

## Employment Alert: Congress Approves Genetic Anti-Discrimination Legislation

5/16/2008

### Overview

On May 1, 2008, Congress passed the Genetic Information Nondiscrimination Act (GINA or the "Act"), which President Bush is expected to sign into law this month. The long-awaited legislation makes it illegal for employers and health insurers to discriminate against individuals based on their genetic information. Title I of the Act prohibits health insurers and plans from requiring genetic testing and from discriminating based on genetic information in enrollment and premium-setting. Title II prohibits employment discrimination on the basis of genetic information, such as a person's predisposition for cancer, sickle cell anemia, or diabetes. In particular, the Act:

prohibits discrimination based on genetic information in hiring, firing, compensation, and other employment decisions;

prohibits employers from collecting genetic information through workplace genetic testing or other means, with very narrow exceptions including (1) if such information is necessary for Family and Medical Leave Act of 1993 ("FMLA") certification requirements, (2) if the information is used to monitor the effects of hazardous workplace exposures, or (3) if the employer conducts DNA analysis as a forensic laboratory; and

imposes strict workplace confidentiality and nondisclosure rules for all genetic information.

The Act expressly states that disparate impact on the basis of genetic information does not establish a cause of action under GINA.

### Action Items for Employers

GINA applies to employers, employment agencies, labor organizations, and joint labor-management committees. While many states have passed similar legislation prohibiting genetic information discrimination, the passage of GINA serves as an important reminder for employers to revisit their employment practices and policies to ensure compliance with both state and federal laws. At a minimum, employers should immediately do the following:

- Confirm that the employer's equal opportunity statement and nondiscrimination policy explicitly include "genetic information" as a basis upon which it does not discriminate.
- Train human resources professionals and managers on rights of employees with regard to their genetic information.
- Implement a procedure that maintains employee genetic information in separate files, treats such information as a confidential medical record, and prevents the disclosure of this information. Genetic information can only be disclosed (1) to the employee or member upon request, (2) to an occupational or other health researcher, (3) in response to a court order, (4) to a government official investigating compliance with GINA, (5) in connection with an employee's compliance with the certification provisions of the FMLA or parallel state laws, or (6) to a public health agency.

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