

**Welfare Benefits 2008 Year in Review:
Effects of the Genetic Information Nondiscrimination Act**

One of the many pieces of welfare benefits legislation passed in 2008 was the Genetic Information Nondiscrimination Act (“GINA”), which President Bush signed on May 21, 2008. GINA establishes new nondiscrimination prohibitions that apply to group health plans, health insurance companies and employers. While some have called GINA the solution in search of a problem, others have called it landmark anti-discrimination legislation.

GINA Explained

GINA has two distinct components. First, GINA amended Title VII of the Civil Rights Act, and works like the American with Disabilities Act in that it forbids employers from using certain qualities about a person (in this case, genetic information) in employment-related decisions. The EEOC issued proposed regulations pertaining to this component of GINA in February. In those regulations, the EEOC borrowed heavily from existing employment discrimination concepts in Title VII of the Civil Rights Act.

The second component of GINA, which is what the remainder of this update analyzes, amended ERISA and the Internal Revenue Code to prohibit “group health plans” (including self-funded plans, Multiple Employer Welfare Arrangements, or “MEWAs,” insurance companies and employers sponsoring group health insurance) from using genetic information to adjust premiums or contribution amounts. It also prohibits group health plans from requesting or requiring genetic testing of an individual, or of any family member of an individual (including fetuses and embryos).

In addition, GINA prohibits group health plans

from requesting, requiring or purchasing genetic information for “underwriting purposes” or with respect to any individual prior to such individual’s enrollment in connection with that person’s enrollment. GINA also amends the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) to treat genetic information as protected health information (“PHI”), thereby subjecting such information to HIPAA’s rules protecting the privacy of PHI and rules limiting the use and disclosure of such information.

GINA authorizes the enforcing agency to levy a penalty of \$100 per day against any sponsor (in this case the Board of Trustees) for any failure to meet the requirements of GINA beginning on the date such failure first occurs and ending on the date the failure is corrected for each participant and beneficiary to whom such failure relates. While at first glance \$100 per day does not sound like a lot, the \$100 per day penalty is for each participant or dependent affected. One day’s mistake that affected all participants and their dependents could be very costly indeed.

GINA’s provisions become effective for plan years beginning on or after May 21, 2009. For calendar year plans, the effective date of GINA is January 1, 2010. For many plans, GINA will require a plan amendment some time during the 2009 calendar year.

The Devil Is Always in the Details

GINA broadly prohibits group health plans from requesting, requiring or purchasing genetic information for “underwriting purposes.” “Underwriting purposes” is defined to include (i) determination of eligibility of benefits, (ii) compu-

tation of premiums or contributions under the plan, (iii) the application of a preexisting condition exclusion, and (iv) other activities relating to the creation, renewal or replacement of coverage. So far, there are no surprises: Congress' primary intent was to prohibit health insurance companies from using genetic information in their risk rating of employer groups and individual participants. However, Congress's definition of "genetic information" includes things that people ordinarily do not associate with that term. Under GINA, in addition to genetic tests of an individual's family member and genetic services, "genetic information" includes family medical histories. The inclusion of family medical histories in the definition of "genetic information" is likely to result in consequences unintended by Congress.

In discussing GINA with officials in the Department of Labor, we discovered that the biggest impact GINA will have on employers (both with fully insured plans and self-insured plan) and Taft-Hartley funds is their health fairs, health screenings, health risk assessments and the like. (For ease of reference, we will refer to all such arrangements as "health risk assessments" or "HRAs.") The questionnaires used in HRAs typically contain inquiries about the person's family medical history. The view informally taken by Department of Labor officials is that GINA prohibits these questions. Their reasoning is that, unlike the other provisions of HIPAA, GINA does not contain a benign discrimination exception. Thus, their argument is, the plan cannot obtain any family medical history information, even if it is used for the participant's benefit.

What This Means for Your Plan

In anticipation of GINA's effective date, it would be a good idea to begin a review of your plan terms to determine whether an amendment is required. While the statute as enacted by Congress does not itself require any plan amendments, regulations to be proposed by the IRS and the Department of Labor probably will. Also, because GINA flatly prohibits group health plans (including employers that sponsor wellness programs, health fairs and health screenings) from obtaining family medical history information, your policies and proce-

dures in this regard should be reviewed to ensure that the plan does not violate GINA.

It is possible that the Department of Labor might create a carve-out in the regulations for wellness programs and HRAs, but the agency is bound by the express language of the statute, so it will not completely reverse its course.

Employers and Taft-Hartley plans can find solace in one thing, though. Even after GINA becomes effective, enforcement efforts will probably not be extensive. Soon after GINA was signed into law, the Department issued a "Request for Information" asking the public (and health industry gurus) for input on the group health plan requirements even before attempting to put together proposed regulations, indicating that the Department is not exactly sure what it will do.

For now, if you have any kind of HRA, you should plan on conducting a review of that program at some point in the near future (especially in light of the changes to the Americans with Disabilities Act and the slew of other health care legislation passed in the last 18 months); one of the items on the list of things to review should be family medical history questions.

For more information about the Genetic Information Nondiscrimination Act or its effect on your health fair, health screening or health risk assessment, please contact us at your earliest convenience.

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March 2009