



Legal Alert: Employers and Insurers Meet GINA – The Newest Addition to the Federal Discrimination Law Family

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On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act (GINA) (H.R. 493), which prohibits discrimination by employers and insurers based on genetic information.

The employment discrimination provisions of the law apply to employers covered by Title VII of the 1964 Civil Rights Act and are similar to many provisions of Title VII. For example, employees must file a charge with the Equal Employment Opportunity Commission (EEOC) before filing a discrimination lawsuit. Additionally, GINA provides for the right to a jury trial and compensatory and punitive damages patterned after Title VII. It also provides for the recovery of attorney fees for prevailing plaintiffs under the general fee-shifting statute applicable to federal civil rights act claims. However, unlike Title VII, GINA does not create a disparate impact cause of action for genetic discrimination.

Currently, 34 states and the District of Columbia have genetic nondiscrimination in employment laws; however, the provisions of these laws vary greatly. Although there has been little reported litigation under these state laws, it is possible employers will see more litigation under the federal law because of its jury trial and damages provisions.

GINA does not preempt federal or state laws that provide greater protection from genetic discrimination.

In addition to the employment discrimination provisions, employers who are sponsors of group health plans should be aware that GINA amends ERISA and the Internal Revenue Code to prohibit genetic discrimination in the provision of health insurance. GINA also amends the privacy provisions of HIPAA to include genetic information in the definition of protected health information. The penalties for violations of the health insurance nondiscrimination provisions can be significant.

The employment discrimination provisions take effect in November 2009, or 18 months after the President signed the bill. The provisions pertaining to group health plans become effective in May 2009, or one year after the date of enactment.

Prohibition of Employment Discrimination on the Basis of Genetic Information

GINA prohibits employers (as well as employment agencies and labor unions) from discriminating against employees and applicants for employment on the basis of genetic information. The law also prohibits employers from requesting or acquiring genetic information regarding an employee or a family member of an employee. Additionally, the law prohibits discrimination based on genetic information with regard to participation in apprenticeship or training programs.

An employer is not considered in violation of GINA based on the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee, even if the disease or condition has or may have a genetic basis. Of course, employers who take action based on such medical information may be liable under other federal laws such as the American with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA) or state laws.

Exceptions to the Prohibition on the Acquisition of Genetic Information

The prohibition on the acquisition of genetic information does not apply where the employer inadvertently requests or requires family medical history of the employee or family member of the employee. It also does not apply where the employer offers health or genetic services, including such services offered as part of a wellness program where:

- the employee provides prior, knowing, voluntary, and written authorization;
- only the employee (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and
- any individually identifiable genetic information provided under this provision in connection with these services is only available for purposes of such services and is not disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees.

The prohibition on the acquisition of genetic information also does not apply where:

- an employer requests or requires family medical history from the employee to comply with the certification provisions of the FMLA or state family and medical leave laws; or
- an employer purchases commercially available documents (such as newspapers, magazines, etc., but not medical databases or court records) that include family medical history; or
- the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification, and requests or requires genetic information of employees, but only to the extent that this information is used for analysis of DNA identification markers for quality control to detect sample contamination.

Additionally, the prohibition on the acquisition of genetic information does not apply where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if:

- the employer provides written notice of the genetic monitoring;
- the employee provides prior, knowing, voluntary, and written authorization or the genetic monitoring is required by federal or state law;
- the employee is informed of individual monitoring results;
- the monitoring is in compliance with any federal genetic monitoring regulations or state genetic monitoring regulations where the state is implementing genetic monitoring regulations under the authority of OSHA; and
- the employer, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific employees.

Definitions in the Employment Discrimination Provisions of GINA

- **Genetic Information:** Genetic information means, with respect to any individual, information about that individual's genetic tests, the genetic tests of the individual's family members, and the manifestation of a disease or disorder in the individual's family members. This term does not include information about the sex or age of an individual. Genetic information regarding an individual or family member of an individual includes genetic information of a fetus carried by the individual or family member. With respect to an individual or family member utilizing an assisted reproductive technology, the term genetic information also includes genetic information relating to an embryo legally held by that individual or family member.
- **Family Member:** Family member means an individual, a dependent (as that term is used for purposes of section 701(f)(2) of ERISA), and any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative of such individual or the dependent.
- **Genetic Test:** Genetic test means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, which detects genotypes, mutations, or chromosomal changes. The term "genetic test" does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.

Confidentiality of Genetic Information

Employers who possess genetic information must treat such information as confidential and maintain it on separate forms and in separate medical files. An employer complies with this provision if it treats the genetic information as a confidential medical record under the ADA.

Employers may disclose genetic information only to the employee (or family member if a family member is receiving the genetic services) at the written request of the employee. Additionally, the law permits disclosure in certain other limited situations, such as where necessary to comply with the FMLA certification provisions.

Regulations

The law requires the EEOC to issue regulations interpreting its employment provisions within one year of the enactment date.

Prohibition on Genetic Discrimination in Health Insurance

GINA prohibits genetic discrimination by group health plans and health insurance issuers offering insurance coverage in connection with a group health plan. It also prohibits genetic discrimination by issuers in the individual health insurance market and issuers of Medicare supplemental policies. This Alert focuses on the provisions relating to group health plans; however, the provisions applicable to issuers in the individual health insurance market and issuers of Medicare supplemental policies are similar to those applicable to group health plans.

No Adjustment to Premium or Contribution Amounts Based on Genetic Information

GINA amends ERISA and the Internal Revenue Code by prohibiting group health plans from adjusting premiums or contribution amounts for the group covered under the plan on the basis of genetic information. The law does not prohibit the health insurance issuer from increasing contributions based on manifestations of disease or disorder in an individual who is currently enrolled in the plan. However, the manifestation of disease in one individual cannot be used as genetic information about other group members to further increase the employer's premium.

No Genetic Testing or Collection of Genetic Information

The law also prohibits group health plans from requiring genetic testing and from collecting genetic information prior to an individual's enrollment in a plan. A health plan does not violate this provision if it obtains genetic information incidental to the collection of other information.

This provision does not preclude a group health plan from using genetic information to make a determination regarding payment, consistent with the other provisions of GINA. The law also includes an exception for voluntary participation in genetic research, so long as the requirements set forth in the statute are met and the results of the research are not used for underwriting purposes.

Revisions to HIPAA's Privacy Regulations

GINA revises the privacy regulations of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to include genetic information in the definition of protected health information. Additionally, GINA revises HIPAA to prohibit covered group health plans, issuers of health insurance or issuers of Medicare supplemental policies from using or disclosing an individual's genetic information for underwriting purposes.

The law provides that these revisions will be made by notice in the Federal Register published not later than 60 days after the date of the enactment of the law and will be effective upon publication, without opportunity for any prior public comment. However, they may be revised, consistent with the provisions of GINA, after opportunity for public comment.

Definitions Pertaining to GINA's Prohibition on Genetic Discrimination

in Health Insurance

- **Genetic Information:** The term ‘genetic information’ means, with respect to any individual, information about: that individual’s genetic tests; the genetic tests of the individual’s family members; and the manifestation of a disease or disorder in the individual’s family members. Genetic information concerning an individual or family member means, with regard to a pregnant individual or family member, genetic information of the fetus. With regard to an individual or family member utilizing an assisted reproductive technology, the term genetic information includes genetic information of any embryo legally held by the individual or family member. Genetic information does not include information about an individual’s sex or age.

- **Genetic Test:** The term “genetic test” means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, which detects genotypes, mutations, or chromosomal changes. This term does not include an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes; or an analysis of proteins or metabolites that is directly related to a manifested disease, disorder, or pathological condition that could reasonably be detected by a health care professional with appropriate training and expertise in the field of medicine involved.

- **Family Member:** Family member is defined as a dependent (as that term is used for purposes of § 701(f)(2) of ERISA) and a first-degree, second-degree, third-degree, or fourth-degree relative of an individual or dependent.

- **Underwriting Purposes:** The term “underwriting purposes” means, with respect to any group health plan or health insurance coverage offered in connection with a group health plan: (1) rules for the determination of eligibility for benefits under the plan or coverage; (2) the computation of premium or contribution amounts; (3) the application of any pre-existing condition exclusion; and (4) other activities related to the creation, renewal, or replacement of a contract of health insurance or health benefits

Penalties

Violations of the genetic nondiscrimination requirements in health insurance may result in a penalty of up to \$100 per day per individual for the period of noncompliance. If a violation is not corrected before receiving notice of the violation, there will be a minimum penalty of \$2,500 with respect to any participant or beneficiary. The law provides for a higher minimum penalty of \$15,000 per individual where the violations are more than de minimis. Additionally, the law provides for a maximum penalty with respect to failures that are due to reasonable cause, and not to willful neglect, of the lesser of 10% of the aggregate amount paid by the plan sponsor during the preceding taxable year for its group health plans or \$500,000.

These penalties will not be imposed if it is determined that the party did not know, and would not have known through the exercise of reasonable diligence, of the violation. In the case of violations due to reasonable cause, the penalties will not be imposed if the violations are corrected within 30 days of when the party first knew, or should have known through the exercise of reasonable diligence, of the violation. The Secretary may waive any penalty to the extent that the penalty would be excessive in relation to the violation.

Regulations

The Secretaries of Health and Human Services, Labor and the Treasury are to coordinate the issuance of regulations, rulings, and interpretations where two or more secretaries have responsibility for the provisions of the new law.

Employers' Bottom Line

The extent to which the law will impact the workplace remains to be seen. Employers should, however, take steps now to ensure that all policies and procedures are in compliance with GINA's requirements. If you have any questions regarding the new law, or other labor, employment or benefits issues, please contact the Ford & Harrison attorney with whom you usually work.