

## **New Federal Law Prohibits Employers from Requiring Genetic Testing of Employees or Discriminating Against Employees on the Basis of Genetic Testing, and Imposes New Record-Keeping Requirements on Employers**

**Breaking Developments In Labor and Employment Law**  
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On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which prohibits employers and health insurance companies from discriminating against or refusing coverage to individuals based on the results of genetic testing. Passage of this law places new burdens on employers. The Equal Employment Opportunity Commission ("EEOC") is required to adopt implementing regulations by May 2009, and GINA becomes effective in November 2009.

GINA is intended to encourage Americans to take advantage of the genetic screening, testing and therapies that have recently become available as a result of advances in the field of genetics — without risking potential negative repercussions from employers and insurance providers who might otherwise be concerned that an individual's genetic predisposition to certain diseases would result in lower productivity, more sick days or higher health care premiums.

Proponents of GINA cited two recent cases when garnering support for the law. The first was a 2002 complaint filed by the EEOC alleging that Burlington Northern & Santa Fe Railway Company violated the Americans with Disabilities Act when it tested 36 employees for their genetic predisposition to carpal tunnel syndrome, without their knowledge, during routine physical exams. The second was a 1998 civil rights lawsuit filed against Lawrence Livermore Laboratory, alleging that the lab conducted secret pre-employment genetic screening on African American applicants to determine whether they were predisposed to developing sickle cell anemia.

As enacted, GINA prohibits employers with more than 15 employees from refusing to hire, promote, retain or otherwise discriminate against employees with respect to compensation or other terms or conditions of employment on the basis of their genetic health information. The prohibition and sanctions in GINA are modeled on existing federal laws prohibiting discrimination on the basis of gender, race and age. Unlike many other federal laws, GINA currently expressly excludes claims based on a "disparate impact" theory. However, Congress has six years to appoint a commission to determine whether to impose liability for facially

neutral practices that have a disparate impact on groups that are believed to have particular genetic predispositions.

GINA also prohibits employers from requesting an employee's genetic information, requiring employees to undergo genetic testing or purchasing an employee's genetic information. This prohibition includes some limited exceptions that shield employer liability, including: (1) when an employee must provide genetic information to comply with the certification requirements of the Family Medical Leave Act or similar state laws; (2) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace; and (3) where the employer conducts DNA analysis for law enforcement purposes.

Finally, GINA requires that employers who come into the possession of genetic information on their employees maintain such information in a separate file — apart from the employee's standard medical file — and to treat the material therein as a confidential medical record.

### **What This Means for Employers**

GINA becomes effective in November 2009. Employers with 15 or more employees should revise their existing employment handbooks and policies to address the substantive provisions of GINA. In addition, employers should review their hiring and related information collection practices to ensure that they are not requesting or requiring prohibited employee genetic health information. Those employers who are already in possession of such information should take steps to ensure that existing genetic information about their employees is maintained in a separate confidential file. As with other medical records, employers should ensure that access to this information is limited to appropriate personnel.

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