



ADA Audio Conference Series December 18, 2012

This session is scheduled to begin at
2:00pm Eastern Time

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ADA and GINA: Understanding the Rules When Employers Request Medical or Genetic Information

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GINA and ADA



- **ADA prohibits discrimination on the basis of manifested conditions that meet the definition of disability.**
- **GINA prohibits discrimination based on genetic information and not on the basis of a manifested condition.**

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ADA Rules Regarding Medical Inquiries and Examinations



- **Pre-Offer: Prohibited from Asking Disability-Related Questions (i.e., essentially medical questions) and Conducting Medical Examinations (including psychological examinations considered medical in nature)**
- **Post-Offer: Permissible to Ask Disability-Related Questions and to Conduct Medical Examinations As Long as All Applicants Hired for Same Position Subject to Same Questions/Examinations**

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ADA Rules Regarding Medical Inquiries and Examinations



- Employment: Disability-Related Questions and Medical Examinations (e.g., fitness for duty examinations) Permissible Only if “Job-Related and Consistent with Business Necessity”
- Applies either to Periodic Inquiries/Examinations for All Persons in Specific Jobs or to Singling Out Specific Employees

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ADA: Examinations of Specific Employees



- To meet the “business necessity” standard and therefore justify requiring employee to answer medical questions or undergo a fitness for duty examination, employer must have reasonable belief, based on objective evidence, that employee MAY have difficulty performing one or more essential functions, or MAY be posing a direct threat, because of a medical condition

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GINA: Basic Rules Related to Employment



- Prohibits use of genetic information to discriminate in employment [*ADA does not have a similar prohibition on use of disability-related information*]
- Prohibits harassment and retaliation
- Restricts employers and other covered entities from requesting, requiring, or purchasing genetic information (with limited exceptions) [*broader restriction than the ADA's*]
- Requires that covered entities keep genetic information confidential, subject to limited exceptions

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What is Genetic Information? Part 1



- Genetic Information means information about:
 1. An individual's **genetic tests** (1635.3(f))
 2. Genetic tests of **family members** (1635.3(a))
 3. The manifestation of a disease or disorder in family members (**family medical history** – all conditions, not limited to conditions currently known to be inheritable) (1635.3(b))

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What is Genetic Information? Part 2



- Genetic information includes:
 - 4. Request for or receipt of genetic services by an individual or family member
 - Meaning: genetic test, counseling, education
 - 5. Genetic information of a fetus carried by an individual or family member or of an embryo legally held by the individual or family member using an assisted reproductive technology.

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Genetic Information Does NOT Include



- Information about an individual's or family member's race, sex, ethnicity, or age
- The fact that an individual currently has a disease or disorder (manifested condition)
 - this individual would be protected by the ADA if the disease rises to the level of a disability

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Acquisition of Genetic Information Prohibited



- **General Rule – 1635.8(a)**
 - Covered entities shall not request, require, or purchase genetic information of an applicant or employee
 - There are six narrow exceptions to this prohibition.

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1. No Liability for Inadvertent Acquisition – 1635.8(b)(1)



- Protects covered entity that unwittingly receives otherwise prohibited genetic information
- Examples of inadvertent acquisition – 1635.8(b)(1)(ii):
 - receipt of unsolicited email message that includes genetic information about an employee;
 - during a casual conversation or in response to a general inquiry about the individual or family member's well-being: e.g., "How are you?" "How is your son feeling today?" "Did they catch it early?" asked of employee whose parent diagnosed with cancer

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Prohibition on Requesting Genetic Information during Medical Inquiries/Examinations Related to Employment – 1635.8(d)



- ADA: Employers may conduct post-offer medical examinations/inquiries or fitness-for-duty examinations consistent with ADA requirements
- GINA: To qualify for Inadvertent Exception: Employers must FIRST direct THEIR doctors NOT to collect genetic information when conducting employment-related medical examinations or when making medical inquiries

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Employers Requesting Health Information from Individual or Individual's Medical Provider – 1635.8(b)(1)(i)



- If employer (or health care worker working on behalf of employer) warns (verbally or in writing) individuals and their health care providers that genetic information MUST NOT BE PROVIDED to the employer, but such information is provided anyway, receipt of this information will be considered inadvertent and not a GINA violation
- If employer (or its agent) does not give this notice, it may still establish that receipt of genetic information was inadvertent if its request was “not likely to result in the employer obtaining genetic information”

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2. Permissible to Acquire Genetic Information Through Employer-Sponsored Health or Genetic Services – 1635.8(b)(2)



- Employer may request genetic information as part of a health or genetic service, such as a wellness program, that meets specific requirements:
 - Voluntary: employer must not require participation nor penalize employees who do not participate
 - Prior, knowing, written authorization
 - Information goes only to individual and his/her health care provider
 - Employer gets information only in aggregate form
 - No financial inducements (e.g., cash, gift cards, t-shirts) may be offered in return for provision of genetic information

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Other Exceptions: May acquire genetic information . . .



- #3: Family medical history under the FMLA [1635.8(b)(3)]
- #4: Through Commercially & publicly available documents [1635.8(b)(4)]
- #5: As part of genetic monitoring [1635.8(b)(5)]
- #6: As part of DNA testing for law enforcement purposes or human remains identification [1635.8(b)(6)]

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Confidentiality - 1635.9



- Beginning Nov. 21, 2009, and thereafter, genetic information that an employer has must be kept confidential and placed in a separate medical file (ADA file is OK)
- Limited disclosure rules, some similar to ADA's rules, others unique to GINA – see 1635.9(b)

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Additional Information/Questions



- GINA:
 - www.eeoc.gov/laws/types/genetic.cfm
 - Offers the regulation, fact sheet, and other information
- ADA:
 - www.eeoc.gov/laws/types/disability.cfm
 - Offers the regulation, guidances and fact sheets, and other information

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Thank you for participating in today's ADA-Audio Conference Session

The next scheduled session is:

**“ADA and Law Enforcement:
Understanding the Issues
January 15, 2013**

Register at: www.ada-audio.org or call 877-232-1990 V/TTY

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