

What's up with GINA? How AI tools could trigger genetic discrimination claims in the US

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Ava Lombardi

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A quiet HR automation risk is emerging. AI intake tools are creating a new route for an old compliance risk: unlawfully acquiring family medical history or other genetic information.



Concerns about companies' use of AI tools in employment decisions are not new, and often focus on the potential of these tools to discriminate against applicants and employees. But a quieter risk is emerging in HR automation: whether chatbots and other third-party platforms are asking for or acquiring genetic information employers cannot lawfully request.

That risk can arise before an algorithm rejects a candidate, generates a health assessment or recommends accommodations for the employee. Under the US Genetic Information Nondiscrimination Act 2008 (GINA), the collection of the information itself is unlawful.

For companies introducing AI into recruitment, occupational health, benefits and employee support functions, an automated question can create the same legal exposure as one asked by a human.

What is GINA?

Title II of GINA prohibits covered employers from discriminating against employees or applicants because of their genetic information. It also prohibits employers from requesting, requiring or purchasing genetic information about an employee, applicant or their family members, subject to limited exceptions.

The law is enforced by the US Equal Employment Opportunity Commission (EEOC) and applies to employers with at least 15 employees.

Genetic information is broader than the results of a DNA or genetic test. It includes an individual's family medical history, as well as requests for or receipt of genetic services and participation in certain genetic research.

How does GINA sit alongside other laws?

It's important for employers to distinguish information protected by GINA from medical information governed by the Americans with Disabilities Act 1990 (ADA), Faegre Drinker Biddle & Reath partner Joseph O'Keefe told Lexology PRO.

"An employee's own manifested disease or disorder, something the employee actually has, is generally medical information under the ADA, not genetic information under GINA. But a relative's manifestation of disease or disorder is genetic information under GINA," O'Keefe said.

Employers must also account for state laws that may impose additional requirements or create greater litigation exposure.

The Illinois [Genetic Information Privacy Act](#), for example, [regulates the collection, use and disclosure of genetic information](#) and allows individuals to bring private claims for violations. The statute has generated a [growing body of class litigation](#) involving employers that allegedly requested family medical history directly or through third-party medical providers.

Oregon, meanwhile, treats an individual's genetic information and DNA samples as [private and separately restricts their collection, retention and disclosure](#).

How can AI expose companies under GINA?

Broad AI use

O'Keefe said there is potential GINA exposure "basically anywhere a chatbot or AI tool is asking health-related questions of employees or applicants."

In fact, the biggest GINA risk may be posed by AI tools or chatbots that are part of a "general application, rather than one specifically designed for HR-related tasks," Sheppard, Mullin, Richter & Hampton partner Douglas Yang told Lexology PRO.

Among other things, this could include tools used for:

- wellness programme enrolment and health risk assessments;
- biometric screening questionnaires;
- post-offer medical examinations;
- occupational health evaluations;
- accommodation and leave requests;
- employee assistance programmes;
- benefits administration; and
- employee health or absence analytics.

Prompt design

GINA's prohibition on requesting or acquiring genetic information is separate from its ban on using this information in employment decisions. This means that standardised tools asking the same questions to every applicant or employee pose [systemic discrimination risk](#). It also means that exposure starts with [prompt design](#).

O'Keefe identified a few "obvious high-risk prompts," such as those that enquire about family health conditions. But "subtler prompts," he said, that ask employees to build "family health trees," upload medical records related to a condition or request health information to "personalize" wellness plans can also create risk.

While GINA does not prohibit an employer from knowing that an employee is taking leave to care for a family member, Yang said, a potential violation arises "when the intake process goes further and inquires into the nature of that family member's condition."

AI-generated follow-up questions

Additionally, generative AI tools can be particularly dangerous "with dynamic follow-ups that turn volunteered information into genetic-testing questions," O'Keefe noted.

"An employee mentions 'my father had colon cancer' in a free-text field, and the AI follows up with questions about genetic screening for cancer risk. That follow-up is soliciting genetic testing information triggered by family medical history, it's a double GINA problem, and it's the kind of thing a well-trained AI might generate because it is medically logical," he said. "Medically logical doesn't mean legally permissible," he added.

Vendor risks

Employers should also carefully assess [vendor involvement](#) when considering AI-related GINA risk, Yang said, adding that "an ounce of prevention here is going to be worth more than a pound of cure."

The statute's ban on requesting or requiring genetic information "attaches to the employer as an entity," Nixon Peabody partner Jacqueline Cooney told Lexology PRO, therefore "it doesn't matter whether a human recruiter, a vendor or a chatbot actually asked the question." She added:

"There's no safe harbor just because the question came from an automated system or because no person ever read the answer. Vendors acting on the employer's behalf can create liability, so employers should hold third parties and third-party chatbots to the same standards that they'd apply to human processes."

Among other things, O’Keefe urged employers to require vendors to agree to GINA-specific compliance representations, indemnity that expressly covers GINA and analogous state claims and “specific guardrails preventing dynamic AI output from generating genetic information follow-up.”

How to mitigate GINA risks through due diligence

Audit AI tools that touch on health

There are several things that companies can do to ensure their AI use is not exposing them to GINA claims. O’Keefe said employers should “start with an inventory” of every AI and chatbot tool that touches on wellness, occupational health, recruiting, accommodation and leave requests, benefits and HR analytics, as “many of these tools may be floating around in a large organization without legal ever having reviewed them.”

Review prompts and responses

Next comes reviewing the content, prompts, forms, upload requests and generated follow-ups. Companies should look for any language about family medical history or causes of death, as well as life insurance or supplemental benefits, questions about parents’ or siblings’ health and accommodation forms that ask “why” a family member needs care, Cooney said.

“Also review training data and knowledge bases to ensure the tool is not grounded on standard clinical intake templates that include family-history questions. A chatbot trained on general medical intake forms will naturally generate family-history prompts because that’s what clinical intake looks like, but the employment context makes those questions unlawful,” O’Keefe added.

Assess vendors

Further, companies should create a structured questionnaire to use for vendor assessments, run tests with “realistic and adversarial inputs,” ensure that systems display [EEOC safe-harbor language](#) and adequately train HR teams and other relevant personnel, O’Keefe said.

What happens after AI inadvertently collects employee genetic information?

Companies should always preserve evidence of compliance and make sure they’re segregating genetic information from standard personnel files. Even with proper due diligence, though, companies may still find themselves up against GINA claims over their AI use.

The first thing employers should do in these situations is “stop the bleeding,” O’Keefe said. In remediation, he continued, companies should “document everything.” This means accounting for “what happened, what was collected, who accessed it, whether it was used in any decision . . . and what corrective steps you took.”

Cooney noted that companies should have an incident response plan for these situations specifically and proof of their vendor due diligence in the event of a breach or regulatory enquiry. She also said that legal departments “should weigh in on both the federal and any relevant state notice obligations.” Perhaps most importantly, she added, the acquired genetic information should never be used in an employment decision.

“GINA’s inadvertent acquisition exception may apply if the disclosure was genuinely accidental and unintentional, but it’s not a reliable argument if the chatbot’s design invited the answer,” Cooney said.

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