Department of Administration
Division of Human Resource Management

Genetic Information Nondiscrimination Act (GINA)

Employment Provisions Guide for State of Nevada Executive Branch Agencies

August 2023

Under the Genetic Information Nondiscrimination Act of 2008 (GINA), it is illegal to discriminate on the basis of genetic information. The federal regulations for the employment provisions of GINA became effective on November 21, 2009. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers from acquiring genetic information and strictly limits the disclosure of genetic information.

The Equal Employment Opportunity Commission (EEOC) enforces Title II of GINA (genetic discrimination in 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." (U.S. Equal Employment Opportunity Commission)

This guide is not a substitute for legal advice and is subject to change without notice. If you need specific information regarding GINA, consult your human resources staff, the Division of Human Resource Management (see Resources), your agency's attorney or the Equal Employment Opportunity Commission.

WHAT IS GENETIC INFORMATION?

GENETIC INFORMATION IS

Genetic information, as defined by GINA, includes information about:

- An individual's genetic tests;
- The genetic tests of an individual's family members (see Family Members);
- The manifestation (see Manifestation) of disease or a condition in family members (see Family Members) of an individual (family medical history);
- An individual's request for or receipt of genetic services or participation in clinical research that includes genetic services by the individual or a family member (see Family Members) of the individual; or
- The genetic information of a fetus carried or legally held (assisted reproductive technology) by an individual or by a family member (see Family Members) of the individual.

Examples of genetic tests would include tests for the predisposition to or increased risk of acquiring certain forms of colon cancer, carrier screening to determine risk of transmission of a gene to a child (e.g., cystic fibrosis, sickle cell anemia, spinal muscular atrophy, fragile X syndrome), DNA testing to detect genetic markers that are associated with information about ancestry, DNA testing that reveals family relationships (paternity) or tests that detect genotypes, mutations or chromosomal changes that indicate how an individual will react to a drug or a particular dosage of a drug.

Any genetic component of a manifested disease, disorder, or pathological condition is subject to GINA.

FAMILY MEMBERS

Family members include dependents as a result of marriage (i.e., spouse) or adoption.

MANIFESTATION (MANIFESTED)

Manifestation or manifested means an individual has been or could reasonably be diagnosed with the disease or condition. A disease or condition is not manifested if the diagnosis is based principally on genetic information.

GENETIC INFORMATION IS NOT

Genetic information does not include information about an individual or family member's (see Family Members):

- Sex;
- Age; or
- Race or ethnicity that is not derived from a genetic test.

In general, medical information about an individual's own manifested (see Manifestation) disease or condition is not genetic information as defined by GINA.

Examples of tests that are not genetic tests would include a test for a virus that is not composed of human DNA, RNA, proteins or metabolites (e.g. HIV test), liver function tests, cholesterol tests, blood glucose tests or testing for infectious and communicable diseases that may be transmitted through food handling.

A test for the presence of alcohol or illegal drugs is not a genetic test.

PROHIBITED ACTS

REQUESTING OR RECEIVING GENETIC INFORMATION

Receiving genetic information, whether requested or not, can be a violation of GINA. Remember that intent to acquire genetic information is not necessary to establish a GINA violation. Managers, supervisors and human resources need to be careful not to ask about family medical history, as a verbal question can potentially be a violation of GINA.

"SAFE HARBOR" LANGUAGE

Recognizing that some legitimate requests for medical information may unintentionally result in an employer being given genetic information, the federal regulations outline a "safe harbor" provision for inadvertent receipt of genetic information. The safe harbor provision is language that can be provided to an employee and/or the medical provider that protects the agency from GINA liability due to the inadvertent receipt of genetic information.

The federal regulation 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.

For the safe harbor language to protect an agency from liability, the warning language needs to be provided with the request for medical information.

FORMS

The "safe harbor" language has been included in the Division of Human Resource Management's (attendance and leave related) forms where appropriate.

The Sick Leave Documentation – GINA Warning form (NPD-82) has been developed to provide (and document) the "safe harbor" warning language when medical documentation is requested of an employee for his or her leave due to his or her own illness and/or injury without the use of a form with the "safe harbor" language (e.g., FMLA Certification of Health Care Provider for Employee's Serious Health Condition). The form allows the warning to be presented to an employee (to be communicated to the employee's health care provider by the employee) by two

possible methods. The form can be presented to the employee to be read and signed. Additionally, if the employee is not physically present (e.g., telephone conversation) 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 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.

WHEN A WARNING IS NOT NECESSARY

The warning language is not necessary if an employer's request was "not likely to result in the employer obtaining genetic information."

For example, a supervisor who asks an employee to provide a doctor's note explaining a five-day absence will not violate GINA if the health care provider includes the family medical history taken as part of the employee's medical examination, even if the employer has not warned the employee or the doctor against providing genetic information.

WHEN A WARNING IS MANDATORY

Because acquiring (including requesting) genetic information is prohibited, when a health care provider performs a medical examination controlled (chosen and/or paid for) by the State or an agency (e.g. fitness for duty examinations, post offer medical examinations), the health care provider must be instructed not to collect genetic information including family medical history during or as part of the examination.

Additionally, an agency must take additional reasonable measures within its control if it learns that genetic information is being requested or required by a health care provider. The reasonable measures to be taken against a health care provider will depend upon the circumstances; however, they may include no longer using the health care provider for these types of examinations.

WHEN CAN GENETIC INFORMATION BE REQUESTED OR RECEIVED?

GINA allows for requesting or receiving of genetic information in the following six circumstances:

INADVERTENT

Examples of inadvertent receipt would include:

- Where a supervisor overhears someone talking about a family member's illness;
- In response to a general inquiry about the individual's or family member's well-being (e.g., "How are you?", "How is your son feeling today?"); or

- An unsolicited email message.

However, receiving genetic information inadvertently does not permit an agency to inquire further.

This exception also includes lawfully requesting documentation about an employee's current medical condition. However, unless the request was "not likely to result in the employer obtaining genetic information" the recommended warning language should be provided, see "Safe Harbor" Language.

WELLNESS PROGRAM

Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by an employer on a voluntary basis, if certain specific requirements are met.

See 29 CFR § 1635.8(b)(2) for more information.

DOCUMENTATION FOR LEAVE DUE TO A FAMILY MEMBER

Proof (i.e., medical documentation) that an employee is entitled to leave to care for a family member due to a medical condition under the Family and Medical Leave Act (FMLA), State law or regulation (e.g., NAC 284.558, 284.566) or employer policy may require an employee to provide family medical history to his or her agency and is permitted under this exception.

COMMERCIALLY & PUBLICLY AVAILABLE

Genetic information may be acquired through commercially and publicly available documents like newspapers or electronic media, as long as an agency 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). This exception does not apply if the genetic information is obtained through any of the following sources:

- Medical databases, court records or research databases available to scientists on a restricted basis;
- Sources with limited access (i.e., those that require permission to access from a specific individual or where access is conditioned on membership in a group);
- Commercially and publicly available sources that were accessed with the intent to obtain genetic information; or
- A source that it is likely to provide genetic information.

GENETIC MONITORING PROGRAM

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. In order for this exception to apply:

- Written notice of the monitoring and the employee's monitoring results must be provided to the employee;
- The employee must not be retaliated or otherwise discriminated against due to his or her refusal to participate in genetic monitoring that is not required by federal or State law; and
- Such monitoring would have to:
    - Be either required by federal or State law or regulation; or
    - Be conducted only where the employee gives prior knowing, voluntary and written authorization. The authorization form must:
        - Be written so that the employee is reasonably likely to understand the form;
        - Describe the genetic information that will be obtained; and
        - Describe the restrictions on disclosure of genetic information.
- Be conducted in compliance with any federal or State genetic monitoring regulations; and
- Report the results of the monitoring, excluding any licensed health care professional or board certified genetic counselor involved in the genetic monitoring program, only in aggregate terms that do not disclose the identity of specific employees.

LAW ENFORCEMENT FORENSICS

Acquisition of employees' genetic information by agencies who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted. However, the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

HARASSMENT

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, offhand comments, or isolated incidents that are not very serious, harassment is illegal when it is so severe or pervasive that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the individual being fired or demoted). A harasser can be the individual'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.

DISCRIMINATION

The law prohibits 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.

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.

CONFIDENTIALITY

Genetic information about applicants or employees must be kept in confidential medical files separate from personnel files. However, genetic information may be kept in the same file as other confidential medical information.

WHEN GENETIC INFORMATION CAN BE DISCLOSED

Genetic information may be given:

- To the employee, if requested in writing;
- To an occupation or health researcher, in compliance with federal regulations;
- In response to a court order;
- To a government official investigating compliance;
- In connection with the certification provisions of the Family and Medical Leave Act; or
- To a public health agency, after notice, dealing with a contagious disease that presents an imminent hazard of death or life-threatening illness.

RESOURCES

Department of Administration – Division of Human Resource Management

- Equal Employment Opportunity

  (775) 684-0104

  tammys@admin.nv.gov
- Employee & Management Services

  (775) 684-0111

  cphughes@admin.nv.gov

Equal Employment Opportunity Commission

(800) 669-4000

TTY (800) 669-6820

info@eeoc.gov

REFERENCES

- U.S. Equal Employment Opportunity Commission, Regulations Under the Genetic Information Nondiscrimination Act of 2008, Final Rule, Federal Register, Vol. 75, No. 216, November 9, 2010

- U.S. Equal Employment Opportunity Commission, Laws, Regulations & Guidance, Types of Discrimination, Genetic Information Discrimination, accessed July 20, 2011

- U.S. Equal Employment Opportunity Commission, Questions and Answers for Small Businesses: EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008, accessed December 29, 2011

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