




**DEPARTMENT OF PERSONNEL**  
**209 East Musser Street, Room 101**  
**Carson City, Nevada 89701-4204**  
**(775) 684-0150**  
**<http://dop.nv.gov>**

**MEMO PERD #46/11**  
**September 1, 2011**

TO: Agency Personnel Liaisons  
Agency Personnel Representatives

FROM: Teresa J. Thienhaus, Director   
Department of Personnel

SUBJECT: Genetic Information Nondiscrimination Act (GINA) final rule impact

---

The Equal Employment Opportunity Commission's (EEOC) final rule on Title II of GINA became effective on January 10, 2011. In general, GINA prohibits discrimination against an individual on the basis of genetic information in regard to hiring, termination, compensation, training or any other term, condition or privilege of employment. The final rule affects requests for medical documentation/evaluations, wellness program inquiries and other means of receipt of genetic information, as defined by GINA. The full text of the final rule, including GINA's definition of genetic information, can be found at <http://www.gpo.gov/fdsys/pkg/FR-2010-11-09/pdf/2010-28011.pdf>.

**EXCEPTIONS**

The final rule states that requesting or receiving the following types of information are not violations of GINA:

- Information regarding an employee's manifested disease, disorder or pathological condition;
- Medical documentation for a family member's condition
  - FMLA leave;
  - Family sick leave, "pursuant to a policy... that permits the use of leave to care for a sick family member and that requires all employees to provide information about the health condition of the family member to substantiate leave" (Regulations Under the Genetic Information Nondiscrimination Act of 2008; Final Rule);

- Information from documents that are commercially and publicly available for review or purchase;
- Genetic monitoring of biological effects of toxic substances;
  - Certain requirements are outlined in the rule. If this issue is applicable to your agency, see the GINA final rule for further information.
- DNA analysis for law enforcement purposes as a forensic lab or for purposes of human remains identification to the extent it is used for analysis of DNA identification markers for quality control to detect sample contamination; and
- “Water cooler” comments;
  - Such as overhearing a conversation between the employee and another individual or receiving it in response to a casual conversation or a general health inquiry (e.g. “How are you?”).

### **“SAFE HARBOR” PROVISION**

The final rule outlines a “safe harbor” provision for inadvertent receipt of genetic information when requesting medical documentation regarding an employee. The final rule states, “If a covered entity acquires genetic information in response to a lawful request for medical information, the acquisition of genetic information will not generally be considered inadvertent unless the covered entity directs the individual and/or health care provider from whom it requested medical information... not to provide genetic information.” The rule specifically mentions the Family and Medical Leave Act (FMLA), Americans with Disabilities Act (ADA) and documentation to support requests for leave not governed by Federal, State, or local laws as situations in which warning language in the request would make receipt inadvertent.

Utilization of this provision will require some changes in medical documentation requests.

Based on the final rule “safe harbor” provision the following forms have been created or revised:

- **New Sick Leave Documentation – GINA Warning (NPD-82)**
  - To document receipt of the GINA warning when an agency requests documentation of authorized use of sick leave.
- **New Medical Inquiry in Response to an Accommodation Request (NPD-86)**
  - To request job related and business necessary medical information in response to an ADA accommodation request.
- **Revised Family & Medical Leave Act (FMLA) Certification of Health Care Provider for Employee’s Serious Health Condition (NPD-83, previously the WH-380-E form)**
- **Revised Family & Medical Leave Act (FMLA) Certification of Qualifying Exigency for Military Family Leave (NPD-84, previously the WH-384 form)**
  - New form number
- **Revised Family & Medical Leave Act (FMLA) Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave (NPD-85, previously the WH-385 form)**
  - New form number
- **New Family & Medical Leave Act (FMLA) Medical Release (NPD-81)**

## MEMO PERD #48/05

September 1, 2011

Page 3

- To document a health care provider's release of the employee to return to work following FMLA leave, when the requirement was indicated previously on the FMLA Designation Form (NPD-63).
- **Revised** State of Nevada Family Medical Leave Act Designation Form (NPD-63)
  - Revised to match the language used on the FMLA medical release form (NPD-81).
- **New** Physician's Certification for Catastrophic Leave Request - Employee (PAY-23CE)
  - Physician's certification of an employee's catastrophic event
- **New** Physician's Certification for Catastrophic Leave Request - Immediate Family Member (PAY-23CF)
  - Physician's certification of an immediate family member's catastrophic event

\*The above new and revised forms can be located on the Department of Personnel's website.

The Department received numerous comments when the NPD-82 form was presented to agencies human resource staff in early 2011. Based on those comments, the Sick Leave Documentation – GINA Warning (previously the Employee Medical Certification) form has been reworked to offer agencies the greatest possible flexibility while assuring protection under GINA's "safe harbor". The revised form communicates the GINA warning only and it no longer can be used to request documentation of authorized use of sick leave from a health care provider. If an agency wishes to continue using the previous version of the form, a copy of the document may be requested from the Department. The form now allows for the agency to present the warning to an employee (to be communicated to the employee's health care provider by the employee) by two different methods. The form can be presented to the employee to be read and signed. Additionally, if the employee is not physically present and there is no method to ensure that the form will be received with the request, the supervisor may read the warning language to the employee and document on the form that the warning was made verbally. The EEOC made the following comment in the Section-by-Section Analysis of the Regulation (Federal Register, Vol. 75, No. 216, p. 68920), "This 'safe harbor' in 1635.8(b)(1)(i)(B) provides that any receipt of genetic information in response to a lawful request for medical information will be deemed inadvertent and not in violation of GINA ***if the request contained such a warning...***" The form has been designed to be used at the time of the request for documentation. However, if in extenuating circumstances the warning is not made at the time of the request for documentation, it is suggested that it be provided before the employee actually physically provides the documentation.

### MANDATORY WARNING

Per GINA's final rule, warning language is mandatory for an employment-related medical examination (e.g. fitness for duty examinations, post offer medical examinations).

"The prohibition on acquisition of genetic information, including family medical history, applies to medical examinations related to employment. A covered entity must tell health care providers not to collect genetic information, including family medical history, as part of a medical examination intended to determine the ability to perform a job, and must take additional

reasonable measures within its control if it learns that genetic information is being requested or required..." (29 CFR § 1635.8 (d))

### **RECOMMENDED WARNING LANGUAGE**

The final rule provides the following sample warning language:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities 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." (29 CFR § 1635.8 (b)(1)(i)(B))

Genetic information that is received must be treated as confidential medical information.

It is recommended that any management, supervisory or personnel/human resources staff that is involved with requesting medical documentation in your agency be made aware of the provisions of GINA's final rule. If you have additional questions or you are interested in training on GINA for your agency, you may contact Carrie Hughes at [cphughes@dop.nv.gov](mailto:cphughes@dop.nv.gov) or (775) 684-0111 or Tammy Smith at [tammys@dop.nv.gov](mailto:tammys@dop.nv.gov) or (775) 684-0104.

TT:cph/jj