



# Fine Print

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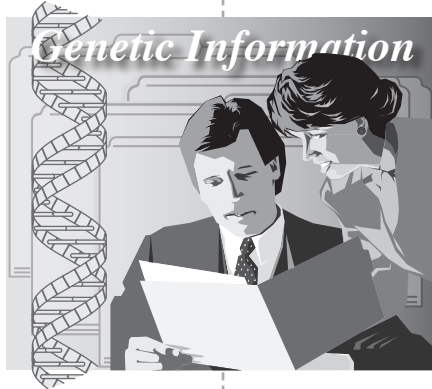
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## Law Will Ban Employers from Using Genetic Information To Make Employment Decisions

By Patricia F. Weisberg

Perhaps you currently employ someone whose chronic disease has caused your group medical insurance rates to skyrocket. If you learn, based upon genetic testing information, which of your potential hires is prone to develop a chronic illness in the future, can you legally use that information to make employment decisions?

The answer is “no,” and by November 21, 2009, when the Genetic Information Non-Discrimination Act (GINA) goes into effect, you must be in compliance. GINA prohibits employers with 15 or more employees, employment agencies, labor organizations and insurance carriers from discriminating against persons based upon genetic information indicating a predisposition to chronic diseases. Among other things, GINA prevents employers from basing employment decisions upon a concern that an applicant, employee or dependent with a genetic predisposition for certain chronic medical conditions will place a financial burden on the employer’s group medical insurance plan. GINA also prohibits employers



from retaliating against employees who claim discrimination based upon the use of genetic information.

What, exactly, is genetic information? “Genetic information” is information gained from (1) an individual’s genetic tests; (2) genetic tests of family members; and (3) an individual’s family medical history. Employers will be breaking the law if, based upon such information, they discharge or refuse to hire any applicant or em-

ployee, or otherwise discriminate against an employee with respect to employment compensation, terms, conditions, or privileges.

GINA also makes it unlawful, with some exceptions, for employers to request, require, or purchase genetic information about an employee. For example, employers will not be allowed to require employees to submit to genetic testing, although such tests may be allowed as part of a wellness program, medical monitoring as required by OSHA, or employer-sponsored medical examinations where the employer will not have access to the information.

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## It’s Just Not Working Out: How to Terminate that Problem Employee

By Stacy Pollock

### What should an employer keep in mind when considering the termination of an employee?

If an employee is at risk of being terminated for poor performance or for certain actions, employers should consider the following before proceeding with termination:

- First ask, “Does the employee have a legitimate reason for his/her actions or poor performance?” If the employee has a qualifying disability, employers are encouraged to discuss with the employee the concerns and whether an accommodation would be reasonable for both parties. The employee may have protected rights to an accommodation under the law.
- When considering terminating an employee, one key is

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The law also makes it illegal for insurance carriers (including self-insured employers) to discriminate against persons based upon genetic information that indicates predisposition to chronic diseases. Likewise, GINA prohibits health insurers from requesting or requiring an individual to take a genetic test. This means that health insurers may not raise premiums or deny coverage based on genetic information.

As a practical matter, GINA will not significantly impact most employers, but to ensure you are in compliance with the law, you should:

- separate your confidential medical and health records from all other records and limit access to these records as required by the Americans With Disabilities Act;
- ask health care providers to pro-

vide only non-genetic health information (pre-employment physicals, return to work exams, etc.) about your employees;

- keep in mind workers' compensation records may have genetic data and treat them appropriately;
- make sure you do not inadvertently receive genetic information about your job applicants or employees.

In addition to addressing employment-related use of genetic information, GINA increases penalties for federal child labor law violations under the Fair Labor Standards Act (FLSA). Specifically, GINA increases the fine from \$10,000 to \$50,000 for each violation that causes death or serious injury to any employee who is under 18 years old. GINA increases other child labor law violations from \$10,000 to \$11,000 and increases the penalty for willful vio-

lations of FLSA minimum wage and overtime provisions from \$1,000 to \$1,100 for each violation.

The EEOC recently proposed rules to implement GINA and is currently seeking written comments from the public.

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**Employers should know:**

Employers who gross \$267,000 or less per year are subject to the federal rather than the Ohio minimum wage. The federal minimum wage is currently \$6.55, but will increase to \$7.25 on July 24, 2009.

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to document performance and discipline issues. The employer should consistently document the events and situations leading up to the termination as they happen and document conversations with the employee, including who was present, when the conversation took place, and what was said. The employer should also prepare a summary of the meeting and have the employee sign an acknowledgment of the conversations and the employer's actions. This acknowledgement does not mean that the employee agrees with the employer's decision.

- The employer should consider whether the termination is consistent with how other situations have been handled in the past. While the employer is not necessarily bound by its past practice in handling similar situations, consistency is recommended in order to avoid claims of discrimination and retaliation. In termination, consider whether employees within protected classes (*i.e.*, age, race, sex, national origin,

pregnancy) are treated the same as employees outside protected classes under similar circumstances.

- Employers must review any termination standards and/or procedures that may be set forth in a collective bargaining agreement, employment contract, or employee handbook. There may be notice requirements or progressive discipline procedures that must be in place prior to termination.

**How should an employer terminate an employee?**

- One goal an employer should have when actually terminating an employee is to avoid giving inconsistent statements about why the employee was terminated. The employee should be told the reason for his or her termination without the sugarcoating. This reason must be consistent with the documentation leading up to the termination.

- If possible, have a witness present at the termination.

- Remind the departing employee of any confidentiality or non-compete agreements.

**What must an employer consider after terminating an employee?**

- Employers with 20 or more employees who offer group health benefits are required to offer terminated employees temporary extension of health benefits (known as COBRA benefits) where coverage would otherwise end. Employers should notify their plan administrators within 30 days of an employee's termination.

- It is generally permissible for an employer to provide negative employment references regarding a former employee to a prospective employer. Any negative references, however, should only contain honest statements given in good faith, and employers should not seek out a prospective employer of a former employee in order to give a negative employment reference. To avoid any potential liability with providing references of a terminated employee, employers often only provide dates of employment and positions held.

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