

“Genetic Information” Discrimination Banned by New Federal Law

The newly enacted Genetic Information Nondiscrimination Act (GINA), signed by President Bush on May 21, 2008, adds individual genetic information to the list of protected employee classifications under federal law and prohibits employers and health insurance companies from discriminating against or refusing coverage to individuals based on the results of genetic testing.

The provisions of GINA pertaining to health insurance plans will take effect on May 21, 2009. These provisions will not affect life, disability, or long-term-care insurance plans. The provisions of GINA pertaining to employers will take effect on November 21, 2009.

GINA was enacted due to a growing fear among employees of being terminated from their positions or dropped from their employer-based health insurance plans if their genetic risks were tested and found to be high. For example, many women were worried about the repercussions they would face if their employer discovered that they were at high risk for breast cancer. Many individuals even refused to undergo routine tests that would determine their probability of developing certain genetic diseases for fear that it would lead to adverse action in the workplace and a hike in their insurance premiums.

With the enactment of GINA, employers are prohibited from using genetic information to make decisions about hiring, firing, and compensation. Genetic information includes an individual's, or family member's, genetic test results, as well as the occurrence of a disease or disorder in a family member. Information about gender or age, however, does not qualify as genetic information, nor does information obtained through routine tests such as complete blood counts (CBC) or HIV tests.

With limited exceptions, GINA prohibits employers from requesting, requiring, or purchasing genetic information of employees and their family members. The exceptions include an employer's inadvertent request that an employee provide his or her family's medical history, the certification requirements for family and medical leave under federal laws, and the use of genetic information in occupations where the effects of toxic substances are monitored in the workplace.

Once an employer comes into possession of an employee's genetic information, the employer must file it as a confidential medical record, separate from any personnel-related records. Any company policy regarding medical information should be reviewed and revised accordingly. It may be necessary to create a separate file, cabinet, or room for genetic information records to ensure that such records are not easily accessible. Under GINA, the employer cannot disclose the employee's genetic information unless disclosure is made (1) to the employee at his/her request; (2) to an occupational or other health researcher; (3) pursuant to court order; (4) to a government official investigating compliance with GINA; or (5) pursuant to the employee's compliance with the certification requirements of family and medical leave laws.



The enforcement and damages provisions of GINA are identical to those found in Title VII of the Civil Rights Act of 1964. Aggrieved employees can seek compensatory and punitive damages subject to Title VII's limitations. The caps on damages range from \$50,000 to \$300,000, depending on the size of the employer.

GINA also prohibits group health plans and health insurance issuers from denying benefits and raising premiums for individual policies based on the discovery of unfavorable genetic test results. However, this does not prevent issuers from making decisions based on actual manifest medical conditions. GINA also prohibits issuers from requesting or requiring that an individual undergo genetic testing. These new GINA prohibitions pertaining to health insurance also amend several federal laws, such as the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act (PHSA), the Internal Revenue Code, Title XVIII of the Social Security Act (SSA), and the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

Thirty-four states and Washington, D.C. have "genetic nondiscrimination in employment" laws. In New York and New Jersey, discrimination is prohibited based on the results of genetic tests. This applies to hiring, firing, and/or the terms, conditions, and privileges of employment. In New Jersey, through the passage of the New Jersey Genetic Privacy Act, N.J.S.A. § 10:5-43 et seq. in 1996, the Legislature included genetic information and refusal to submit to genetic testing as protected activities under the New Jersey Law Against Discrimination. New York prohibits discrimination on the basis of an individual's genetic predisposition or carrier status. N.Y. Exec. Law § 296(1).

If you have any questions about GINA or any other labor & employment law concerns, please contact Rachel Wingerter or any member of our Labor & Employment Law Group.

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