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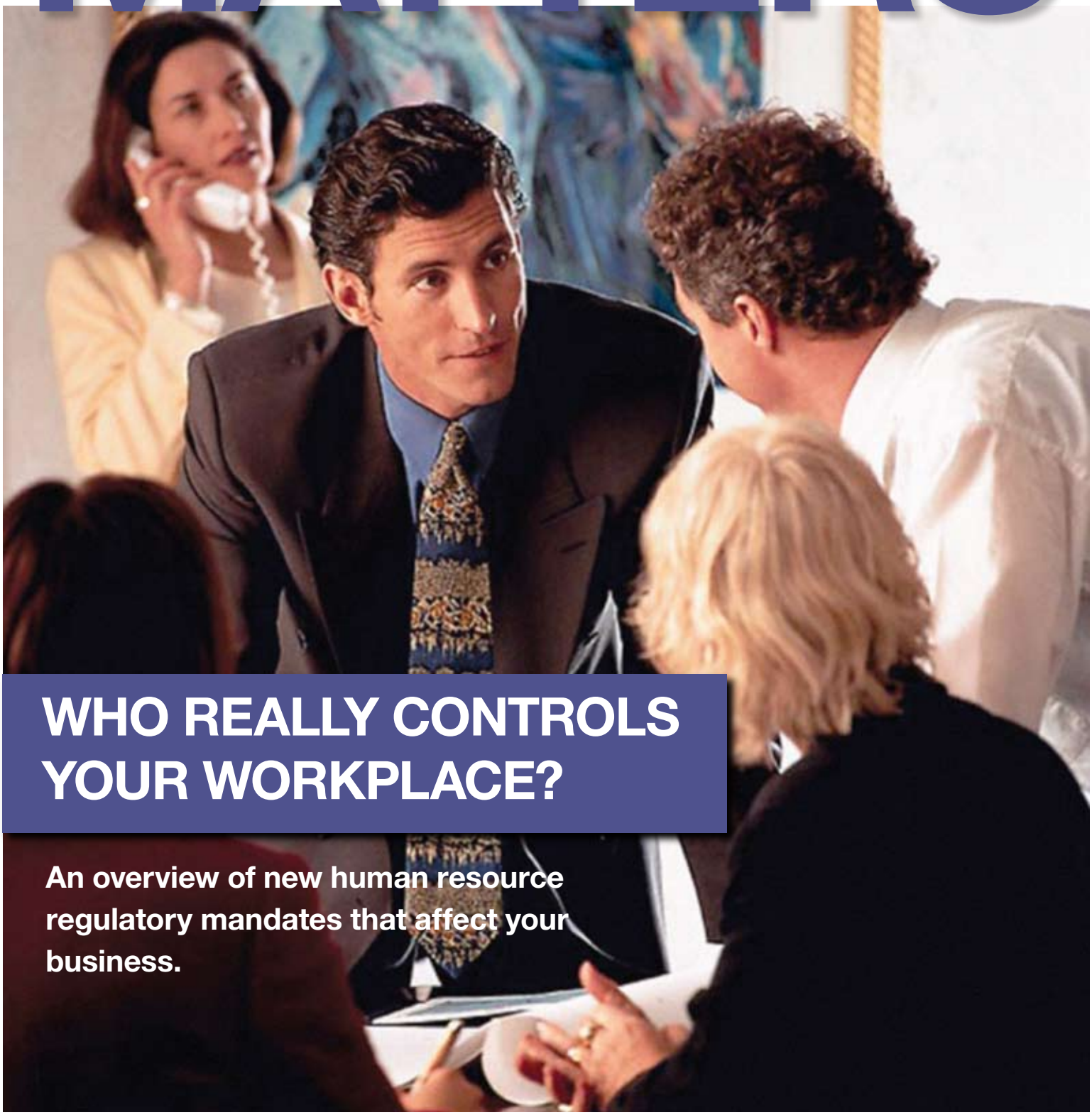

## WHO REALLY CONTROLS YOUR WORKPLACE?

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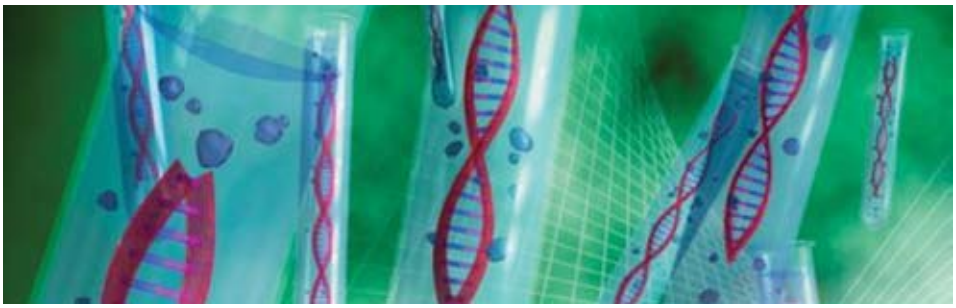
# WHAT EMPLOYERS NEED TO KNOW ABOUT GINA



By Allen S. Kinzer, Linda R. Mendel, Yolanda C. Vorys, at Vorys, Sater, Seymour & Pease LLP

The recently enacted Genetic Information Nondiscrimination Act (GINA) will affect most employers. As a result, it is imperative that employers familiarize themselves with its requirements and prohibitions. Generally, Congress enacted GINA to prevent discrimination on the basis of genetic information, which has the potential to proliferate because of the bourgeoning advances in the field of genetics. Indeed, in enacting GINA, Congress noted that although "[n]ew knowledge about genetics may allow for the development of better therapies that are more effective against disease or have fewer side effects than current treatments, [such] advances give rise to the potential misuse of genetic information to discriminate in health insurance and employment."

GINA is separated into three segments, each with a different focus. Title I of GINA applies to group health plans for plan years beginning on or after May 21, 2009, and the interim final regulations that implement Title I apply for plan years beginning on or after Dec. 7, 2009. Together with already existing non-discrimination provisions of the Health Insurance Portability and Accountability Act (HIPAA), Title I prohibits group health plans and health insurers from requesting or requiring genetic information or using such information for decisions regarding coverage, rates or pre-existing conditions. Title II of GINA, effective Nov. 21, 2009, prohibits most employers from using genetic information for hiring, firing or promotion decisions and any decisions regarding the terms of employment. Title III of GINA contains miscellaneous provisions on severability and will not be discussed in this article.

Both Title I and Title II define "genetic information" as information about (1) an individual's genetic tests; (2) genetic tests of the individual's family members; or (3) the manifestation of disease or disorder in family members of the individual. Title I and Title II will be discussed in greater detail below, as well as practical advice for employers.

## Title I of GINA: Impact on Health Risk Assessments

The prohibitions articulated in Title I and the regulations that implement it strengthen and clarify existing HIPAA nondiscrimination and portability provisions. Generally, under Title I, group health plans and health insurers may not: (1) adjust premiums and contributions based on genetic information; (2) require that an individual or family member undergo a genetic test; or (3) collect genetic information for underwriting purposes or in connection with enrollment.

For employers, the most significant impact of Title I is its effect on the practice of requiring employees to complete heath risk assessments (HRAs), which usually include family medical history, before enrolling in employment-based health insurance coverage. Many employers institute wellness programs to promote healthy behaviors among employees, and HRAs are often an intrinsic part of such programs. Employers should use caution with respect to HRAs for two reasons.

First, because under Title I genetic information cannot be collected prior to enrollment, employers are prohibited from asking about an individual's family medical history in an HRA that is completed before an individual is actually enrolled in a group health plan.

Second, the prohibition of collecting genetic information for underwriting purposes affects employers that utilize HRAs. "Underwriting" is broadly defined by the regulations under Title I to include "changing deductibles or cost-sharing mechanisms or providing discounts, rebates, payments in kind, or other premium differential mechanisms in return for activities such as completing an HRA or participating in a wellness program." The application of the underwriting prohibition is illustrated by examples in the regulations, one of which is set forth below:

**Facts.** A group health plan provides a premium reduction to enrollees who complete an HRA. The HRA is requested to be completed after enrollment and includes questions about the individual's family medical history. Neither the completion of the HRA or the responses given on the HRA have any effect on an individual's enrollment status, or on the enrollment status of members of the individual's family.

**Conclusion.** In this example, the HRA includes a request for genetic information (that is, the individual's family medical history). Because completing the HRA results in a premium reduction, the request for genetic information is for underwriting purposes. Consequently, the request violates the prohibition on the collection of genetic information.

As a practical matter, HRAs that request information regarding family medical history are permissible, but employers cannot offer incentives for the completion of the HRAs, and the HRAs must be completed after enrollment. Therefore, if employers ask employees to complete HRAs or provide any sort of financial reward for the completion of the HRAs and the HRAs include questions about individual's family medical history, they are encouraged to revisit the arrangement in the near future. Moreover, employers should include statements in their HRAs providing that respondents should not include genetic information in their responses to prevent incidental collection of genetic information.

## Title II of GINA: Impact on a Broad Range of Employment Practices

Private and public employers with 15 or more employees, including employment agencies, labor unions, joint labor management training programs and state, local and federal governments and agencies are subject to Title II. Title II generally provides anti-discrimination prohibitions similar to those found in the other federal laws prohibiting employment discrimination and adds specific provisions

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to be vaccinated. If an employee or an employee's family member has a serious health condition that puts them at high risk for complications from H1N1, then it is possible that an employee would be eligible for intermittent FMLA time to get themselves or the family member vaccinated. Otherwise, allowing an employee time off to get themselves or a family member vaccinated is at the employer's discretion.

### OSHA

Employers have a general duty to provide their workers with a safe workplace. This duty implies potential liability if an employer flagrantly allows a seriously ill employee to remain at work. Obviously, common sense should dictate such decisions.

**SO, IN SUMMARY, CONSIDER THE FOLLOWING:**

- **Employees who exhibit flu-related symptoms should be sent home and should not return to work until they have been without a fever for 24 hours.**
- **Suspend disciplinary actions for flu-related absences. This can be done for the employee's own illness, for family members' illnesses, or both.**
- **At-risk employees (elderly, pregnant, etc.) who present a note from a doctor for telework should be accommodated, unless to do so would be an undue burden. If telework is not possible, consider "social distancing" to allow for more space between employees.**
- **Take steps to preserve employee privacy by maintaining the confidentiality of any employee health information.**

Although some of the steps outlined above may inconvenience your company in the short-term, they will protect your employees from illness, protect your company from legal liability and, ultimately, may protect your bottom line.

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concerning the treatment of genetic information. Specifically, Title II: (1) prohibits employers from discriminating on the basis of genetic information; (2) prohibits employers from intentionally acquiring genetic information from employees or applicants; and (3) imposes strict confidentiality requirements on genetic information. For example, Title II forbids employers from asking for genetic information in an interview or on a job application or basing any workplace decisions related to the "terms, conditions or privileges of employment" on genetic information.

For employers, many potential hazards can be found in Title II and the regulations promulgated under it. Title II prohibits discrimination on the basis of genetic information with respect to a broad range of employment practices, including hiring, promotion, demotion, seniority, discipline, termination and compensation. Moreover, pursuant to Title II, employers are prohibited from limiting, segregating or classifying employees in any way that would deprive them of employment opportunities or otherwise adversely affect them. Retaliation against those who file discrimination charges under GINA or testify in connection with a charge also is proscribed by Title II.

Although an employer may not request, require or purchase genetic information of an employee or family member of an employee, the regulations offer a non-exhaustive list of exceptions regarding when inadvertent acquisition of genetic information does not violate GINA. These exceptions include requesting, requiring or acquiring genetic information: (1) inadvertently; (2) through health or genetic services offered to employees as part of a wellness program; (3) in compliance with FMLA (or similar state law) certification requirements; (4) through commercially or publicly available sources; (5) through genetic monitoring of the biological effects of toxic substances in the workplace; or (6) for law enforcement purposes.

When one of the foregoing exceptions applies, and an employer maintains genetic information concerning an employee or family member, Title II imposes strict confidentiality requirements. According to Title II, the genetic information must be regarded in the same manner as medical information. Specifically, genetic information must be kept apart from other personnel information with employees' medical records.

Employers can take the following steps to ensure compliance with GINA: (1) revise equal employment opportunity statements to include a non-discrimination on the basis of genetic information statement; (2) review discrimination and harassment policies, family medical leave forms and related employment practices to ensure they are not inappropriately requesting, receiving or using genetic information; (3) review all currently held employee medical information to determine whether that information may constitute genetic information; and (4) ensure that all genetic information is kept separate from personnel information.

[1] *The Equal Employment Opportunity Commission has yet to issue final regulations on Title II, but the final regulations are forecasted to be similar to the proposed regulations.*

### Penalties for Failure to Comply with GINA

Employers should not ignore GINA's requirements, because strict penalties can be imposed for violation of the statute. For failure to meet the requirements of Title I, GINA provides that a penalty may be imposed on any plan sponsor (usually the employer), group health plan or health insurer for failure to comply. The amount of the penalty is $100 for each day in the noncompliance period with respect to each participant or beneficiary to whom the violation relates. The minimum penalty if there is more than one violation is $2500, and if violations are more than de minimis, the minimum penalty is $15,000.

If employers violate Title II, the remedies mirror those available to employees under Title VII—employees can recover compensatory and punitive damages, which are capped at $300,000. Employees can also be reinstated to their former employment and recover pecuniary damages such as back pay, front pay in lieu of reinstatement and attorneys' fees.

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