



Labor and Employment Law Information Memo

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NEW FEDERAL LAW BANS GENETIC INFORMATION DISCRIMINATION IN THE WORKPLACE

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008, prohibiting employers, group health plans and entities that issue group health insurance from discriminating on the basis of genetic information. This law, known as "GINA," takes effect on November 21, 2009 for employers, and prohibits the use of genetic information in making employment decisions. The law also prohibits group, state-regulated, and individual health insurance plans that take effect on or after May 21, 2009, from basing eligibility or premium determinations on genetic information.

This law comes in response to a growing fear that employers are relying on genetic information in an attempt to screen out potentially unhealthy employees, and to lower healthcare costs. GINA provides a uniform, national standard that Congress deemed appropriate to protect the public from discrimination, and allow individuals to take advantage of genetic testing, technologies and new therapies.

GINA broadly defines "genetic information" to include information from an individual's own genetic tests, the tests of the individual's family members, or the occurrence of a disease among family members. A "family member" is defined to include an individual's spouse or dependent child by birth or adoption, as well as relatives from the first to the fourth degree of relationship (i.e., parents, grandparents, great grandparents and great, great grandparents).

Employment Discrimination

GINA makes it an unlawful employment practice for employers with 15 or more employees, employment agencies, labor organizations, and training programs to refuse to hire any applicant, or to discharge or otherwise to discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment based on the individual's genetic information.

With just a few exceptions, GINA also makes it unlawful for employers to request, require, or purchase genetic information about an employee or family members of the employee. The limited exceptions include: (1) inadvertently requesting or requiring family medical history for health or genetic services offered by the employer; (2) requesting or requiring family medical history for purposes of complying with certification requirements of the Family Medical Leave Act or state family and medical leave laws; and (3) genetic monitoring of the biological effects of toxic substances in the workplace, when required to do so by law and under specific conditions.

In the event a covered employer lawfully or inadvertently acquires genetic information of an employee, the employer must apply the same confidentiality protections for genetic information that are applicable to medical information protected under the Americans With Disabilities Act. In particular, the genetic information must be kept in a separate file,

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treated as a confidential medical record, and may be disclosed to third parties only in very limited circumstances.

Health Insurance Discrimination

GINA prohibits discrimination based on genetic information by group, state-regulated, and individual health insurance plans. Specifically, the law amends the Employee Retirement Income Security Act of 1974 (“ERISA”), the Public Health Service Act, and the Internal Revenue Code to prohibit group health plans (including self-insured plans) and health insurance issuers from using genetic information to adjust premiums or contribution amounts.

Additionally, GINA prohibits group health plans from requesting or requiring genetic testing of an individual or of any family member of an individual. This prohibition, however, does not limit the ability of a healthcare professional to request that an individual undergo a genetic test or preclude a group health plan from obtaining or using the results of a genetic test to make a payment determination.

GINA also prohibits group health plans from requesting, requiring, or purchasing genetic information for underwriting or enrollment purposes, and amends the Health Insurance Portability and Accountability Act (“HIPAA”) to treat genetic information as protected health information, subjecting the use and disclosure of such information to HIPAA standards.

What Does GINA mean for New York Employers?

New York was one of the 35 states that had pre-existing laws prohibiting workplace genetic discrimination, prior to the passage of GINA. Under existing New York law, it is an unlawful discriminatory practice for an employer or licensing agency to refuse to hire, to discharge from employment, or to discriminate against any individual in compensation or in terms, conditions or privileges of employment because of the individual’s predisposing genetic characteristics. New York also has existing restrictions on soliciting and acquiring genetic testing information that are largely analogous to the restrictions under GINA. The principal impact of the new federal statute will be to heighten awareness of the limitations on the use of genetic information, and to create additional potential causes of action against employers. Further, to the extent that employers’ non-discrimination policies do not already preclude discrimination based on genetic information, they should be revised to do so.

Another potential problem associated with GINA may well be the complications that employers will face from the receipt of genetic information from health care providers. Such information could be included in pre-employment medical questionnaires, health insurance forms, workers’ compensation reports, and similar records. Moving forward, employers should re-write requests for medical records to ensure that custodians of health care records release only non-genetic health information. Employers may also consider modifying applications, health insurance forms, and workers’ compensation authorizations, and any similar forms that may request such medical information to exclude genetic information. If an employer inadvertently obtains genetic information, it is imperative that the information be kept in a separate file and treated as a confidential medical record, and that it not be disclosed to supervisors and managers who are making employment decisions.

If you have any questions, please contact:

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