



Getting to Know GINA

Insights

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After languishing in Congress for 12 years, the Genetic Information Nondiscrimination Act (GINA) has now been passed by both the U.S. House of Representatives and the Senate. President Bush has publicly supported the legislation and is expected to sign it soon.

The New Law's Provisions

GINA makes it an unlawful employment practice for employers with more than 15 employees, employment agencies, labor organizations, and training programs to refuse to hire, or to discharge, any applicant or employee, or otherwise to discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment based on that employee's genetic information. The definition of "genetic information" is broad and includes information from an individual's own genetic tests, the genetic tests of the individual's family members, or the occurrence of a disease in family members of the individual.

GINA also would make it unlawful for employers to request, require, or purchase genetic information about an employee, although, there are some exceptions to this prohibition. A key exception makes it permissible for an employer to undertake genetic monitoring of the biological effects of toxic substances in the workplace if: 1) the employer provides written notice to the employee; 2) the employee gives prior, knowing, voluntary, and written authorization, or the monitoring is required by law; 3) the employee is informed of individual monitoring results; 4) the monitoring complies with applicable federal or state laws; and, 5) the employer receives only aggregate information that does not identify individual employees.

Why Now?

The legislation was advanced in response to a small, but growing, trend by employers to rely on genetic information in an attempt to screen out potentially unhealthy employees and to lower surging healthcare costs. In 2004, the American Management Association found that many companies were genetically testing employees for risk of breast and colon cancer, Huntington's disease, and susceptibility to workplace hazards. In addition, one in six of the companies surveyed also collected family medical histories of their employees. At least half of the employers surveyed who required genetic testing were using the test results in their employment decisions.

While such practices were potentially already barred by the Americans with Disabilities Act (ADA) or the anti-genetic discrimination laws of the 32 states which had such legislation already on the books, GINA would clearly bar these practices going forward.

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Do You Need To Take Action?

At this point, the practical impact of this legislation appears to be insignificant. As noted above, 32 states have had genetic anti-discrimination laws in place for years – yet, there has never been a reported lawsuit where an employee sued an employer for genetic-information discrimination.

Perhaps the biggest potential problem associated with GINA will be the inadvertent receipt of genetic information from health care providers. For example, under the ADA, after a conditional offer of employment, employers are permitted to require, as a condition of employment, that individuals submit to a medical examination and sign an authorization for the release of their health records. These health records almost invariably include genetic information now barred from disclosure by GINA.

In order to minimize the risk associated with an inadvertent receipt of genetic information in this situation, we advise that requests for medical records be re-written to request that custodians of health records release only non-genetic health information. Other minor modifications of applications, health insurance forms, and workers compensation authorizations may also be warranted in light of GINA.

In addition to the employment provisions discussed above, GINA has an insurance component which would make it illegal for health insurers to raise premiums or deny coverage based on genetic information. This provision will principally affect employers who self insure the healthcare expenses of their employees.

If you have questions regarding GINA and how it may impact your company, contact your regular FP attorney.

This Alert provides information about a specific federal law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.