



NEW FEDERAL LAW PROHIBITS "GENETIC INFORMATION" DISCRIMINATION BY EMPLOYERS AND HEALTH PLANS

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On May 21, President George W. Bush signed into law the Genetic Information Nondiscrimination Act of 2008 (GINA). After years of considering different versions of the law, the Senate and House approved GINA with nearly unanimous support. The new law prohibits discrimination against individuals on the basis of their "genetic information" in both private sector and public sector employment and health care. GINA has two main parts – Title I, which relates to health plans, and Title II, which relates to employers. The provisions affecting health plans become effective on May 21, 2009, while the employment provisions become effective on November 21, 2009.

GINA's drafters primarily wanted to encourage Americans to take advantage of new medical therapies, technologies, and treatments involving genetic information. Because many Americans feared discrimination based on their genetic test results, GINA's provisions were drafted to allay these concerns by preventing health insurers and employers from adversely impacting health coverage and employment based on such results.

Title I prohibits group health plans and issuers of insurance offering health coverage from:

- adjusting group premium or contribution amounts based on genetic information;
- using genetic information about an individual for underwriting purposes;
- requesting or requiring genetic testing;
- denying enrollment based on genetic information; or
- requesting, requiring, or purchasing genetic information prior to enrollment and in connection with enrollment.

In addition, Title I expands the Health Insurance Portability and Accountability Act (HIPAA) by adding the term "genetic information" to the definition of "health information" in the privacy regulations promulgated under HIPAA. This reduces any ambiguity in HIPAA regarding the confidentiality of such information.

Title II requires employers, employment agencies, labor organizations, and apprenticeship and training programs to refrain from:

- hiring, firing, promoting, or making any employment decision, based on genetic information;
- disclosing genetic information about an individual, with certain exceptions;
- requesting or requiring genetic information, with certain exceptions; or
- retaliating against those who assert their rights under the law.

GINA further prohibits restriction, segregation, or classification of employees based on genetic information in any way that may "adversely affect" an employee's employment status or that would "deprive or tend to deprive" any employee of employment opportunities.

GINA defines "genetic information" , with respect to any individual as: 1) genetic tests; 2) genetic tests of family members; and 3) the manifestation of a disease or disorder in a family member. "Genetic test" is defined as "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes."

Penalties for noncompliance with GINA can be severe. With regard to plan sponsors and health insurance issuers, GINA provides the Secretary of Labor with the power to seek monetary fines that can reach up to \$100 per day for each day of noncompliance. There are, however, the following exceptions to such penalties: 1) where ". . . failure during any period for which it is established to the satisfaction of the Secretary that the person otherwise liable for such penalty did not know, and exercising reasonable diligence would not have known, that such failure existed;" or 2) where the failure was ". . . due to a reasonable cause and not to willful neglect" and it was ". . . corrected during the 30-day time period beginning on the first date the person otherwise liable for such penalty knew, or exercising reasonable diligence would have known, that such failure existed." With respect to employers and employees, the new law's remedies parallel those provided under Title VII of the Civil Rights Act of 1964. Employees may obtain compensatory and punitive damages, as well as attorneys' fees, against employers who have violated GINA.

Despite the excitement over the recent passing of GINA, it is unlikely to have any significant immediate impact because genetic testing is not currently a very common practice. Additionally, there is considerable overlap between GINA, the Americans with Disabilities Act (ADA), and existing federal and state anti-discrimination laws. Furthermore, regulations pertinent to GINA have not yet been promulgated by any federal agency, although such regulations are mandated by the statute. If issues arise under GINA, employers should be advised to keep all information confidential and contact employment counsel immediately.

PERB DECISIONS

These decisions have been issued by the Public Employment Relations Board or its staff. Any summary that might be of interest should be reviewed as to the facts and circumstances of the case to assure the decision might be applicable to circumstances in which you may have an interest. In addition, any decision should be researched to ascertain its subsequent disposition, if in fact an appeal to the Board was made, and, if it was, further researched to determine if a court appeal followed. Email your editor John Galligan at galli14@earthlink.net for a copy of any decision summarized. Use the PERB web site (www.perb.state.ny.us) where summaries of recent decisions appear and the agency's forms can be downloaded.

- a public employer is not included in the definition of a "covered entity" under HIPAA or HIPAA regulations. Consequently, a public employer could not face sanctions for disclosing medical information without a valid authorization from an individual. July 25 Board decision in Village of Monroe.
- a managerial employee is one who may reasonably be required to assist a public employer directly in the preparation for in the conduct of collective negotiations or to have a major role in the administration of labor agreements or in personnel administration. A public employee may be designated as confidential by PERB only if they assist and act in a confidential capacity to a managerial employee. To be designated as confidential, an employee must assist a managerial employee in the delivery of managerial duties and, in doing so must act in a confidential capacity to the managerial employee. The first part of

the test is duty oriented; the second part is relationship-oriented. July 2 ALJ decision in Fashion Institute of Technology; and

- if a defense is raised during the course of a PERB proceeding, but it fails to appear in a post-hearing brief, the defense will be deemed to have been abandoned. July 2 ALJ decision in Fashion Institute of Technology.

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