



COMPLIANCE @ WORK

September 2016

The Genetic Information Nondiscrimination Act (GINA)

Under GINA, an employee's genetic information cannot be the basis of any hiring, discharge, payment, promotion, demotion, or any other employment decision.

Title II of the [Genetic Information Nondiscrimination Act \(GINA\) of 2008](#), protects legislative branch employees from employment discrimination on the basis of genetic information by prohibiting the use of genetic information in making employment decisions in all circumstances, without any exceptions. Title II of GINA also restricts legislative branch employing offices from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of any and all genetic information. GINA was enacted to prevent potential misuse of genetic testing results that arose with more recent advancements in genetics discoveries. The Equal Employment Opportunity Commission (EEOC) is tasked with issuing Title II GINA regulations which apply to legislative branch employing offices and employees.¹ The EEOC recently updated its existing regulations through a Final Rule dated May 17, 2016.

What Information is Protected by GINA?

GINA protects genetic information and testing of an employee or an employee's family member, family medical history, and requests for genetic services by an individual or a family, but does not include the protection of medical information that may be required to certify requests for leave under the Family and Medical Leave Act of 1993 or reasonable accommodation under the Americans with Disabilities Act of 1990.² Genetic information and medical information are two distinct concepts. This distinction is important in understanding your rights as an employee.



Genetic Information

Genetic information includes information about an individual or their family member's genetic tests, as well as information about the manifestation of a disease or disorder in an individual's family (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.



Medical Information

Employing offices are not in violation of GINA by using, acquiring, or disclosing medical information that does not have a genetic basis.³ For example, in *Hoffman v. Family Dollar Stores*,⁴ an employee's HIV-positive diagnosis was not considered by the court to be information protected by GINA because an HIV-test is not a genetic test. Sharing the information was, however, in violation of the Americans with Disabilities Act.⁵

¹ 29 C.F.R. § 1635.2(c)(3).

² *Ortiz v. City of San Antonio Fire Dept*, 806 F.3d 822, 826 (5th Cir. 2015).

³ 42 U.S.C. § 2000ff-9.

⁴ *Hoffman v. Family Dollar Stores*, 99 F.Supp.3d 631, 637 (W.D. N.C. 2015).

⁵ *Id.*

GINA in the Work Setting

In *Lowe v. Atlas Logistics Group Retail Services*, an employer required its employees to provide cheek swabs in order to determine who had inappropriately used the warehouse floor as an outhouse.⁶ The court found that the DNA cheek swab was a genetic test in violation of GINA because the test was in fact “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes,” despite the employer’s argument that the purpose of the swab was not to determine the employee’s propensity for a disease.⁷

In *E.E.O.C. v. Grisham Farm Products*, the employer violated GINA by requiring all job applicants to complete pre-health history forms which forced them to disclose previous health care information and whether “future diagnostic testing had been recommended or discussed by their doctor.” The Court determined that these questions would require an applicant who had previously been told by a physician to get diagnostic testing in light of their family history or risk factors, to reveal genetic information to the employer, in violation of GINA’s anti-solicitation provision.⁸

For more information on the Office of Compliance or the Congressional Accountability Act please call us at (202) 724-9250 or visit www.compliance.gov. All inquiries are strictly confidential.

⁶ *Lowe v. Atlas Logistics Grp. Retail Servs. (Atlanta)*, 102 F. Supp. 3d 1360, 1369 (N.D. Ga. 2015).

⁷ 42 U.S.C. § 2000ff-1(b).

⁸ *E.E.O.C. v. Grisham Farm Prods.*, No. 6:16-cv-03105-MDH, 2016 WL 3221161, at *4 (W.D. Mo. June 8, 2016).

⁹ 29 C.F.R. § 1635.3(c)(2).

¹⁰ 29 C.F.R. § 1635.3(c); *Lewis v. District of Columbia*, No. 15-521, 2015 WL 8082293, at *11 (D.D.C. Dec. 7, 2015).

What Information is not Protected by GINA?

Certain types of information are not protected by GINA including: information that is publicly available, such as stories published in newspapers, magazines, and the Internet; inadvertently requested or required information such as through casual conversation; and information about an individual’s age or sex.⁹ Additionally, drug or alcohol tests are not considered genetic tests.¹⁰



Enforcement

The CAA requires that a request for counseling be brought to the OOC within 180 days after the alleged GINA violation. After the required period of counseling and mediation, an eligible employee may file an administrative complaint with the OOC or proceed with a civil action in district court.