

# **FEDERAL BENEFITS UPDATE 2010**

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## **Genetic Information Nondiscrimination Act of 2008 (GINA)**

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- a) Prohibits employment discrimination on the basis of genetic information
- b) applies to private sector employers with 15+ employees and most public sector employers

### **“Genetic Information” Defined**

“Genetic Information” is any information about:

- (1) the genetic tests of the individual employee
- (2) the genetic tests of family members of such employee; and
- (3) the manifestation of a disease or disorder in family members of such employee

→ Genetic Information does NOT include the employee’s sex or age. Also note that in its definition of “genetic information” GINA does not include the manifestation of a disease or disorder of the individual employee.

### **Prohibited Actions**

1. Under Title II of GINA it is unlawful for genetic information to be the basis for any of the following actions of an employer:
  - a. decision not to hire an individual
  - b. decision to terminate an employee
  - c. any decision that affects the employee’s position, wages or benefits
  - d. limiting, segregating or classifying the employee in any way that would deprive the employee of employment opportunities or benefits
  - e. harassment of an employee or job applicant on the basis of genetic information or genetic status (this includes behavior by the employer, supervisor, co-worker, or someone else with whom the employee interacts in the workplace)
2. It is also unlawful for an employer to fire, demote, harass or otherwise retaliate against an applicant or employee for:
  - a. complaining of discrimination
  - b. participating in an official discrimination proceeding; or
  - c. otherwise opposing discrimination based on genetic information

### **Acquiring Genetic Information Generally Prohibited with Exceptions**

→ It is an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee, except under the following circumstances:

- a. “water cooler exception” where an employer inadvertently requests or requires family medical history of the employee or family member of the employee (e.g. when the employer incidentally learns of a family member’s illness)
- b. where genetic information is obtained as part of health or genetic services, including wellness programs, offered by the employer and...
  - i. the employee provides prior, knowing, voluntary and written authorization
  - ii. only the employee and health care professional receive individually identifiable information about the results of service
  - iii. the genetic information is available only for the purpose of the service; and
  - iv. no identifying information is disclosed to the employer
- c. where genetic information is acquired as part of the certification process for leave under the FMLA, or similar state or local laws, where the employee is asking for leave to care for a family member with a serious health condition
- d. acquisition through commercially and publicly available documents is permitted, as long as the employer is not searching those documents with the intent of finding genetic information
- e. acquisition through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace is permitted where the monitoring is required by law or, under carefully defined conditions, and where the program is voluntary; and/or
- f. acquisition of genetic information by employers who engage in DNA testing for law enforcement purposes, such as a forensic lab, or for purposes of human remains identification

**Privacy Requirements in Maintaining Employee Genetic Information**

- 1. If an employer possesses genetic information about an employee, such information shall be maintained on separate forms and in separate medical files and be treated as a confidential medical record of the employee. Employers may not disclose genetic information except under the following circumstances:
  - a. to the employee (or family member if he/she is receiving the genetic service) at the written request of the employee
  - b. to an occupational or other health researcher for certain research projects that are being conducted in compliance with Federal regulations
  - c. in response to a court order (the employer shall inform the employee of the order and any genetic information that was disclosed pursuant to such order)

- d. to government officials who are investigating compliance with GINA if such information is relevant
  - e. to the extent such disclosure relates to an employee's certification process for FMLA leave (or leave under similar state or local laws), where an employee is asking for leave to care for a family member with a serious health condition; and/or
  - f. information on the manifestation of a disease or disorder in family member(s) of an employee to a Federal, State, or local public health agency as it concerns a contagious disease that presents an imminent hazard of death or life-threatening illness (and the employee whose family member(s) is or are the subject of a disclosure under this paragraph is notified of such disclosure)
2. Relationship to HIPAA:
    - a. GINA amends HIPAA to specifically state that genetic information is considered medical information subject to the same privacy protections. Also, HIPAA now specifies that genetic information without a current diagnosis is not a pre-existing condition
    - b. GINA specifically provides that it does not prohibit a covered entity under HIPAA from any use or disclosure of health information that is authorized for the covered entity under HIPAA regulations

#### **GINA amends ERISA (Restrictions on Employer-Sponsored Health Insurance)**

1. GINA prohibits discrimination based on genetic information by ERISA-covered group health plans. Group health plans and health insurers may not adjust premium or contribution amounts based on genetic information.
2. Health insurers may not request or require an individual or family member to undergo a genetic test, except:
  - a. for the purpose of making payment determinations and the request seeks the minimum amount of information; and
  - b. for research purposes under certain circumstances
3. Health insurers cannot request, require, or purchase an individual's genetic information prior to his or her enrollment under the plan or coverage; obtaining genetic information incidental to the collection of other information will not be considered a violation

#### **GINA is Governed by the EEOC**

1. EEOC is responsible for enforcing GINA and for issuing regulations to implement the Act

2. The EEOC published a Notice of Proposed Rulemaking on March 2, 2009 and the public comment period ended on May 1, 2009; the EEOC was expected to issue final regulations by now, but the process has been delayed

### **Other Employment Laws Affected by GINA**

GINA also amends the Fair Labor Standards Act of 1938 to increase the penalty for child labor violations to \$11,000 per violation and raises potential employer liability to \$50,000 in cases of minor's death or serious injury. Such amounts may be doubled for willful violations.

### **The Family and Medical Leave Act (FMLA)**

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1. The FMLA was enacted in 1993, the first regulations came out in 1995, and other than a few court cases there were no changes to the FMLA until 2008 when the military exigency leave and military caregiver leave were enacted. The regulations for the 2008 amendments came out in 2009, just months before the most recent changes to the FMLA (for which guidelines or regulations have yet to be promulgated).
2. On October 28, 2009 the Fiscal Year 2010 National Defense Authorization Act (H.R. 2647) was signed into law and made some changes (effective immediately) to the FMLA military leave provisions.

### **Qualifying Exigency Leave**

- a. Previously, the exigency leave allowed certain family members of a National Guard or reservist up to a total of 12 weeks off to deal with the sudden call to duty.
- b. Under the new law (H.R. 2647) qualifying exigency leave benefits are expanded to include family members of active duty service members being deployed to a foreign country, regardless of war time.
  - Prior to this enactment, only family members of National Guard and Reservists called to federal [foreign] active duty during war time or national emergency were eligible for qualifying exigency leave.

### **Military Caregiver Leave**

- a. An employee may take up to 26 weeks of unpaid leave to care for a family member (spouse, son, daughter, parent, or next of kin) who is injured while serving on active military duty.
- b. Under the new law (H.R. 2647) the caregiver leave provision is expanded to include care for veterans that were in the Armed Forces (including the National Guard and Reserves) at any time during the preceding five years, who are undergoing medical treatment, recuperation or therapy for a serious injury or illness that was incurred in the line of duty on active duty in the Armed Forces (or was aggravated by their service in line of duty on active duty) and that manifested itself before or after the member became a veteran.

→ In other words: if the veteran was in the Armed Forces within the last five years and incurred an injury in the line of duty, while on active duty – or an existing injury was aggravated by the same- then the caregiver leave provision applies (whether the injury manifested itself while in the Armed Forces or after becoming a veteran).

**The Consolidated Omnibus Budget Reconciliation Act (COBRA)  
The American Recovery and Reinvestment Act of 2009 (ARRA)  
&  
The Department of Defense Appropriations Act of 2010 (DoDAA)**

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**COBRA**

Enacted in 1985, COBRA gives workers who lose their job (and thus their health benefits) the right to continue group health coverage under their employer's plan for up to 18 months (or 36 months in case of disability) by paying group rates.

**ARRA**

ARRA, enacted February 17, 2009, requires employers to temporarily subsidize certain employee's COBRA premiums.

- i. employees who lose their job are required to pay only 35% of their COBRA premium, and employers must pay the remaining 65% of the premium cost.
- ii. employers can recoup the entire subsidy by claiming it as a credit on their quarterly employment tax returns  
→ In order to allow for this, the IRS has updated its Form 941. Although the new form does not require any supporting documentation to be filed, employers should retain documents related to coverage eligibility and payment.

The following provisions of ARRA have now been changed/expanded by DoDAA:

- iii. an employee who has been involuntarily terminated can receive the employer subsidized premium reduction for up to nine months (this time period has now been extended under DoDAA, see below)
- iv. the employer subsidized premium reduction for COBRA coverage is available to employees who were involuntarily terminated between September 1, 2008 and December 31, 2009 (this date has now been extended under DoDAA, see below)
- v. because the law retroactively applies to employees terminated as of September 2008, employers were to have notified eligible former employees of their right to buy subsidized COBRA benefits by April 18, 2009

## DoDAA

On December 19, 2009 (DoDAA) was enacted and contained a provision that extended the period during which involuntary terminations would trigger subsidy eligibility, as well as expanded the duration of the subsidy.

- i. an employee who has been involuntarily terminated can now receive the employer subsidized premium reduction for up to 15 months, rather than nine; this includes individuals currently receiving subsidized COBRA coverage
- ii. the December 31, 2009 deadline has been extended, and now the employer subsidized premium reduction is available to employees who were involuntarily terminated between September 1, 2008 and *February 28, 2010*
- iii. The Act resolves a thorny issue created by the language of the ARRA regarding eligibility for the subsidy:
  1. ARRA required that, for an individual to be eligible for the subsidy, both the qualifying event and the beginning of the COBRA coverage period had to occur on or before the deadline of December 31, 2009.
    - This meant that individuals whose employment terminated in December and coverage expired on December 31, but whose COBRA coverage commenced on January 1, would not have been eligible.
  2. DoDAA changes this by conditioning subsidy eligibility solely on the timing of the qualifying event, which is the event causing the loss of coverage.
    - Assistance-eligible individuals who experience an involuntary termination (a qualifying event) on or before February 28, 2010 would be eligible for the subsidy (even if their COBRA coverage would not start until March).
- iv. DoDAA protects individuals who, before DoDAA, exhausted their nine months of subsidized COBRA coverage and then did not continue coverage by paying full COBRA premiums, by providing for a transition period, during which those individuals would be able to pay premiums retroactively (at the subsidized rate) if they do so by a certain date – the later of February 19, 2010, or 30 days from receipt of a new required notice.
- v. DoDAA allows employers to apply the same refund or crediting rules that were in ARRA for those assistance-eligible individuals who exhausted their nine-month subsidy but continued to pay the full COBRA premium in order to keep coverage in place.
- vi. Plan administrators will be required to issue a notice describing the new subsidy rules to all individuals who were or are assistance-eligible individuals on or after October 31, 2009, or who are terminated from employment on or after October 31, 2009.

1. Additionally, DoDAA requires special notice to those assistance-eligible individuals who either dropped COBRA or paid the full premium for it when their nine-month subsidy ended

→ This notice must explain that they are now eligible either to reinstate their coverage retroactively at the subsidized rate or to receive a credit or refund if they paid more than the Act would have required.

## Health Insurance Portability and Accountability Act of 1996 (HIPAA)

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- a) HIPAA governs the uses and disclosures of private health information (PHI).
  - b) All covered entities must be in compliance. A “Covered Entity” is a health care provider or health plan administrator.
  - c) In general, employers ARE NOT covered by HIPAA, except in those instances when an employer also provides health care or administers a health plan for its employees
    - i) such employers are called “hybrid” employers, and are only covered by HIPAA when acting as the health care provider or health plan administrator – but NOT in purely employment functions
  - d) To determine if HIPAA applies (to you, the employer):
    - (1) Do you provide health care to your employees or are you the administrator of a health plan for your employees? → if no, then you are not covered by HIPAA; if yes, then you *may* be covered and must determine Question 2.  
→ Note: *providing* (or sponsoring) and *administering* a health plan are not the same- you may provide, or make available (or sponsor) a health plan for your employees but a third-party may administer it – in which case you would not be covered by HIPAA. But, if you directly gather PHI from your employees for the health plan (for example, to get a new employee on the health plan), then you are administering it and are covered by HIPAA.
    - (2) What position did the employer play when it obtained the employee’s health information?
      - (a) Was it acting as a health care provider or an administrator of the group health plan? (if yes, then HIPAA applies)
- For example, if the employer is obtaining information for a group health plan, then it is acting as an administrator of a health plan and the information is protected by HIPAA.

-OR-

- (b) Was it acting as an employer? (if yes, then HIPAA does not apply)

→ That is, if the employer is making hiring, firing, promotion, or payment decisions when it receives the information, then it is acting as an employer and the information is not protected by HIPAA. (For example, if the employer obtains the information for FMLA certification, this is an employer function, as FMLA leave is an employment decision.)

- e) Workers Comp carriers are NOT covered entities under HIPAA
- f) medical information may initially be (PHI) under HIPAA, but once an employer receives the information (as an employer), then it is no longer PHI.

## **NEW EEOC POSTER**

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- i. With these new developments, employers need to obtain a new Federal "Equal Employment Opportunity in the Law" poster, which contains the new FMLA provisions, as well as the July 2009 federal minimum wage increase and the new information about GINA (Genetic Information Non-discrimination Act of 2008).
- ii. The new posters were to be posted by November 21, 2009.
- iii. Posters can be obtained directly from the Equal Employment Opportunity Commission, at [www.eeoc.gov](http://www.eeoc.gov) or various private sites, such as [www.calbizcentral.com](http://www.calbizcentral.com).

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