

# Five years on: How to comply with the GINA genetic information law

The Genetic Information Nondiscrimination Act (GINA), enacted in 2008, prohibits employers from discriminating against employees on the basis of their genetic information.

**THE LAW:** In addition to prohibiting discrimination, Title II of GINA bans harassing employees based on their genetic information. It also protects employees from retaliation for exercising their GINA rights.

GINA defines genetic information as “information about an individual’s genetic tests and the genetic tests of an individual’s family members, as well as information about the manifestation of a disease or disorder in an individual’s family members (i.e., family medical history).”

**WHAT’S NEW:** The EEOC has filed its first two GINA class actions against employers that allegedly collected and used genetic information in hiring and firing decisions. Tulsa, Okla.-based Fabricut settled both ADA and GINA charges for \$50,000 after it failed to hire a woman it perceived as having carpal tunnel syndrome. The company had requested a family medical history as part of its post-offer medical exam.

Corning, N.Y.-based Founder’s Pavilion, Inc., also faces a GINA lawsuit in which the EEOC alleges the company asks for extensive family medical history during its pre-employment physical. The EEOC claims the company refused to accommodate a disabled employee during a probation period, refused to hire two others because of perceived disabilities and either refused to hire or fired three women because they were pregnant.

**HOW TO COMPLY:** GINA transgressions often violate the ADA’s “perceived as disabled” measures. The law generally prohibits employers from obtaining an employee’s genetic information, but EEOC regulations carve out six specific exceptions:

1. Inadvertently acquiring genetic information do not violate GINA.
2. Genetic information (such as family medical history) may be obtained as part of health or genetic services, including voluntary wellness programs offered by the employer.
3. Family medical history may be acquired as part of the certification process for FMLA leave, when an employee asks for leave to care for a family member.
4. Genetic information may be acquired through commercially and publicly available documents like newspapers, as long as the employer is not searching those sources in order to find genetic information.
5. Genetic information may be acquired through a genetic monitoring program targeting the biological effects of toxic substances in the workplace where the monitoring is required by law or (under carefully defined conditions) is voluntary.
6. Acquisition of genetic information of employees by employers that engage in DNA testing for law enforcement purposes is permitted, but the genetic information may only be used for quality control purposes.

## Inadvertent acquisitions

Employers that overhear or accidentally discover an employee’s genetic information may not use it to

discriminate.

Train supervisors about the GINA regulations so they know how to recognize and treat genetic information when they encounter it.

## **Wellness programs**

Employees may voluntarily provide genetic information to further a wellness program, but don't have to.

Train employees and contractors who administer wellness programs not to pressure participants for genetic information.

## **Other genetic information**

Random drug testing, pre-hiring physical exams or workers' compensation evaluations may provide employee genetic information. Employers may not use it to discriminate against the employee by denying employment, promotions or full participation in any benefit of employment. Keep all genetic information in the employee's confidential file.

## **GINA 'safe harbor' for medical certifications**

GINA regulations grant employers a "safe harbor" for collecting genetic information while obtaining medical certification of an employee's need for FMLA leave or ADA reasonable accommodations. When requesting medical information from medical professionals, include the following statement:

"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."

This safe harbor language should also be on all requests for employee medical information such as for fitness-for-duty determinations. Update all forms to ensure they contain this language.

**Important note:** If the leave request pertains to an immediate family member's serious health condition, do not include the safe harbor language. By definition, the provider must provide family member medical information.