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in conjunction with United Benefit Advisors

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# GINA Reshuffles the Deck

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# Presenters

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# Genetic Information Nondiscrimination Act (“GINA”)

- ▶ Enacted on May 21, 2008
- ▶ Title I: Health Insurance Provisions
  - Applies to both group and individual markets
  - Effective for plan years beginning after 5-21-09
- ▶ Title II: Employment Provisions
  - Applies to employers with 15 or more employees (same as Title VII)
  - Effective as of 11-21-09

# GINA Title I

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- ▶ Generally prohibits discrimination in health coverage on the basis of genetic information
- ▶ Amends ERISA, Tax Code and Public Health Service Act
- ▶ Also broadens scope of HIPAA Privacy Rule

# GINA Title I

- ▶ Administered by IRS, DOL, and HHS
- ▶ Interim final regulations issued by all three agencies on 10-7-09
- ▶ Effective for plan years beginning on or after 12-7-09
- ▶ HHS also proposed revisions to HIPAA Privacy Rule at same time

# Title I Prohibitions

- ▶ Health plans and issuers may not
  - **Adjust premiums** on the basis of genetic information
    - Applies on **group** basis
    - HIPAA already barred **individual** discrimination
  - Request or require a **genetic test**
    - Exception for determination of “medical necessity”
    - Providers may still recommend testing

# Title I Prohibitions (cont.)

- ▶ Health plans and issuers may not
  - **Request, require or purchase** genetic information, either
    - prior to enrollment, or
    - for “underwriting purposes”
- ▶ Substantial impediment to typical health risk assessment (“HRA”)

# “Genetic Information”

- ▶ Results of individual’s genetic test
- ▶ Results of family member’s genetic test
- ▶ **Family medical history**
- ▶ Request for or receipt of genetic services by individual or family member
- ▶ **Excludes** manifested condition, age, or gender

# “Underwriting Purposes”

- ▶ Determination of eligibility
- ▶ Applying preexisting condition exclusion
- ▶ Computation of premium
  - Defined to include **any** monetary reward
  - Specifically includes reward for completing health risk assessment or participating in wellness program

# Effect on HRAs

- ▶ May not offer HRA that asks for genetic information **pre-enrollment**
- ▶ May not provide **premium discount** for completing even post-enrollment HRA that asks for genetic information
- ▶ Must caution individuals not to provide genetic information in response to open-ended questions
- ▶ **Remember:** “Genetic information” includes family medical history

# So, . . . What's Allowed?

- ▶ May offer **post-enrollment** HRA, so long as
  - No genetic information is requested, **or**
  - No financial reward is provided for completing the HRA, **or**
  - All questions concerning genetic information appear in an addendum **and** any financial reward is provided even if the addendum is not completed

# HIPAA Privacy Rule



- ▶ As directed by Congress, HHS has proposed conforming amendments to HIPAA Privacy Rule
- ▶ Would adopt GINA Title I definitions of “underwriting purposes,” etc.
- ▶ So HRAs and wellness programs that request family medical history may also violate Privacy Rule

# GINA Title II - Employment

- ▶ Administered by EEOC
- ▶ Regulations proposed on 3-2-09
- ▶ Statutory provisions became effective on 11-21-09
- ▶ Still awaiting final regulations (apparently under review by OMB)

# Scope of Title II

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- ▶ Applies to employers with 15 or more employees
- ▶ Indirectly applicable to health (and other) plans of such employers
- ▶ But EEOC has stated that Title II prohibitions will not apply where a practice is governed by Title I

# Title II Prohibitions

- ▶ Covered employer
  - **May not discriminate** in terms and conditions of employment on the basis of genetic information
  - **May not request, require or purchase** genetic information
  - **Must maintain confidentiality** of genetic information

# Title II Exceptions

- ▶ Employer may request, require, or purchase genetic information
  - If obtained **inadvertently** (“water cooler exception”), or
  - Pursuant to **voluntary wellness program** (with employee authorization and subject to confidentiality restrictions), or
  - To **comply with FMLA** or state leave laws

# Interaction With FMLA

- ▶ Although compliance with FMLA is an exception to prohibition on collecting genetic information . . . ,
- ▶ Forms should be revised to caution medical providers against disclosing genetic information
  - Any genetic information received from medical providers must be kept separate from personnel file
  - Such information may be combined with ADA-related medical information

# Interaction With ADA

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- ▶ Although ADA allows post-offer medical exams to determine fitness for duty, such exams may not request genetic information
- ▶ May still request medical information to determine reasonable accommodation
  - Forms should caution medical providers against disclosing genetic information
  - Any genetic information acquired in this process must be held in separate file

# Interaction with HIPAA Nondiscrimination

- ▶ HIPAA prohibits health plan discrimination against an individual on the basis of genetic information, but does not bar discrimination against a **group**
- ▶ GINA now bars such group-wide discrimination on the basis of an individual's genetic information
- ▶ Prohibition applies to both employers and health insurers

# Interaction With Other Laws

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- ▶ Nothing in GINA preempts state or other federal (e.g., ADA) laws that provide more protection for genetic information
- ▶ GINA Title II does not apply to claims governed by HIPAA (nondiscrimination or Privacy Rule) or Title I of GINA

# Enforcement

- ▶ Title I violations subject to enforcement under ERISA or PHSAA
  - Claims for benefits, attorney's fees and injunctive relief
  - Also \$100 per day excise tax
- ▶ Title II violations subject to enforcement under Title VII rules
  - Compensatory and punitive damages
  - Attorney's fees and injunctive relief

# GINA

## What Should Employers Do Now?

- ▶ Review/revise existing policies and handbooks
  - Add prohibitions of discrimination
- ▶ Post new EEOC nondiscrimination poster
  - <http://www.eeoc.gov/laws/types/genetic.cfm>
- ▶ Train HR personnel regarding GINA
- ▶ Review/revise forms to avoid gathering genetic information
  - FMLA, ADA, post-offer medical exam forms, EAPs
  - Specifically discourage providing family medical history
- ▶ Implement privacy practices to protect genetic information

# Questions and Answers



**Thank you for  
your time!**



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