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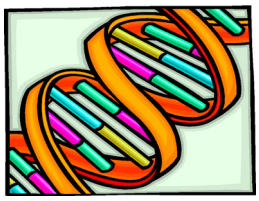

GINA - The Name Every Employer Needs to Know

By Barry H. Uhrman

In 2008, President George W. Bush signed into law the Genetic Information Nondiscrimination Act ("GINA"). GINA prohibits employers of 15 or more employees from acquiring any genetic information from applicants or employees, with few very limited exceptions. The new law also amended Title VII, the Employee Retirement Income Security Act, the Public Health Service Act, and other federal laws, to prohibit employers from discriminating against applicants or employees on the basis of genetic information. GINA further prohibits health insurers from restricting enrollment and premium adjustments for health insurance on the basis of genetic information or genetic services.

What is Genetic Information?

"Genetic information" is not limited to the results of genetic tests administered to applicants or employees. The law is much broader in its protection. Under GINA, "genetic information" also includes the results of genetic tests administered to family members and information about "the manifestation of a disease or disorder in family members of an applicant or employee." The language of the statute is broad enough to include family medical history. Of note, "genetic information" does not including information about the sex or age of any individual.

The term "genetic test" means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.

Title I - Health Insurance

Title I of GINA prohibits group health plans and health insurance carriers from "requesting, requiring or purchasing genetic information prior to or in connection with enrollment, or at any time for underwriting purposes." The law applies to all health insurance plans, including those under federally-regulated ERISA plans, state-regulated plans, and private individual plans.

In addition, Title I prohibits the collection of genetic information to determine eligibility for benefits or provide rewards in the form of premium or contribution discounts. This means that employer wellness programs would violate GINA when they seek information regarding family medical history.

The statute has an exception for the "inadvertent" request of a family medical history provided in the context of a "voluntary" wellness program. The Equal Employment Opportunity Commission ("EEOC") has acknowledged that under the Americans with Disabilities Act, a wellness program is voluntary if it neither requires employees to participate nor penalizes employees for non-participation. If the wellness program is not "voluntary," any questions about family medical history will be prohibited by the statute.

GINA requires amendments to the privacy regulations under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") providing that "genetic information" is to be treated as health information. The use or disclosure of such information will not be considered a "permitted use or disclosure" under those regulations.

Title II - Employment Discrimination

The employment provisions ("Title II") of GINA became effective on November 21, 2009. These provisions apply to private and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs. Under Title II, employers are prohibited from discharging, refusing to

hire, or otherwise discriminating on the basis of genetic information, and from intentionally acquiring genetic information about applicants and employees. The law imposes strict confidentiality requirements regarding genetic information.

For all covered employers, it is an unlawful employment practice under Title II:

> (1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or
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> (2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.

It is also an unlawful employment practice for an employer to request, collect, or purchase genetic information, except in several limited and clearly-defined situations. These exceptions include circumstances where the information is: (a) required to comply with medical certification requirements of state or federal family and medical leave laws, (b) included in commercially and publicly available documents; and (c) to be used for genetic monitoring of the biological effects of toxic substances in the workplace. There is an additional exception where an employer conducts DNA analysis for law enforcement purposes as a forensic laboratory.

There are also exceptions to the prohibitions against the disclosure of genetic information. For example, an employee may make a written request for the information. In addition, disclosure is permitted to occupational or other health researchers or to government officials investigating compliance with GINA. Information may also be disclosed pursuant to a court order or in connection with the employee's compliance with the Family and Medical Leave Act or state family and medical leave laws.

Even though genetic information may be inadvertently or permissibly received, such information may not be used for purposes of prohibited employment actions based on that information.

Remedies and Litigation Under GINA

Enforcement of and remedies under Title II for GINA violations are the same as those under Title VII of the 1964 Civil Rights Act, with one notable exception. Litigation under GINA is limited to claims of intentional discrimination (i.e., disparate treatment claims). There is no cause of action under the statute for "disparate impact" on the basis of genetic information.

Title II also includes a "firewall" provision intended to eliminate "double liability" by preventing claims under Title II from being asserted regarding matters subject to enforcement under Title I or the other genetics provisions for group coverage in ERISA, the Public Health Service Act, and the Internal Revenue Code. The firewall seeks to ensure that health plan or issuer requirements or prohibitions are addressed and remedied through those statutes and not through Title II and other employment discrimination procedures. The firewall does not immunize covered entities from liability for decisions and actions taken that violate Title II, including employment decisions based on health benefits, as such benefits are within the definition of compensation, terms, conditions, or privileges of employment.

Practical Advice and To Do List for Employers

GINA presents several new and significant concerns for employers. Employment decisions may now be challenged on the basis that an employer came into possession of such information and then made an adverse employment decision. Employers who offer employee wellness programs need to make sure that employees do not provide family medical history as part of those programs.

In addition, employment practices that are permitted under the Americans with Disabilities Act ("ADA") may be unlawful under GINA. Employers who require medical examinations or fitness-for-duty examinations for employees must change the kinds of questions asked as part of those exams. Even though the ADA permits employers to obtain medical information, including genetic information, from post-offer job applicants, employers are not permitted to obtain any genetic information (including family medical history) under GINA.

Employers are also required to post the revised workplace notice ("Equal Employment Opportunity is the Law") that includes information regarding GINA's ban on employment discrimination based upon an individual's genetic information. Employers may either post the supplement alongside the September 2002 poster or post the November 2009 revised version

of the poster. Copies of the posters (in both English and Spanish) are available on the EEOC's website: http://www1.eeoc.gov/employers/poster.cfm.

Employers must understand their legal obligations and requirements with respect to the new regulations and disabled employees. Most importantly, employers must ensure that all human resources personnel, supervisors, and managers are trained regarding the new statutory provisions to avoid costly litigation landmines. ◆

Jones, Skelton and Hochuli's Employment Law Practice Group will continue to keep you apprised of all future developments concerning the Genetic Information Nondiscrimination Act. Please feel free to contact Barry H. Uhrman [(602) 263-7328, buhrman@jshfirm.com] with any questions you may have regarding these important developments in employment law.

About The Author

Barry H. Uhrman

Mr. Uhrman joined Jones, Skelton & Hochuli in 2007 and concentrates his practice on employment law, complex litigation and governmental liability. He has successfully defended Title VII, ADA, ADEA and FMLA cases for Fortune 500 clients and public and private sector employers. Mr. Uhrman has extensive experience revising sexual harassment and other employment policies for employee handbooks. In addition, he has authored articles and seminar materials regarding leaves of absence under the ADA and FMLA.

Mr. Uhrman has also represented clients in other areas of employment law, with an emphasis on intellectual property and trade secrets. He has successfully defended multi-million dollar copyright infringement, defamation and trade secrets cases. Mr. Uhrman has also represented private sector employers in cases involving employment law torts, including interference with business advantage, violation of the right of publicity, and tortious interference with contractual relationships.

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