



GENETIC INFORMATION NONDISCRIMINATION ACT *AND ITS EFFECT ON ABSENCE MANAGEMENT*

Agenda

- Introductions
- GINA Overview
- Limitations on Employer Acquisition of Genetic Information
 - Violations and Exceptions
 - Forms and Safe Harbor Language
 - Confidentiality Requirements
 - HIPAA Relation
- Scenarios
- Critical Steps for Employers
- Question / Answer

Introductions



- **Marti Cardi, Chief Compliance Officer**

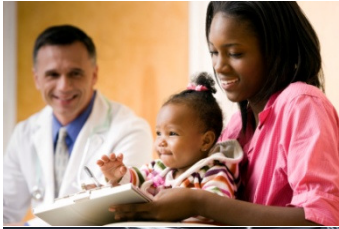
- Seasoned employment law attorney with over 25 years in private practice and as in-house counsel, representing management
- Leave-of-absence experience includes legal advice and counsel on FMLA and state leave laws, ERISA disability claims, ADA reasonable accommodations and claims assessment, GINA, USERRA . . .
- Additional experience includes management of employment litigation and EEO charges, wage & hour compliance, discrimination claims, drafting and audits of personnel policies, HR and management training . . .
- As CCO at Reed Group Marti is responsible for ensuring that company services and products are provided in compliance with state and federal leave laws



- **Kevin Curry, Senior VP Client Services, National Practice Leader**

- Absence management expert with experience in strategy, design, development and implementation of best-practice solutions to industry needs
- More than 20 years of experience in disability management and consulting
- Respected former senior absence management consultant in Mercer's Total Health Management practice, helping numerous employers achieve cost reduction and productivity improvements in FMLA, disability and employee absence management activities
- As National Practice Leader, he informs on the creation and innovation of clinical case management services, leave of absence administration and software offerings at Reed Group





GINA OVERVIEW

GINA – Fast Facts

- Genetic Information Nondiscrimination Act of 2008
 - Effective as of November 21, 2009
 - EEOC issued final regulations interpreting GINA, effective Jan. 10, 2011
 - Title II: Adds Genetic Information as a protected class to employment discrimination law
 - Prohibits discrimination in employment decisions based on Genetic Information
 - Prohibits retaliation and, by EEOC interpretation, also prohibits harassment based on Genetic Information
 - Does not allow “disparate impact” claims
 - Title II: Requires special procedures with respect to acquiring, handling, and disclosing Genetic Information
 - Title I: Prohibits discrimination in health care coverage (not covered today)



Employer requirements related to leave of absence

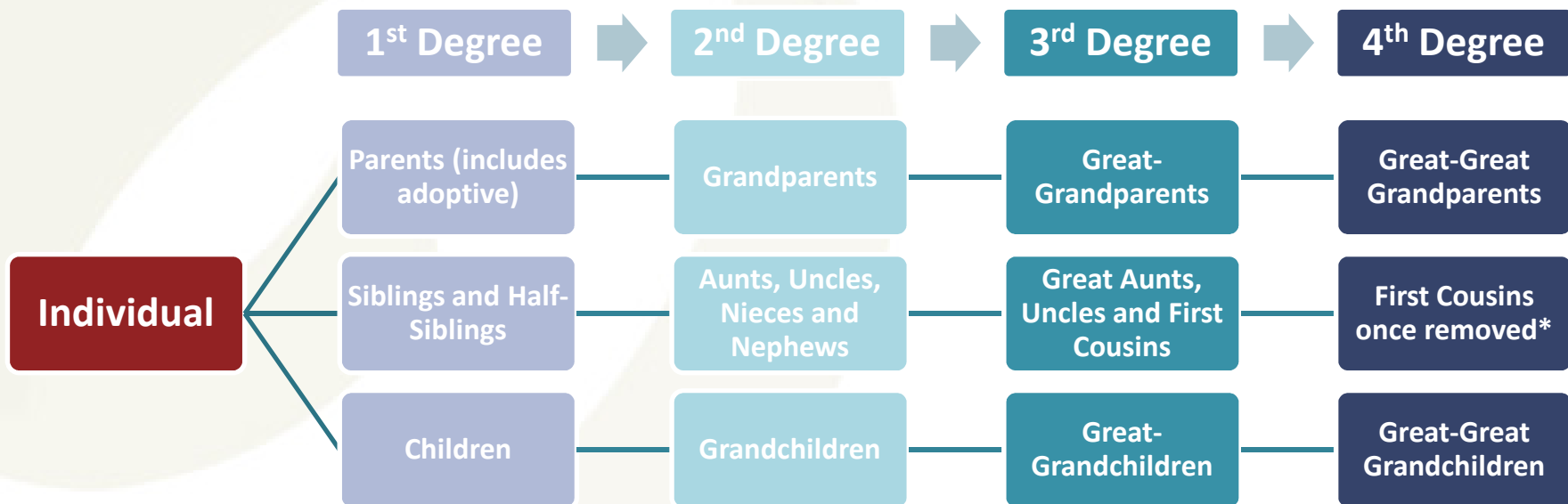
- Refrain from requesting, requiring, or purchasing “Genetic Information” (as uniquely defined by GINA) of an employee or the employee’s family members, except in narrow circumstances
- Include special “safe harbor” language on permitted requests for medical information
- Direct healthcare providers not to solicit Genetic Information during job-related medical examinations
- Protect Genetic Information from disclosure except in narrow circumstances
- Segregate Genetic Information from other personnel records and files

Interpreting “Genetic Information”

- Definition of “Genetic Information” in GINA is extremely broad
 - Results of genetic tests for an individual and/or his relatives
 - “Family medical history”, which means “the manifestation of disease or disorder in family members of such individual”
 - An individual’s or family member’s request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services
 - Genetic information of a fetus or embryo carried or legally held by the individual or family member
 - 29 C.F.R. § 1635.3(c)(1)
- The disease or disorder that constitutes Genetic Information does not have to be hereditary
- Genetic Information does not include sex or age, or information about the race or ethnicity of the individual or family members that is not derived from a genetic test
 - 29 C.F.R. § 1635.3(c)(2)

GINA “Family Members”

- Includes obvious relatives such as parents, children and siblings
- Also includes adoptive relatives and dependents, and “any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative of such individual or of an individual” – such as uncles, great-great grandmothers, and first cousins once removed.
- 29 C.F.R. § 1635.3(a)



* Children of individual's first cousin



LIMITATIONS ON EMPLOYER ACQUISITION OF GENETIC INFORMATION

Limitations on Acquisition of Genetic Information

- Under GINA the simple act of acquiring Genetic Information about employees or their family members may constitute a violation of the Act. 29 C.F.R. § 1635.8(a).
- Generally, GINA prohibits employers from requesting, requiring, or purchasing an applicant's or employee's Genetic Information.
- A "request" may include
 - conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information;
 - actively listening to third-party conversations
 - searching an individual's personal effects for the purpose of obtaining genetic information; and
 - making requests for information about an individual's health in a way that is likely to yield genetic information
 - 29 C.F.R. § 1635.8(a).

Exceptions to GINA Violations upon Acquisition

An employer *inadvertently* requests or requires Genetic Information of the individual or family member of an individual

- 29 C.F.R. § 1635.8(b)(1)
- This “inadvertence” exception may apply to:
 - A request for medical information pursuant to law
 - E.g., leave requests under the FMLA to attend to the *employee’s own serious health condition* or to comply with a fitness-for-duty certification requirement
 - A request for documentation to support a request for leave not governed by law
 - The documentation required must comply with the ADA and other laws limiting employer access to medical information
 - A request for documentation to support a request for a reasonable accommodation under law
 - If need is not obvious, documentation is limited to the impairment at issue
 - IMPORTANT: These requests for medical information must be accompanied by “safe harbor” language or the acquisition is not inadvertent. *More later . . .*

Inadvertent Acquisition Exceptions

Additional examples of *inadvertent* acquisition of Genetic Information

- A supervisor inadvertently overhears a conversation between the employee and others
- Information acquired in response to an ordinary expression of concern for the employee's well-being (e.g., "how are you?" or "how is your mother doing?") compared to active probing for information
- A supervisor learns genetic information from the individual or a third-party without having solicited or sought the information
- A manager learns genetic information from a social media platform which he or she was given permission to access by the creator of the profile
- 29 C.F.R. § 1635.8(b)(1)



Other Exceptions

Other exceptions to the acquisition of Genetic Information considered violations

- Information requested to support a leave of absence to care for an ill family member
 - e.g., FMLA time or company policy that allows use to care for a sick family member
- Part of health or genetic services and wellness programs provided on a voluntary basis (Note: extensive conditions apply to this exception)
- Information obtained from commercially and publicly available sources such as newspapers, magazines, and electronic sources
- Part of genetic monitoring required by law or provided on a voluntary basis
- Employers who conduct DNA testing for law enforcement purposes as a forensic lab or for human remains identification
- 29 C.F.R. § 1635.8(b)(2)–(6)

GINA Safe Harbor Language

For the acquisition of Genetic Information in response to a request for medical information to be considered “inadvertent”

- The request for medical information must be accompanied by a warning *to the employee and to any health care provider(s)* from whom the employer is requesting medical information not to provide Genetic Information.
- “Safe harbor” language is provided by the regulations:
 - *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 employees or their family members. In order 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 C.F.R. §§ 1635.8(b)(1)(A)and(B)



GINA Safe Harbor Language cont.

- Warning may be in writing or oral if the employer typically does not make requests in writing
- This specific language is not mandatory as long as another similar statement accomplishes GINA's purpose
- Failure to use safe harbor language:
 - Receipt of genetic information may still be “inadvertent” if the request for medical information was narrowly tailored and not “likely to result in a covered entity obtaining genetic information”
 - 29 C.F.R. §§ 1635.8(b)(1)(A) and (B)

Safe Harbor Language and FMLA Forms

- Certification for Employee's serious health condition:
 - EEOC has not taken a position on whether its medical certification forms require “safe harbor” language to make acquisition of Genetic Information “inadvertent.”
 - Don't be the test case: add the language to employee FMLA forms
- Certification for a family member's serious health condition:
 - GINA specifically exempts acquisition of Genetic Information
 - for a leave law or company policy that permits the use of leave to care for a sick family member
 - that requires information about the health condition of the family member to substantiate the need for leave
 - 29 C.F.R. § 1635.8(b)(3)

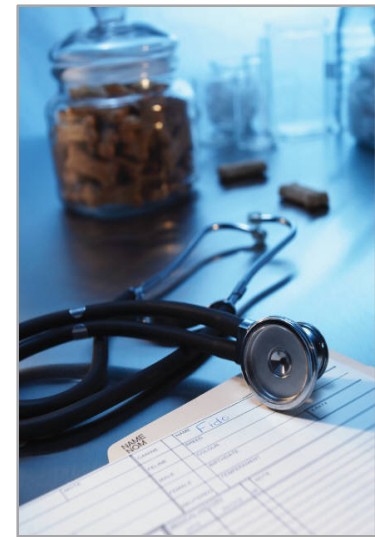


Safe Harbor Language and FMLA Forms cont.

- Recommendation on certification for a family member's Serious Health Condition: Use GINA safe harbor language adding something similar to:
 - *“Genetic Information may be provided with respect to leave to care for a family member with a serious health condition, if necessary to substantiate the need for the leave of absence.”*
- OR
- *“Genetic Information may be provided with respect to leave to care for a family member with a serious health condition, if failure to provide the information will result in an incomplete or insufficient certification.”*

Employment-Related Medical Examinations

- The prohibition on acquisition of Genetic Information, including family medical history, applies to medical examinations related to employment, such as:
 - Fitness-for-duty certifications
 - Post-offer examinations
 - Requests for medical information to support an ADA accommodation request
- The employer must specifically tell health care providers not to collect Genetic Information as part of a job-related examination
- Also include the safe harbor language
- If an employer learns that Genetic Information is being requested by the Health Care Provider the employer must take measures to discourage this practice, including perhaps declining to use the services of the health care provider
 - 29 C.F.R. § 1635.8(d)



Enforcements and Remedies for GINA Violations

- Follows Title VII scheme:
 - Employee must file a charge alleging GINA violation with EEOC
 - EEOC will follow charge management procedures
 - EEOC will issue right to sue notice if charge is not resolved in the administrative process
- Remedies also follow Title VII and 42 U.S.C. § 1981(a):
 - Reinstatement, injunctive relief, back pay, compensatory and punitive damages (capped at \$300,000), attorneys' fees, and costs.

GINA Confidentiality Obligations

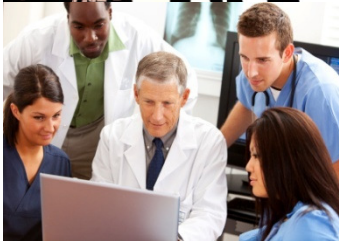
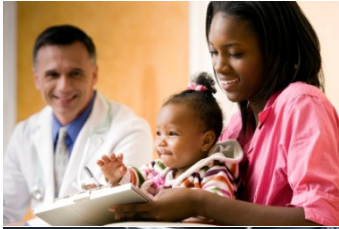
GINA imposes substantial limitations on handling and disclosure of Genetic Information:

- Genetic Information must be regarded and handled as a confidential medical record and filed separately from regular personnel files. 29 C.F.R. § 1635.9(a)(1), (2)
- Genetic Information acquired by the employer may not be disclosed except as provided in the regulations, including :
 - To the employee, (or to a family member receiving genetic services) if requested in writing by the employee or family member
 - To an occupational or other health researcher if the research is conducted in compliance with federal regulations
 - In response to a court order, but only to the extent expressly identified by order
 - To government officials investigating compliance with GINA
 - To support an employee's compliance with the requirements for a medical leave of absence
 - To a public health agency regarding the manifestation of a contagious disease that presents an imminent hazard of death or life-threatening illness
 - 29 C.F.R. § 1635.9(b)(1)–(6)



Relationship to HIPAA Privacy Regulations

- HIPAA rules supersede GINA rules regarding Genetic Information that also constitutes protected health information (PHI)
- An entity subject to HIPAA (most employers are not) must continue to comply with HIPAA regarding privacy and disclosure rules
- Health Care Providers (HCPs):
 - Are not subject to GINA as an HCP
 - Will still require HIPAA-compliant releases to share PHI
 - Expect lack of cooperation from HCPs regarding GINA safe harbor requests



SCENARIOS FOR INTERPRETATION



Scenarios Open for Interpretation

Case #1

- **A Healthcare Provider is performing a fitness-for-duty examination for an employee who suffered a heart attack for the first time**
 - The HCP discovers during the course of the examination that the employee has a history of heart disease in his family, affecting his opinion of the employee's ability to return to full duty in a demanding high-stress position

Scenarios Open for Interpretation

Case #2

- **The colleague of an employee who is out on disability under the employer's policy reports to her supervisor that she met the employee's family while visiting him in the hospital**
 - In the course of regular conversation, the employee's sister revealed that their father suffered from substance abuse



NEXT STEPS FOR EMPLOYERS



Next Steps for Employers

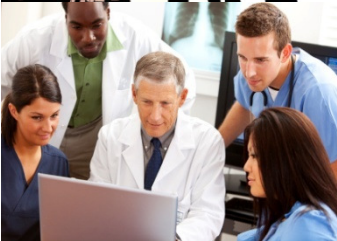
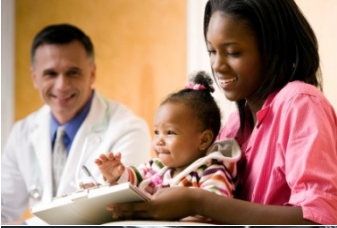


- Update employment policies and procedures to ensure that Genetic Information is listed as a protected class in nondiscrimination policy
- Revise policies regarding recruiting, background checks, etc. to prohibit internet and social media searches that might yield Genetic Information
- Review company-sponsored wellness programs to ensure that provision of Genetic Information, including family medical history, is voluntary and that financial incentives are not conditioned upon providing such information
- Develop procedures to respond to requests for files with medical information:
 - ✓ Determine whether file contains Genetic Information as defined by GINA
 - ✓ Assess whether disclosure pursuant to the request is permitted under one of the six exceptions to confidentiality
- Post notice of GINA rights in the workplace <http://bit.ly/ginaposter>

Next Steps for Employers cont.

- Provide training to employees on GINA, especially HR personnel, managers, and supervisors to understand what permitted and prohibited “requests” for Genetic Information may include
- Update medical request forms or prepare a supplement to issue with the forms to include the GINA safe harbor language
 - ✓ FMLA certifications
 - ✓ ADA requests
 - ✓ Attending Physician Statements for STD, LTD, EIB or Pension Disability Benefits
 - ✓ Fitness-for-duty certifications
 - ✓ Forms or requests’ required for company medical-based leaves of absence for the employee or to care for a family member
- If Genetic Information is acquired, be sure it is stored in files separate from regular personnel files, with access limited to need to know status
- Reed Group has implemented the above practices for clients
 - ✓ CCO and team continually monitoring GINA developments





Q & A

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Additional Resources

- Additional reading & resources:
 - M. Cardi, *FMLA Update*, “GINA final regulations: new absence management requirements for employers”, <http://www.reedgroup.com> (January 31, 2011)
 - EEOC GINA Website at <http://www.eeoc.gov/laws/types/genetic.cfm>
 - GINA Rights in the Workplace Poster <http://bit.ly/ginaposter>
 - P. Gordon, *Workplace Privacy Counsel*, “10 Steps For Avoiding GINA Violations”, <http://privacyblog.littler.com/2010/11/articles/genetic-information/10-tips-for-avoiding-gina-violations/> (November 29, 2010)

