counseling and represents employers in defense of claims involving Title VII, ADA, ADEA, FMLA, FLSA, whistleblower claims, contractual disputes, and other employment matters.

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