

# What You Need to Know About the Genetic Information Nondiscrimination Act (GINA)

Employees and managers need to be aware of the Genetic Information Nondiscrimination Act (GINA) and how it affects the way we do business at NDE.

GINA prohibits the use of “genetic information” in making decisions related to any terms, conditions, or privileges of employment (e.g., hiring, firing, and opportunities for advancement); restricts NDE from requesting, requiring, or purchasing genetic information; generally requires NDE to keep any genetic information we have about applicants or employees confidential; and prohibits retaliation.

The federal statute and the final EEOC regulations state that “genetic information” includes:

- Information about an individual’s genetic tests;
  - Information about the genetic tests of a family member;
  - Family (not personal) medical history;
  - Requests for and receipt of genetic services by an individual or a family member; and
  - Genetic information about a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using assisted reproductive technology.
- An employer may acquire genetic information in six situations. Even when an employer is allowed to acquire the information, the employer is prohibited from using the information in employment decisionmaking. The six situations in which an employer is allowed to acquire genetic information are:
- Where the information is acquired inadvertently;
  - As part of health or genetic services (including a wellness program) that a covered entity provides on a voluntary basis;
  - In the form of family medical history to comply with the certification requirements of the Family and Medical Leave Act, state or local leave laws, or certain employer leave policies;
  - From sources that are commercially and publicly available, such as newspapers books, magazines, and even electronic sources;
  - As part of genetic monitoring that is either required by law or provided on a voluntary basis; and
  - By employers who conduct DNA testing for law enforcement purposes as a forensic lab, or for human remains identification.

GINA’s legislative history says that the exception for inadvertent acquisition of genetic information was intended to address the “water cooler problem” – a situation in which a manager or supervisor learns genetic information by overhearing a discussion between co-workers. The regulations explain that this exception can apply in other situations as well, such as when a supervisor receives genetic information in response to a question about an employee’s general well-being (“How are you?” or “Did they catch it early?” asked of an employee who was just diagnosed with cancer), or a question about the general health of a family member (“How’s your son feeling today?” or “Will your daughter be OK?”). Another example of inadvertent acquisition is when a supervisor receives an unsolicited communication about an employee’s family member (e.g., an email indicating that an employee’s mother has cancer). The regulation also notes that the inadvertent acquisition exception applies to interactions that take place in the “virtual” world, i.e., through a social media platform from which

an employer receives genetic information (e.g., where a supervisor and employee are connected on a social networking site as friends and the employee provides family medical history on his page). What isn't allowed is performing a search on a social media website that is "likely to result in uncovering genetic information."

GINA prohibits NDE 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 any request for medical information.

GINA and the regulations say that an employer may acquire genetic information about an employee or his or her family members when the employer offers health or genetic services, including wellness programs, on a voluntary basis to the employee. The individual receiving the services must give prior voluntary, knowing, and written authorization to disclose the genetic information. While individualized genetic information may be provided to the employee and to his or her health or genetic service providers, genetic information may only be provided to the employer in aggregate form. The final rule says that employers may offer certain kinds of financial inducements to encourage participation in health or genetic services under certain circumstances, but they may not offer an inducement for individuals to provide genetic information. Therefore, it would not violate Title II of GINA for an employer to offer individuals an inducement for completing a health risk assessment that includes questions about family medical history or other genetic information, as long as the employer specifically identifies those questions and makes clear, in language reasonably likely to be understood by those completing the health risk assessment, that the individual will receive the inducement whether or not they answer the questions that request genetic information.

If NDE receives any genetic information about applicants or employees, the information will be kept confidential and, if the information is in writing, will be kept apart from other personnel information in separate medical files.

This information was not intended by the author to be legal advice. If you have questions about how GINA applies to your particular circumstances, please contact Joel Scherling in Human Resources or Scott Summers in the General Counsel's Office.

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Source: This information was excerpted from an article entitled "EEOC Issues Final GINA Regulations", which appeared in the December, 2010 issue of the Lincoln Human Resources Association Newsletter, and was written by Keith L. Prettyman, of Woods & Aitken law firm, located in Lincoln, Nebraska.