

The Genetic Information Nondiscrimination Act

On May 21, 2008 President Bush signed into law the “Genetic Information Nondiscrimination Act” (“GINA”) expanding even further the list of unlawful employment practices and potential legal claims which disgruntled employees may file. The following highlights some of the major components of the new law.

WHAT YOU NEED TO KNOW

Who does it cover?

The GINA applies to most employers, including all of those covered by Title VII of the Civil Rights Act of 1964. So, if you have more than 15 employees, you are covered.

What employment practices are prohibited?

The GINA makes it unlawful for an employer to fire or refuse to hire, discharge, limit, segregate, classify or “otherwise adversely affect the status” of an employee or applicant based on any “genetic information” concerning the employee or the employee’s “family member.” “Genetic information” includes information gleaned from a genetic test on that employee, genetic tests of family members, and the “manifestation of a disease or disorder” in the family members of such individual. “Family member” includes a spouse, child (adopted or natural), parent, grandparent or great-grandparent. The GINA further prohibits any retaliation because of an employee’s opposition to discrimination based on genetic information.

What about the handling of genetic information?

Acquiring Genetic Information. The GINA also makes it unlawful for an employer to “request, require or purchase” genetic information about the individual or the individual’s family member, except in very limited circumstances. One significant exception is that employer’s may still request or require medical history if necessary to comply with the certification provisions of the Family and Medical Leave Act. Employees may also test, to the

extent necessary to monitor the effects of toxic substances on the workplace, subject to certain restrictions.

Confidentiality of Genetic Information. Genetic information you have acquired now must be treated as protected health information under HIPPA. Hence, the employer has an obligation to maintain such information in separate medical files, which must be treated as confidential.

Health Care Coverage. The GINA prohibits health care plans from denying coverage or adjusting premium rates based upon genetic information.

What are the available remedies?

The GINA offers employees the same remedies that are provided for in Title VII and the other federal employment statutes, namely, the right to a jury trial, reinstatement, backpay, compensatory damages, and reimbursement of the plaintiff’s attorneys fees.

What does the GINA really mean to an employer?

More than 30 states (including New York, New Jersey and Maryland) already have laws on the books which prohibit discrimination based upon genetic information. Thus, some might say this new federal law will have little impact on employers in these states. We disagree. First, the GINA preempts any less stringent state laws. Also, we think it is likely that the new statute will give rise to new litigation, as any new federal law always tends to spawn new claims, based upon an untested statute. These new federal laws receive wide media coverage. Employees (and lawyers) will likely read and hear about the new law, and claims will thus mushroom. For example, will an employee who is about to be fired claim that his termination is actually based on the fact that his son was just diagnosed with cancer, and the employer now fears that he will also get cancer? Will an employee with a genetic disease claim that the illness is

the reason for his transfer, not his poor job performance? The list of potential claims is limited only by the imagination of the plaintiffs and their lawyers.

WHAT SHOULD YOU DO?

- The first step is to make sure that you have the correct policies in place, and that those policies track the language of the GINA, as well as the laws in the states where you do business.
- The second step is to make sure that your Human Resources department is conversant with the requirements of the GINA, and is looking out for potential workplace issues concerning employees who may have disclosed genetic conditions or illnesses, of themselves or their families. For one, HR should review all personnel files and make sure that you do not have any prohibited “genetic information” in those files, and that all medical information is separated from the personnel file.
- The last step is training your managers. First, they must be aware of the law and trained not to make employment decisions based on prohibited “genetic information.” Second, they should be trained not discuss such issues in the workplace. Finally, remind them to **document, document, document**. Good documentation is the key to every employment case. If there is good documentation, and an objective reason for the action taken – employers can make the decisions they need to make, manage their employees, and prevail in court when those decisions are challenged as unlawful.

For more information or advice about complying with this new legislation, or on any other labor and employment matter, please contact:

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