



## Employers, Health Plans & Insurers Face Significant New Nondiscrimination & Other Rules Under Genetic Information Law Signed By President

*Law Expected To Impact Broad Range of Practices*

*May 21, 2008*

The broad definition of the term “genetic information” contained in the Genetic Information Nondiscrimination Act of 2008, H.R. 493 (GINA) means employers, employment agencies, labor organizations, joint labor-management committees, group health plans and insurers will need to carefully review and update their group health plan, family leave, disability accommodation, and other existing policies and practices to comply with forthcoming implementing regulations to avoid liability under new GINA’s rules governing genetic information collection, use, protection and disclosure \signed into law by President Bush earlier today, Wednesday, May 21, 2008.

As signed into law, GINA amends Title VII of the Civil Rights Act, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act, the Internal Revenue Code of 1986, and Title XVIII (Medicare) of the Social Security Act to implement sweeping new federal restrictions on the collection, use, and disclosure of information that falls within its broad definition of “genetic information” by these covered entities.

The implications of GINA for employers, group health plans, health insurers, unions and other entities covered by its provisions promise to be particularly sweeping because of its broad definition of genetic information. Under GINA, “genetic information” is defined to mean with respect to any individual, information about:

- Such individual's genetic tests;
- The genetic tests of family members of such individual; and
- The manifestation of a disease or disorder in family members of such individual.

GINA also specifies that any reference to genetic information concerning an individual or family member includes genetic information of a fetus carried by a pregnant woman and an embryo legally held by an individual or family member utilizing an assisted reproductive technology.

Pending issuance of regulatory guidance, Gina’s inclusion of information about the “manifestation of a disease or disorder in family members” raises potential challenges for a broad range of wellness and safety, leave, and other

employment and benefit practices, particularly as apparently will reach a broader range of conditions than those currently protected under the disability discrimination prohibitions of the Americans With Disabilities Act (“ADA”). For this reason, employers, group health plans and other covered parties should be diligent to monitor and undertake timely compliance efforts, to monitor and provide constructive input to the agencies that will be responsible for issuing implementing regulations on proposed regulations, and to begin identifying workplace and benefit records and practices where genetic information currently may be collected or exist in preparation for coming into compliance with GINA’s requirements.

### **Restrictions On Employment Related Uses & Disclosures**

Under GINA, employers, employment agencies, labor organizations and joint labor-management committees face significant liability for violating the sweeping nondiscrimination and confidentiality requirements of GINA concerning their use, maintenance and disclosure of genetic information. Under GINA, employees and individuals can sue for damages and other relief like currently available under Title VII of the Civil Rights Act of 1964 and other nondiscrimination laws.

GINA’s employment related provisions include rules that will:

- Prohibit employers and employment agencies from discriminating based on genetic information in hiring, termination or referral decisions or in other decisions regarding compensation, terms, conditions or privileges of employment;
- Prohibit employers and employment agencies from limiting, segregating or classifying employees so as to deny employment opportunities to an employee based on genetic information;
- Bar labor organizations from excluding, expelling or otherwise discriminating against individuals based on genetic information;
- Prohibit employers, employment agencies and labor organizations from requesting, requiring or purchasing genetic information of an employee or an employee’s family member except as allowed by GINA to satisfy certification requirements of family and medical leave laws, to monitor the biological effects of toxic substances in the workplace or other conditions specifically allowed by GINA;
- Prohibit employers, labor organizations and joint labor-management committees from discriminating in any decisions related to admission or employment in training or retraining programs, including apprenticeships based on genetic information;
- Mandate that in the narrow situations where limited cases where genetic information is obtained by a covered entity, it maintain the information on separate forms in separate medical files, treat the information as a confidential medical record, and not disclosure the genetic information except in those situations specifically allowed by GINA; and

- Prohibit any person from retaliating against an individual for opposing an act or practice made unlawful by GINA.

### **Group Health Plan and Health Insurance Restrictions**

In addition to its regulation of the use of genetic information for employment and union related purposes, GINA also restricts the use of genetic information by health insurers and group health plans (including small plans) for underwriting, enrollment and premium purposes and requires safeguarding of genetic information in accordance with HIPAA.

As part of these rules, GINA expands federal restrictions on the use of genetic information by group health plans and health insurers when determining eligibility and premiums or for underwriting purposes. Specifically under GINA, group health plans and health insurers may not:

- Request, require or purchase genetic information for underwriting purposes or in advance of an individual's enrollment;
- Adjust premiums or contribution amounts of the group based on genetic information; or
- Request or require an individual or family member to undergo a genetic test except in limited situations specifically allowed by GINA.

GINA also will prohibit insurers providing individual health insurance from establishing rules for eligibility, adjust premiums or contribution amounts for an individual, imposing preexisting condition exclusions based on, requesting or requiring individuals or family members to undergo genetic testing.

Noncompliance with GINA's group health plan and insurer rules risks significant liability. Under amendments to ERISA made by GINA, group health plan noncompliance can create significant liability for both the plan and its sponsor. Participants or beneficiaries will be able to sue noncompliant group health plans for damages and equitable relief. If the participant or beneficiary can show an alleged violation would result in irreparable harm to the individual's health, the participant or beneficiary may not have to exhaust certain otherwise applicable Department of Labor administrative remedies before bringing suit.

In addition to private suits, GINA also authorizes the imposition of penalties against employers and other sponsors of group health plans that violate applicable requirements of GINA of up to \$500,000. The minimum penalties generally are set at the greater of \$100 per day or a minimum penalty amount ranging from \$2,500 for de minimus violations corrected before the health plan received notice of noncompliance to \$15,000 in cases in which the violations are more than de minimus. GINA also includes language allowing the Secretary of Labor to reduce otherwise applicable penalties for violations that could not have been identified through the exercise of due diligence or when the plan corrects the violation quickly.

GINA also amends HIPAA to make clear that information that falls within its definition of "genetic information" also

is protected health information for purposes of HIPAA. This means that it will require that all genetic information be treated as protected health information subject to the Privacy and Security Standards applicable to group health plans, health insurers, health care providers, and health care clearinghouses covered by HIPAA. As for other violations of the HIPAA Privacy and Security Standards, failures to administer genetic information in accordance with HIPAA's Privacy and Security Rules can trigger the imposition of civil penalties of \$100 per violation, up to \$250,000 by the Department of Health & Human Services Office of Civil Rights, criminal prosecution leading to imprisonment for up to 10 years, or both.

### **Compliance Deadlines**

GINA is scheduled to take effect in November, 2009, 18 months from its signature into law by President Bush. In anticipation of this date, GINA requires the Equal Employment Opportunity Commission (employment issues), the Department of Labor (ERISA issues), the Secretary of Health and Human Services (HIPAA and certain group health insurance issues) and the Secretary of Treasury (IRS issues) to publish regulations implementing its provisions within the next 12 months.

If you have any questions about or need assistance responding to GINA, monitoring, evaluating, commenting or responding to impending regulations about GINA, or other legal or operational concerns impacting your employment, employee benefits, health, safety or insurance and risk management practices, would like a copy of GINA, or if we may be of assistance with regard to any other employee benefit or employment related matters, please do not hesitate to contact Cynthia Marcotte Stamer at 972.419.7188.

### ***About Cynthia Marcotte Stamer***

Board Certified In Labor and Employment Law by the Texas Board of Legal Specialization, attorney Cynthia Marcotte Stamer has more than 20 years experience helping employers and business leaders, health plan fiduciaries and administrators, insurers and others design, implement, administer and defend health and other employee benefit and compensation, insurance and other human resources practices, policies and strategies. Ms. Stamer is recognized for her work helping clients design, implement, administer and defend legally compliant employee benefit and human resources programs, practices and products. Chair of the ABA Health Law Section Managed Care & Insurance Interest Group, she works extensively with employers to design, document, enforce and defend workforce, employment, employee benefit, wellness and safety and other human resources, compensation and benefit practices. Chair of the Managed Care & Insurance Interest Group of the American Bar Association, Ms. Stamer also is nationally and internationally known for her work advising and representing domestic and foreign governments, public and private employers domestically and internationally, insured and self insured employer and union sponsored health and other benefit plans and their fiduciaries, insurers, third party administrators, IROs, Medicare and Medicaid Advantage Plans and outsourcers and others about the design, documentation, operation, regulation and defense of health, disability, retirement, worker's compensation and occupational accident, wellness and disease management, and other related benefit and insurance programs, practices, products and technologies. She also advises and represents these and other clients about employment, health, employee benefit and other related legislative and regulatory matters and represents and defends these and other clients against disputes, litigation and administrative actions involving private plaintiff's, the Labor Department, IRS, SEC, HHS, insurance regulators, and other federal and state regulators.

Recognized in the International Who's Who of Professionals and bearing the Martindale Hubble AV-Rating, Ms. Stamer is a highly regarded legal advisor and consultant, author and speaker, who regularly conducts management and other training on a wide range of employee benefit, human resources and internal controls, and other related risk management matters. Ms Stamer is the author of 100s of publications on a host of human resources and related issues. Her writings have appeared in a variety of other publications, including works published by the American Bar Association, Aspen Publishers, BNA, the American Health Lawyers Association, SHRM, World At Work, Government Institutes, Inc. and many others. For a listing of some of these publications and programs, see [cynthiastamer.com](http://cynthiastamer.com). Her insights on human resources risk management matters also have been quoted in The Wall Street Journal, various publications of The Bureau of National Affairs and Aspen Publishing, the Dallas Morning News, Spencer Publications, Health Leaders, Business Insurance, the Dallas and Houston Business Journals and a host of other publications. She also serves in leadership positions in numerous human resources, corporate compliance, and other professional and civic organizations. For instance, she presently is Chair of the American Bar Association (ABA) Health Law Section Managed Care & Insurance Interest Group, Vice Chair of both the ABA Real Property, Probate & Trust Section Employee Benefits & Compensation Group and the ABA TIPS Worker's Compensation Committee, Continuing Education Liaison for the ABA Joint Committee on Employee Benefits, a member of the IRS TEGE Council, a member of the Editorial Advisory Board and contributing author of various publications, and as faculty member and planning committee member for numerous human resources related programs. She also has previously served as Region IV Chair and a National Consultants Forum Board Member for the Society of Human Resources Management, Chair of the Dallas Bar Association Employee Benefits and Executive Compensation Section, and as a State Executive Board Member and Dallas Chapter Chair of the Texas Association of Business. For more details about Ms. Stamer's experience and other credentials, contact Ms. Stamer, information about workshops and other training, selected publications and other human resources related information, see [CynthiaStamer.com](http://CynthiaStamer.com) or contact Ms. Stamer via telephone at 972.419.7188 or via e-mail at [cstamer@solutionslawyer.net](mailto:cstamer@solutionslawyer.net).

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