

Training Outline – Statutory Provisions

Genetic Information Nondiscrimination Act of 2008 & ADA Amendments Act of 2008

I. Genetic Information Nondiscrimination Act of 2008 (GINA)

- Signed into law by President George W. Bush on May 21, 2008
- Went into effect on November 21, 2009
- Title I applies to health insurance, Title II applies to employment

Difference Between GINA and ADA

- ADA protects individuals who currently have, are perceived as having, or have a past history of an impairment that meets the definition of disability
- GINA prohibits discrimination based on the individual's genetic information, i.e. based on the possibility that someone will acquire a condition in the future

GINA's Purposes

- Decoding of the human genome and advances in genomic medicine resulted in development of genetic tests to determine whether someone has genetic markers that may indicate increased risk of acquiring a condition in the future.
- Medical community was concerned patients not taking advantage of genetic tests for fear of discrimination by insurers or employers with access to their genetic information.

GINA applies to:

- Employers covered under Title VII of the Civil Rights Act of 1964 (15 or more employees)
- Federal executive branch agencies
- State and local government employers
- Executive Office of the President, U.S. House and Senate

Basic Rules Related to Employment

- Prohibits use** of genetic information to make employment decisions
- Prohibits employers from requesting, requiring, or purchasing genetic information, with very limited exceptions**
- Requires** that genetic information **be kept confidential**, with very limited exceptions

What is Genetic information?

Info. about an individual's **genetic tests** or the genetic tests of family members

Request for or receipt of **genetic services** by an individual or family member -- counseling, education

Manifestation of a disease or disorder in family members -- **family medical history**

Genetic information of a **fetus or embryo** carried or held by individual or family member

Genetic Information Does NOT Include:

- the fact that an individual currently has a disease or disorder (manifested condition)

... this individual would be protected by the ADA if the condition meets the definition of disability.

**USE of Genetic Information in Employment Decisions
PROHIBITED**

- Absolute: no exceptions

**ACQUISITION of Genetic Information Prohibited with SIX
NARROW EXCEPTIONS**

- Unlawful to request, require, or purchase genetic info. except:
 - Where acquisition is inadvertent
 - As part of a voluntary wellness program
 - For FMLA purposes
 - Through commercially and publicly available sources
 - As part of genetic monitoring programs
 - In some forensic lab situations

**Implications of GINA Acquisition Restrictions for Post-offer/Pre-
employment Medical Exams and Fitness for Duty Exams**

- No genetic information can be sought by employer or employer's doctor (including family medical history)

Confidentiality

- Genetic information that an employer has must be kept confidential and placed in a separate medical file (separate from personnel file)
- Although ADA and GINA have different exceptions to confidentiality, genetic information and medical information may be kept in the same file if employer chooses

GINA Confidentiality Exceptions

- Exceptions:
 - To the individual or family member to whom the information pertains, subject to written request
 - For research purposes pursuant to 45 CFR Pt. 46
 - For FMLA purposes

- To government officials investigating compliance with GINA, where relevant
- Pursuant to court order
- To federal, state, or local public health agency where an individual's family member has a contagious disease that presents imminent hazard of death or life-threatening illness

The "Firewall"

- Specific section addresses relationship between GINA Titles I (health insurance) & II (employment)
- Basic point: to prevent an employment cause of action regarding matters subject to enforcement under GINA's health insurance provision while ensuring that employers remain liable for actions that violate Title II

Remedies

- GINA remedies modeled on Title VII
- Equitable relief, including injunctive relief and back pay
- Punitive and compensatory damages to the extent allowed under Title VII
- Punitive damages unavailable against federal state, and local government employers

Rulemaking Process for GINA

- Notice of Proposed Rulemaking published on March 2, 2009 for 60-day comment period
- Public comments can be viewed at www.regulations.gov
- Once approved, the final regulations will be published in the Federal Register and 29 CFR 1635

II. ADA Amendments Act of 2008

- Signed into law by President George W. Bush on September 25, 2008
- Statutory provision states the effective date is January 1, 2009
- Applies to the Rehabilitation Act too

● Congress intended the ADA definition of disability to be construed broadly but courts were finding too many people outside the ADA's protections

- ADAAA makes it easier to meet the definition of disability

ADAAA states:

- definition of disability "shall be construed in favor of broad coverage"
- definition of disability "should not demand extensive analysis"
- "primary object of attention" should be on whether discrimination occurred

Basic 3-part definition of "disability" remains the same (a physical or mental impairment that substantially limits a major life activity; a record of such an impairment; or being regarded as having such an impairment), ... but the meaning of the terms has changed.

"Substantially" Limited

Need not be "severely" or "significantly" restricted in performing major life activity

Major Life Activities Expanded

- **Now includes “major bodily functions,”** e.g. functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions
- **Also still includes types of major life activities previously recognized,** e.g. caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.
- Examples are non-exhaustive

Ameliorative Effects of Mitigating Measures: (except ordinary eyeglasses and contact lenses) No Longer Taken into Account in Determining if “Substantially Limited,” e.g. --

- medication, medical supplies, equipment, or appliances, low-vision devices, prosthetics (including limbs and devices), hearing aids and cochlear implants or other implantable hearing devices, mobility devices, oxygen therapy equipment and supplies
- use of assistive technology
- reasonable accommodations or auxiliary aids or services
- learned behavioral or adaptive neurological modifications
- **EXCEPTION: ordinary eyeglasses and contact lenses**

Impairments that are Episodic or in Remission: are episodic or in remission are substantially limiting if they would be when active.

Summary: ADAAA Changes to “Substantially Limited in a Major Life Activity”:

- **“Substantially”** is lower – **need not be “severe” or “significant” limitation**
- **“Major bodily functions”** can be cited instead of other major life activities
- **Mitigating measures** (other than ordinary eyeglasses or contact lenses) **cannot be considered** in determining “disability”

- Impairment that is episodic or in remission is a disability if would be substantially limiting when active

“Regarded As”: No longer requires that employer regarded employee to be “substantially limited”

• Individual “regarded as” having a disability where subjected to “prohibited action” -- e.g., hiring, demotion, promotion, discipline, annual evaluation, compensation, termination -- because of on an actual or perceived impairment, unless the impairment is transitory (lasting or expected to last six months or less) AND minor

• Expanded definition but only applies to disparate treatment or harassment

• Individuals who are only “regarded as” disabled are not entitled to reasonable accommodation

Other ADA AAA Provisions

- Employers using an “uncorrected vision standard” as a qualification standard, employment test, or other type of selection criterion must show that it is job-related and consistent with business necessity.

- “Nothing in this Act shall provide a basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual’s lack of disability.”

- Phrase “discriminate on the basis of a disability” replaces “discriminate against a qualified individual with a disability because of the disability of such individual.”

Rulemaking Process for ADA AAA

• Notice of Proposed Rulemaking (to amend 29 CFR Part 1630) published on September 23, 2009, for 60-day comment period

• Public comments can be viewed at www.regulations.gov

• Once approved, the final regulations will be published in the Federal Register and 29 CFR Part 1630

ADAAA Did Not Change:

- “Qualified”
- “Reasonable Accommodation”
- “Undue Hardship” Defense
- Direct Threat to Safety Defense
- Disability-Related Inquiries and Medical Exams
- Confidentiality of Medical Information