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**SHEPPARD MULLIN**  
SHEPPARD MULLIN RICHTER & HAMPTON LLP

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## The Genetic Information Nondiscrimination Act Of 2008: Civil Rights Or Science Fiction?

On May 21, 2008, President Bush signed into law a bill forbidding insurance companies and employers from discriminating against an individual based on their genetic information. Advocates of the Genetic Information Nondiscrimination Act, aka the GINA, contend that it is "the first major civil rights act of the 21st century." The GINA expands Title VII which already bans discrimination by race and gender to prohibit employers from discriminating against employees on the basis of "genetic information" in hiring, firing, and other activities. "Genetic information," for the law's purposes, not only include tests that determine variations in a person's DNA, but also information regarding family history of a particular disease. The GINA also prohibits employers from collecting genetic information from their employees, except for rare circumstances such as testing for adverse effects to hazardous workplace exposures, and requires strict confidentiality of genetic information obtained by employers. The GINA grants employees and individuals remedies similar to those provided under Title VII and other nondiscrimination laws, i.e., compensatory and punitive damages. It also provides that no person shall retaliate against an individual for opposing an act or practice made unlawful by GINA. Currently, the GINA does not prohibit discrimination once someone already has a disease.

The GINA is far-reaching in that it amends or touches upon many laws including the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act, the Internal Revenue Code of 1986, Title XVIII (Medicare) of the Social Security Act, and the Health Insurance Portability and Accountability Act of 1996 (HIPAA). For example, it amends ERISA and the Public Health Service Act to prohibit health insurers from discriminating against individuals on the basis of genetic information. It also prohibits insurers from requiring genetic testing, tying premiums to genetic information, or considering family history of genetic disorders in making underwriting and premium determinations. The GINA also requires that all genetic information be treated as health information under HIPAA, thus making this information subject to HIPAA's privacy regulations.

Some technical concerns remain regarding genetic nondiscrimination in employment. For example, the ADA, Title VII, and other discrimination laws recognize that there can be rare cases where an employer has a legitimate reason to make employment decisions based on information that would otherwise be protected, i.e., the bona fide occupational qualification exception. Courts have narrowly interpreted this exception but have recognized that employers can have valid reasons for such policies. A similar narrow exception does not currently exist in the GINA's language. Thus, it remains to be seen whether employers will be able to make employment decisions based on genetic information and a legitimate business necessity.

Further, because the definition of "genetic information" is broad, the GINA raises significant compliance issues with respect to other laws not specifically addressed by the Act. For example, an employee seeking time off to care for a family member under the Family and Medical Leave Act must provide certification of the family member's serious health condition in order to qualify for leave. This knowledge could qualify as "genetic information" under the Act's definition. Will employees be able to claim that subsequent disciplinary actions violate the GINA? While such questions will be clarified in the regulations that GINA requires various agencies such as the EEOC and DOL to promulgate within a year of passage, the Act is sure to generate litigation after it takes effect 18 months from the date that it is signed into law.

Still what is most interesting about the GINA is that it is based on a fear that the potential for discrimination may be causing employees to avoid taking genetic tests. Groups representing businesses opposed to the GINA have stated that consideration of the bill was premature as there is no evidence that employers are, in fact, engaging in discrimination based on the genetic makeup of their employees. Indeed, unlike its predecessors such as the Civil Rights Act which was premised on a well-developed record demonstrating the inadequacy of then current law with regard to actual sexual and racial harassment, the GINA is based purely on a theoretical potential of discrimination. This new pre-emptive approach makes it difficult to predict the regulation's impact on employers and courts, both of which are already overburdened with employment litigation. The GINA arguably provides yet another basis for aggrieved employees to sue their employers. However, the lack of evidence that genetic discrimination is widespread suggests that in the immediate future the act's impact is likely to be limited.