Worker's Compensation: Meet Your New Friend GINA

Celia Collins
Johnstone, Adams, Bailey, Gordon & Harris, LLC

Those of us who are "mature" worker's compensation specialists will remember the day when the only law we needed to worry about was the basic Alabama Worker's Compensation Statute. Then, in quick order, along came retaliatory discharge, the ADA and the FMLA making our lives much more interesting. Now we can add a new friend to our play group – The Genetic Information Non-discrimination Act of 2008, 42 USC 2000ff, et seq., affectionately known as GINA.

Introducing GINA

GINA was enacted in May 2008 and Title II of the Act, governing the conduct of employers, became effective on November 21, 2009. GINA prevents employers from discriminating on the basis of genetic information in regard to hiring, discharge, compensation or terms, conditions or privileges of employment, from segregating or classifying employees on the basis of genetic information and from retaliating against employers for opposing unlawful genetic discrimination.

Significant to the worker's compensation context, GINA prohibits employers from deliberately acquiring genetic information relating to an employee or to an employee's family member "to the fourth degree," thereby extending to first cousins once removed (children of a first cousin), great aunts and uncles and great, great grandparents. Employers are expressly prohibited from inquiring not only as to genetic tests, but also as to the medical history of the employee's family. "Genetic tests" are defined as the analysis of DNA, RNA, chromosomes, proteins, or metabolites. "Genetic information" includes not only the genetic tests of employees and their family members but extends to the manifestation of a disease or disorder in an employee's family member, otherwise known as family medical history. The standard family medical history questions in many post-offer/pre-employment health questionnaires, as well as the family medical history component of physician and medical provider's patient assessments, would encompass information protected under GINA.

The employment component of GINA operates under the jurisdiction of the Equal Employment Opportunity Commission. Claims relating to violations of GINA will be filed with the EEOC and handled under the EEOC processes. Lawsuits following such claims will include the same remedies as Title VII and the ADA, including back pay, compensatory damages and punitive damages subject to the statutory caps, reasonable attorney fees and injunctive relief.

continued on page 6

Your worker's comp cases don't have to be a workout.

Spine & Neuro Center is worker's comp friendly, offering comprehensive services to get your patients back on the job quickly and safely. Complete Worker's Compensation and Industrial Rehabilitation Services include:

- *Functional Capacity Evaluations*
- *Impairment Ratings*
- *Complete Spine Therapy*
- *Job Site Observation*
- *Pre-work Screening*
- *Body Mechanics & Lifting Classes*
- *Dedicated Worker's Compensation Specialists*

SPINE & NEURO CENTER

Spine care at a higher level.

Huntsville • Decatur • Cullman | 201 Governors Drive • Huntsville, AL 35801 • Toll Free: 1-888-736-1762 • 256-533-1600 • www.spineandneuro.com

Physical Medicine & Rehabilitation: Keith C. Anderson, D.O., FAAPMR | Hayley C. White, M.D. | W. Luke Robinson, M.D.

NeuroSpine Surgeons: Rhett B. Murray, M.D., F.A.C.S. | Joel D. Pickett, M.D., F.A.C.S. | John D. Johnson, Jr., M.D., F.A.C.S. | Cheng W. Tao, M.D. | Jason T. Banks, M.D.

MIDLANDS

Providing Excess Workers' Compensation Since 1990

for Single Entities, Groups & Public Entities

Provided by an A.M. Best "A" (Excellent) VIII Rated Carrier

Aggregate Coverage Available
Installment Schedule Available

SIR's starting at $300,000
Claims Management Available

Minimum Premiums:
- **Individual: $50,000**
- **Groups: $100,000**

Risk Control Services Available

- Websource
  - **Free** Monthly Web Based Seminars
  - Technical Safety Documentation
- Program Evaluation
- Risk Improvement
- Safety Training
- IH Services
- Loss History Analysis / Accident Investigation
- Ergonomic Evaluation & Training
- Disaster Protection & Recovery Planning Toolkit

Accepting Submissions from Agents & Brokers Nationwide

Midlands also offers Excess Employers' Liability Coverage with Excess Capacity of $5,000,000 & Minimum Retentions of $100,000.

For additional information, please contact: Midlands Management Corporation
ExcessWorkersComp@midman.com • Phone: 800.800.4007 • www.midlandsmgt.com

PMA COMPANIES

GINA has implications for employers well outside of worker's compensation and the scope of this article, including ADA accommodation requests, FMLA requests, health and wellness programs and supervisor/employee communications. HR officials should consult their counsel, review their systems, and conduct appropriate training to ensure compliance with all of the new requirements of the Act.

Application to Worker's Compensation

While neither the statute nor the regulations reference the specific interaction between GINA and a state's workers' compensation laws, the statute provides that the law does not "limit or expand the protections, rights or obligations of employees or employers under applicable workers' compensation laws." 42 USC § 2000ff-8(a)(4). This implies that employers retain the same right to choose and control medical treatment as they presently have under the Alabama Workers' Compensation law and as well as the right to obtain information from the medical providers relating to that treatment. (See Ex Parte Smitherman Bros. Trucking, Inc., 751 So. 2d 1232 (Ala. 1999)). The regulations clarifying the Act that became effective on January 10, 2011, however, include restrictions on the collection of employee medical information that impacts the handling of workers' compensation claims. 29 CFR § 1635.8 of the regulations expressly prohibits an employer from "making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information." Since many physician and medical provider records include a summary of the employee's "family medical history" in their charts, general requests for medical records in workers' compensation claims will often result in a response including protected genetic information.

Although the regulations protect employers from the situation "where the entity inadvertently receives genetic information," they provide that, "if genetic information is received in response to a lawful request for information, the acquisition of genetic information will not generally be considered inadvertent unless the entity directs the health care provider not to provide genetic information." 29 CFR § 1635.8(b).

The regulations offer "safe harbor" language to include in requests for medical information which will render any protected genetic information received to be inadvertent receipt. Unless an employer is issuing a very narrow request for medical information not expected to elicit GINA protected information, the employer should include the following language with any request to a health care provider for employee medical information:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information," as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assisted reproductive services.

29 CFR § 1635.8(b)(1)(i)(B).

This language may be included in the employee's medical release or in any cover letter or form that is sent to

the medical provider. The safe harbor language may be unnecessary if the request is for narrow specific information about a restriction such as asking the doctor to comment on whether the employee can perform the physical tasks on the critical demand form for the employee's position. The EEOC has opined, however, that the safe harbor warning is required in certain situations:

> A warning is mandatory in all cases where a covered entity requests a health care professional to conduct an employment-related medical examination on the covered entity's behalf, since in that situation, the covered entity should know that the acquisition of genetic information (e.g.. family medical history) would be likely in absence of the warning.

75 Fed. Reg. p 68921.

It is particularly common for initial evaluations, IME reports, and even FCE reports to reflect the family medical history of the employee. The regulations thus make clear that "the prohibition on the acquisition of genetic information, including family medical history applies to medical examinations relating to employment" and further mandate that an employer instruct health care providers:

> not to collect genetic information, including family medical history, as part of a medical examination intended to determine the ability to perform a job and must take additional reasonable measures within its control if it learns that genetic information is being requested or required . . . [including] no longer using the services of a health care professional who continues to request or require genetic information during medical examinations after being informed not to do so.

29 CFR 1635.8(d).

Maintenance of Protected Information in Your File

GINA requires that an employer who "possesses genetic information about an employee," must keep such information on separate forms in separate medical files and treat the information as a confidential medical record of the employee. An employer is deemed in compliance with GINA if it maintains the information under the requirements of 42 U.S.C. § 12112(d)(3)(B), which is the ADA provision governing medical records. 42 USC § 2000ff-5(a).

AmTrust North America

Third Party Administration Claims Service

AmTrust North America's Third Party Administration (TPA) Claims Service offers partially self-insured businesses and public entities comprehensive workers' compensation claims management. AmTrust services claims in about 40 states for a diverse group of the AmTrust Group's other clients.

Our seasoned claims professionals have an average of 30 years of experience and are strategically located throughout the country. AmTrust's TPA has an extremely low turnover of accounts, which indicates clients receive unparalleled service and value.

With robust internal and external reporting systems and online inquiry capabilities, AmTrust's comprehensive TPA service offers you the freedom to focus on what you do best – run your business.

For a quote contact Steve Yount at:
P.O. Box 740042 • Atlanta, Georgia 30374-0042
678.258.8556
Steve.Yount@amtrustgroup.com
www.amtrustgroup.com

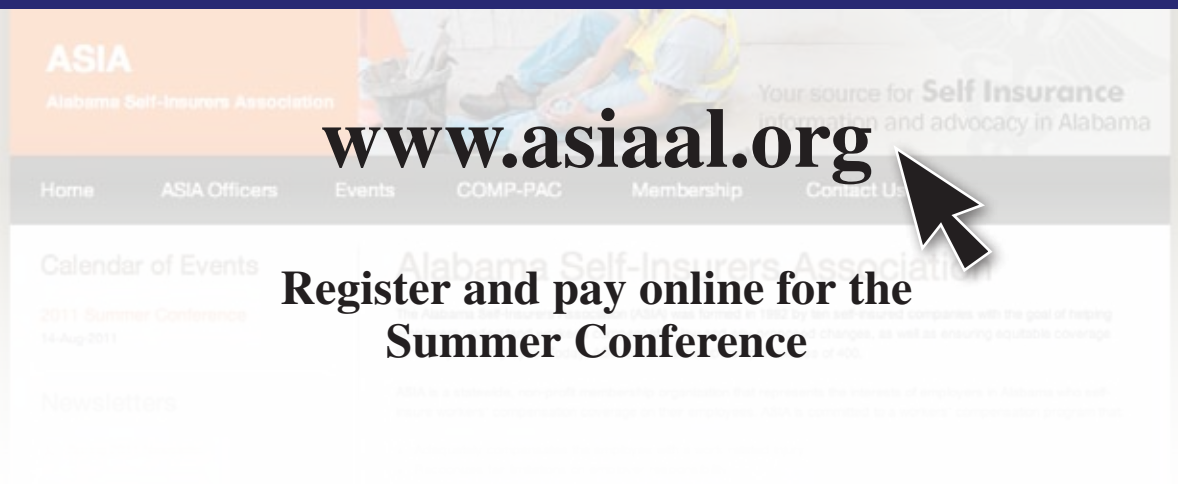
Comp One
FIRST IN WORKERS' COMPENSATION SERVICES

- Telephonic & Field Case Management
- Licensed in Alabama & Tennessee
- Aggressive Return-To-Work Program
- Catastrophic Case Management
- Optional Bill Repricing/PPO Network
- LIVE 24 / 7 Injury Line
- Real-Time Response

Left to right: Jennifer, Leah, Diane, Judy, Janet, Beth, Mary Ann and Marlana

Phone 256/532-2777 • Fax 256/532-2778
www.compone.org

ASIA Website Now Up and Running



www.asiaal.org

Register and pay online for the Summer Conference

GINA also severely limits the employer's ability to disclose GINA-protected information. It may be disclosed to the employee at the written request of the employee. It may be disclosed to an occupational or other health researcher, if conducted in compliance with certain federal regulations. It may be disclosed in response to a Court Order, but the employer may disclose only the genetic information expressly authorized by the Order; and, if the Order was secured without the knowledge of the employee, the employer must inform the employee of the Order and of any genetic information disclosed pursuant to the Order.

Information may be disclosed to government officials who are investigating compliance with the Act or to the extent the disclosure is in connection with the employee's compliance with the medical certification provisions of the Family Medical Leave Act. It also may be disclosed to a federal, state or local public health agency only to the extent it concerns a contagious disease which presents an imminent hazard of death or life-threatening illness, and, again, the employer or family members must be notified of this disclosure. 42 USC § 2000ff-5(b).

Should the information the employer receives in the workers' compensation context include genetic information or family medical history, it should be maintained pursuant to the strict requirements of GINA. To avoid an unintended violation of GINA, any such information inadvertently received should be redacted or removed prior to supplying copies of medical records to others involved in the claim (adjusters/attorneys/case managers, etc.) Similarly, if workers' compensation files created prior to November 2009 included protected genetic information, the genetic information need not be removed. Nevertheless, such information in those files is subject to the use and disclosure requirements applicable to genetic information acquired after the enactment of GINA. 29 CFR § 1635.9(a)(5). Accordingly, special care should be taken to review and redact older files prior to disseminating them for any purpose, including litigation or responding to non-party subpoenas.

Take Away Points

While GINA may not be a friend you want, you can keep her from being an enemy by following some simple guidelines:

- Utilize the GINA "Safe Harbor" language in any request for medical information from the employee's treating physicians, IME providers or other health care providers either by cover letter or in the body of the release.
- Segregate any employee or employee family member genetic information from your workers' compensation file and maintain in accordance with GINA.
- Redact any protected genetic information from employee medical records prior to supplying copies to others involved in the worker's compensation claim.
- Do not disclose protected genetic information in response to a subpoena unless there is a related court order authorizing the disclosure of the information.

Celia Collins is a member of the Johnstone, Adams, Bailey, Gordon & Harris, LLC law firm, where she has been practicing for more than 30 years. Her practice focuses primarily on labor and employment law and workers' compensation. She is past Chair of the Labor and Employment Section of the Alabama State Bar and is recognized in Super Lawyers and Best Lawyers of America in the areas of Labor and Employment Law and Workers' Compensation. She is a frequent speaker and a nationally published author on topics related to these areas. Ms. Collins may be reached at Johnstone Adams, P. O. Box 1988, Mobile, Alabama, 36633, phone (251) 432-7682, email cjc@johnstoneadams.com.