

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008 ("GINA"), which addresses the use of genetic information in both the health insurance and employment contexts. Under GINA, "genetic information" is defined as:

- (1) An individual's own genetic test;
- (2) The genetic tests of family members; and
- (3) The manifestation of a disease or disorder in family members.

General information does not include information about an individual's current disease or disorder.

GINA includes two titles. Title I of GINA, which deals with the use of genetic information in health insurance, amends the Employee Retirement Income Security Act ("ERISA") to prohibit health insurers from taking certain actions based on employees' genetic information with regard to group health plans, individual plans and Medicare supplemental plans.

In particular, Title I:

- (1) Prohibits the use of genetic information in enrollment restrictions and premium adjustments;
- (2) Prohibits health plans and insurers from requesting or requiring genetic testing; and
- (3) Applies to all health insurance plans, including those under federally-regulated ERISA plans, state-regulated plans, and private individual plans.

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

The provisions on health insurance discrimination contained in Title I of GINA became effective May 21, 2009. All employers offering self-insured plans would be well-advised to consult legal counsel regarding Title I of GINA because the penalties for non-compliance can be significant.

Title II of GINA (employment discrimination) addresses genetic information in the employment context and will become effective November 21, 2009. Specifically, for all employers with 15 or more employees, Title II of GINA:

- (1) Prohibits employers from discriminating in the terms or conditions of employment based upon genetic information;
- (2) Prohibits employers from retaliating against employees who oppose discrimination based upon genetic information;
- (3) Prohibits employers from collecting genetic information about an employee or an employee's family member except in limited circumstances; and
- (4) Prohibits the disclosure of genetic information except in limited circumstances.

The most notable of the limited circumstances referenced in (3) and (4) above apply to the medical certification requirements of state or federal family and medical leave laws. In addition, (3) above specifically eliminates an employer's ability to obtain genetic information after making a job offer, as was permitted under the ADA.

Title II of GINA also requires employers who obtain genetic information under the limited exceptions to maintain that information separately from other employment-related files and to treat the genetic information as confidential.

With respect to enforcement, GINA incorporates Title VII's remedial scheme. Employees are required to exhaust administrative remedies before initiating a lawsuit, and the damages available are the same as those available under Title VII and subject to the same restrictions. Also like Title VII, GINA does not preempt more stringent state laws.

Unlike Title VII, GINA does not permit claims based on a disparate impact theory. The EEOC, however, is authorized to create a commission to review the developing science of genetics and to make recommendations as to whether disparate impact claims should be permitted at some future point.

GINA is intended to prevent employers from making employment decisions based upon a concern that an applicant, employee or dependent with a genetic predisposition for certain chronic medical conditions will place a financial burden on the employer's group medical insurance plan. Employers can take certain steps to not only ensure that their employment practices do not violate GINA but also to minimize negative inferences to be drawn from their conduct. The recommended actions include:

- Add non-discrimination on the basis of genetic information to the Equal Employment Opportunity Sections of the employee handbook;
- Train all managers and supervisors on how to recognize what is considered "genetic information" under GINA and how to treat such genetic information;
- Discontinue requests to applicants and employees to provide a family medical history;

- Review the internal process for maintaining records and confidentiality with regard to “genetic information” and, if necessary, implement policies and procedures to prevent the inadvertent disclosure of such genetic information;
- Implement a policy to screen all applicant and employee medical information upon receipt to determine whether such information is considered “genetic information” and, if so, provide the required confidentiality protections; and
- If offering a self-insured health plan, consult legal counsel to determine whether any changes are necessary to comply with Title I of GINA.

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