



DEPARTMENT OF THE ARMY
U. S. ARMY MEDICAL COMMAND
2050 WORTH ROAD, FORT SAM HOUSTON, TEXAS 78234-6013

MCEE

29 March 2010

MEMORANDUM FOR Chiefs of Staff, MEDCOM Major Subordinate Commands

SUBJECT: Genetic Information Nondiscrimination Act of 2008

1. We are forwarding information on the Genetic Information Nondiscrimination Act (GINA) of 2008 that took effect on November 21, 2009. This statute makes it illegal to discriminate against employees or applicants because of genetic information and adds genetics as a basis under which an Equal Employment Opportunity (EEO) complaint of discrimination can be filed. Title II of GINA deals with employment discrimination and is enforced by the US Equal Employment Opportunity Commission (EEOC).

2. Supervisors are responsible for maintaining a work environment that is free from any form of unlawful discrimination. For that reason, commanders should ensure that both civilian and military supervisors of all MEDCOM civilian employees read the information on GINA at Enclosure 1. The EEOC expects to issue additional regulatory guidance in the near future.

3. Our EEO point of contact is Mrs. Carmen L. Lopez, Director, Office of EEO Programs, at commercial (210) 221-8170, DSN 471 or email: Carmen.Lopez@us.army.mil.

FOR THE COMMANDER:


HERBERT A. COLEY
Chief of Staff

Encl
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CF:

Directors, OTSG/MEDCOM OneStaff
Commander, US Army Garrison, Fort Detrick, ATTN: MCHD-EE (Deborah Eyer)
1520 Freedman Drive, Suite 209, Fort Detrick, MD 21702-5016
Commander, Walter Reed Army Medical Center, ATTN: MCWR-EEO (Olga Bryant),
6900 Georgia Avenue, Washington, DC 20307-5001
Commander, Western Regional Medical Command, ATTN: WRMC-EEO
(Alverta Pearson), 2006 Liggett Avenue, Box 339500 Mail Stop, Joint Base
Lewis-McChord, WA 98433-9500
EO Advisors/Leaders
Servicing EEO Offices

Title II of the Genetic Information Nondiscrimination Act (GINA) of 2008

GINA took effect on November 21, 2009. The statute was enacted to ensure that individuals are not discouraged from availing themselves of genetic testing and genetic services for fear of losing their health benefits or from the possible perception that employers will take adverse employment actions against them based on their genetic information.

Title II of GINA deals with employment discrimination and is enforced by the EEOC. It incorporates definitions, remedies, and procedures provided in Title VII of the Civil Rights Act of 1964, as amended, including the cap on compensatory damages. Title II of GINA does not amend the Rehabilitation Act or the ADA.

Title II prohibits the following with respect to applicants and employees:

- (1) employment discrimination on the basis of genetic information;
- (2) harassment of an individual because of his/her genetic information; and
- (3) retaliation against an individual for engaging in protected EEO activity related to genetic discrimination.

Genetic information is defined under the EEOC proposed regulation as information from genetic tests, the genetic tests of family members, family medical history, 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. It also considers information about an individual's or family member's request for or receipt of genetic services. **An individual's or family member's age and gender are excluded from the definition of genetic information.**

Further GINA-specific information and definition are available in the EEOC proposed regulations.

There are three general rules employers must abide by with respect to genetic information:

1. Employers cannot use genetic information to make employment decisions. **THERE ARE NO EXCEPTIONS.**
2. Employers are restricted from acquiring genetic information about employees, former employees, and applicants for employment. Some employers, including Federal agencies, have in the past requested family medical history as part of a post-offer medical exam. Such requests are now illegal under GINA. An employer may still use post-offer medical exams to assess an applicant's current ability to perform in the offered position.

NOTE: There are six exceptions to the prohibition against employers acquiring genetic information:

- (1) Inadvertent acquisitions of genetic information, for instance, where an employee is overheard talking about a family member's medical condition, are not prohibited;
- (2) Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a **voluntary** basis, if certain specific requirements are met;
- (3) Genetic information may be acquired as part of the certification process for a leave request under the Family Medical Leave Act where an employee asks for leave to care for a family member with a serious health condition;

(4) Acquisition through commercially and publicly available documents like newspapers is permitted, as long as the employer is not searching those sources with the intent of finding genetic information. An example might be if a manager happens to read in the obituaries that an employee's deceased family member had Huntington's Disease;

(5) 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, where the program is voluntary; and,

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

3. When employers do obtain genetic information about applicants, employees, or former employees, they are required to keep that information confidential. Such information received in writing by the employer should be kept in a secured file, separate from other employment records. The information may be kept in the same file as medical documentation provided in a request for accommodation of a disability.

NOTE: There are six exceptions to the confidentiality requirement:

(1) Genetic information obtained by the employer may be disclosed to the applicant, employee, or former employee in question if that individual requests it in writing;

(2) Genetic information may be provided to an occupational health researcher for research purposes in certain circumstances;

(3) GINA authorizes disclosure of genetic information in compliance with a court order;

(4) GINA authorizes disclosure of relevant genetic information to government officials investigating compliance with GINA;

(5) Disclosure of genetic information is authorized to comply with requirements of the Family Medical Leave Act; and

(6) Disclosure of genetic information is authorized to public health officials in connection with a contagious disease that presents an imminent hazard of death or life-threatening illness.

Genetics vs. Disability: What is the Difference?

The challenge is to be able to identify a claim of genetic discrimination and not confuse it with a claim of disability discrimination. The following examples are designed to illustrate the difference between genetics and disability.

An employee is subjected to an adverse employment action because she has breast cancer. This is an example of disability discrimination. An employer has used an employee's manifested medical condition to make an employment decision.

An employee is subjected to an adverse employment action because her mother has breast cancer. This is an example of genetic discrimination. **Current medical conditions of your family members constitute your genetic information.**

Please visit the following websites for further information on GINA:

(1) GINA 2008 – <http://www.eeoc.gov/laws/statutes/gina.cfm>;

(2) EEOC proposed regulations – <http://edocket.access.gpo.gov/2009/E9-4221.htm>;

(3) EEOC GINA webpage – <http://www.eeoc.gov/laws/types/genetic.cfm>.

(Contributed by Ms. Victoria Evans, Complaints & Compliance Analyst, US Army Installation Management Command)