

NEW LAW PROHIBITS DISCRIMINATION REGARDING “GENETIC INFORMATION”

Insights
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On September 7, 2011, California Gov. Jerry Brown signed into law an act prohibiting discrimination based upon “genetic information.” The new law becomes effective on January 1, 2012 and, in the context of employment discrimination, covers California employers who regularly employ five or more workers.

California already prohibits discrimination in the context of employment, housing, and the provision of business services when such discrimination is based upon certain “protected” characteristics, including race, sex, age, disability, and several others. Specifically, California’s Unruh Act prohibits businesses from discriminating in the manner they provide their services. Likewise, California’s Fair Employment and Housing Act prohibits employment and housing-related discrimination. The new law now adds “genetic information” to the list of characteristics protected by these two laws.

“Genetic information” is defined as: 1) a person’s genetic tests; 2) the genetic tests of a person’s family members; 3) diseases or disorders suffered by a person’s family members; and 4) a request for, or receipt of, genetic services or participation in genetic-based clinical research by a person or that person’s family member. In short, the California law protects a person from discrimination based upon genetic tests or family medical history showing that the person has a pre-disposition for diseases or other abnormalities.

For example, the law prohibits an employer from asking a job applicant to take a genetic test in order to determine if the applicant has a predisposition for heart disease or cancer “ and potentially cost the employer higher medical premiums. Likewise, the law prohibits an employer from terminating an employee upon

discovering that the employee's parent has a genetic disease, such as Huntington's disease.

Despite relying upon the term "family member" for its definition of "genetic information," no definition of "family member" is provided. The law is derived from the federal government's similar Genetic Information Nondiscrimination Act of 2008 (commonly referred to as "GINA") and employs the same definition of "genetic information" as the federal law. GINA does provide a definition for the term "family member" as 1) a dependant, as defined under ERISA; or 2) any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative of such individual.

Since the new California law is derived from GINA, it may have adopted the federal definition of "family member." However, at the same time, California's Fair Employment and Housing Act already uses the term "family" in regards to medical leave. In the California medical leave law, the term "family" is limited to a parent, spouse or child.

Additionally, the administrative regulations tied to the California medical-leave law employ the term "family member" as synonymous with the parent, spouse or child definition. Accordingly, with multiple possible definitions of the term "family member," the scope of the new genetic information discrimination law is not yet certain.

We suggest that all California employers review their personnel policies to ensure compliance with the new law.

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