

LEGAL GUIDANCE ON THE GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

The IAFF General Counsel's law firm, Woodley & McGillivray LLP, prepared the following guidance on the Genetic Information Nondiscrimination Act of 2008 (GINA) for the use of IAFF members and affiliates. GINA has important implications for Fire Department wellness and fitness programs, and this guidance is intended to provide general information on this relatively recent law.

What is GINA?

The Genetic Information Nondiscrimination Act of 2008 (GINA), 42 U.S.C. § 2000ff, *et seq.*, is a federal law that prohibits discrimination by employers against employees or applicants because of their genetic information. The U.S. Equal Employment Opportunity Commission (EEOC) enforces GINA with respect to employment discrimination.

The definition of genetic information includes information about an employee's genetic tests, the genetic tests of an employee's family members, and an employee's family medical history. According to the EEOC, family medical history is included in this definition because it is often used to determine whether an employee has an increased risk of getting a disease, disorder, or health condition in the future.

GINA prohibits employers from discriminating on the basis of genetic information with respect to any aspect of employment, such as hiring, firing, promotions, and job assignments. Therefore, employers cannot use genetic information when making any employment decisions because genetic information is not relevant to an employee's current ability to work. GINA also prohibits harassment of an employee because of his or her genetic information.

Significantly, GINA also prohibits employers from ***requesting, requiring, or purchasing genetic information*** with respect to an employee, subject to several exceptions (discussed below). The EEOC's regulations implementing GINA provide that this prohibition on requiring genetic information applies to medical examinations related to employment, such as fit-for-duty exams. Employers must instruct health care providers not to request genetic information, including family medical history, when administering fit-for-duty exams.

IAFF affiliates should note that GINA also prohibits ***labor organizations*** from discriminating against members on the basis of genetic information and from requesting, requiring, or purchasing genetic information with respect to a member. One court allowed a GINA suit to proceed against a union on the basis that a union was potentially involved in drafting or implementing a wellness program that requested information protected by GINA.

Remedies for GINA violations include reinstatement, compensatory damages, injunctive relief, and reasonable attorney's fees and costs.

GINA Exceptions

While GINA generally prohibits employers and labor organizations from requesting and obtaining genetic information, there are several narrow exceptions to this prohibition. These exceptions include the following:

- Employers may request an employee's genetic information through a "**voluntary**" **wellness program**. More information on this exception is provided below.
- Employers may *inadvertently* acquire genetic information, such as a supervisor overhearing an employee discussing a family member's health issue.
- Employers may obtain protected information when an employee completes the certification process for requesting leave to care for a family member with a serious health condition under the Family Medical Leave Act (FMLA) or a similar state or local law.
- Employers may acquire genetic information through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where the monitoring is either required by law or is voluntary.

If the employer is in possession of an employee's genetic information pursuant to one of these exceptions, GINA strictly limits the disclosure of this genetic information. The genetic information must be kept confidential and in a separate medical file apart from an employee's personnel file.

GINA and "Voluntary" Wellness Programs

As noted above, one exception to GINA's prohibition on employers acquiring employee genetic information is when the employer requests this information as part of a voluntary wellness program. What does this mean?

GINA provides that an employer may request genetic information, such as family medical history, as part of a health or wellness program, so long as the employee provides "prior, knowing, voluntary, and written authorization." Based on this language, employers would be able to request genetic information through a wellness program, so long as they obtain a voluntary and written authorization from the employee.

The EEOC's regulations elaborate on this requirement and state that this authorization may be in electronic format. The regulations also require the employee to complete an authorization form, and that this form meet certain requirements:

- (1) The form must be written so the employee is reasonably likely to understand it;
- (2) The form must describe the type of genetic information that will be obtained and the general purposes for which it will be used; and

(3) The form must describe the restrictions on disclosure of genetic information.

This written authorization requirement is significant; one U.S. District court found that the employer could not establish that the employee provided any genetic information voluntarily in the absence of a written authorization form in accordance with the EEOC regulations.

The current EEOC regulations implementing GINA specify that the wellness program exception only applies to employers who offer “health ... services, including such services offered as part of a voluntary wellness program.” Therefore, the EEOC regulations appear to require that a wellness program requesting genetic information be voluntary in order to be covered under this exception.

Furthermore, under the wellness program exception, an employee cannot be required to provide genetic information or be penalized for choosing not to provide this information. The EEOC regulations do not allow employers to offer financial incentives to employees to induce them to provide genetic information. Employers, however, may offer financial incentives for completion of health risk assessments that *include* questions about family medical history or other genetic information, so long as the employer makes clear, in language reasonably understood by employees completing the health risk assessment, that the incentive will be made available whether or not the employee answers the questions regarding genetic information. In this situation, employers must clearly indicate which questions request genetic information.

Furthermore, employers may offer financial incentives to encourage employees, who have voluntarily provided genetic information that indicates they are at an increased risk of acquiring a certain health condition, to participate in disease management programs or other programs promoting healthy lifestyles, and/or to meet particular health goals as part of a health or genetic service. In order to comply with GINA, however, these programs must also be offered to employees with current health conditions and to employees whose lifestyle choices put them at increased risk of developing the condition.

The EEOC regulations place strict restrictions on the disclosure of employee genetic information obtained through wellness programs. Genetic information may only be disclosed to the employee and the licensed health care professionals or board-certified genetic counselors involved in providing these services, and this information may not be accessed by managers, supervisors, anyone who makes employment decisions, or anyone else in the workplace. Genetic information may only be provided to the employer in aggregate terms that do not disclose the identity of specific employees.

Important Takeaways for IAFF Affiliates

The IAFF strongly encourages mandatory, non-punitive medical examinations administered through comprehensive wellness-fitness programs for fire fighters. Well-designed programs are vital in the fire fighting profession because they allow fire fighters to maintain a high level of job performance and provide high quality services to the communities they serve. GINA’s requirements, however, impact certain wellness-fitness programs.

In light of GINA's requirements, below are important takeaways with respect to wellness programs:

- Mandatory physical examinations that are part of wellness programs should not include requests for family medical history or any other genetic information. In this situation, GINA would not apply. Furthermore, the EEOC regulations state that employers are prohibited from acquiring genetic information through medical examinations related to employment. In light of these regulations, ***all fit-for-duty examinations should not request nor require GINA-protected information from employees.***
- Wellness programs that include requests for genetic information should be voluntary in order to comply with the EEOC regulations.
- Before acquiring any employee genetic information pursuant to a wellness program, the employee must complete a voluntary written authorization form that comports with all of the requirements in GINA and the EEOC regulations.
- Employees cannot face any penalties for refusing to provide any genetic information as part of a wellness program. If the wellness program utilizes financial incentives, the program cannot base receipt of those incentives on whether the employee provides or does not provide genetic information.

As of the publication of this guidance, there are not many court decisions interpreting GINA and the EEOC regulations. We will update this guidance as necessary as more courts decide issues arising under GINA.