

## **New Law Prohibits Employers from Considering Genetic Information in Making Employment Decisions**

**May 22, 2008**

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008 (GINA), prohibiting employers from using genetic information for decisions on hiring, firing, promotions, or job assignments, and group health plans and health insurers from basing eligibility or premium determinations on genetic information.

Introduced by Representative Louise M. Slaughter (D-NY) and hailed by legislators and patient rights advocates as “the first major new civil rights bill of the new century,” this legislation has had broad political support in its 13-year struggle through Congress but, until now, has never managed to pass both houses in the same session.

### **Employment-Related Decisions**

GINA broadly prohibits covered employers from discriminating against an employee, individual, or member because of the employee’s “genetic information,” which is broadly defined in GINA to mean (1) genetic tests of the individual, (2) genetic tests of family members of the individual, and (3) the manifestation of a disease or disorder in family members of such individual. GINA also prohibits employers from requesting, requiring, or purchasing an employee’s genetic information. This prohibition does not extend to information that is requested or required to comply with the certification requirements of family and medical leave laws, or to information inadvertently obtained through lawful inquiries under, for example, the Americans with Disabilities Act, provided the employer does not use the information in any discriminatory manner. In the event a covered employer lawfully (or inadvertently) acquires genetic information, the information must be kept in a separate file and treated as a confidential medical record, and may be disclosed to third parties only in very limited circumstances.

Remedies for violation of GINA are the same as those available under Title VII of the Civil Rights Act. An employee who believes he or she has been discriminated against must make a complaint to the Equal Employment Opportunity Commission (EEOC) or his or her state deferral agency, which will investigate the claim and bring suit on behalf of the employee if evidence of a violation is found. Should the EEOC opt not to bring suit, the employee may bring suit independently. Unlike Title VII, however, GINA specifically provides that no charges may be filed for claims of “disparate impact” discrimination, i.e., a discriminatory *effect* on a protected class caused by an employment practice or policy that appears on its face to be nondiscriminatory.

## **Insurance-Related Decisions**

GINA amends the Employee Retirement Income Security Act of 1974, the Public Health Service Act, and the Internal Revenue Code to prohibit group health plans (including small group health plans) and health insurance issuers offering coverage in connection with a group health plan from using genetic information to adjust premiums or contribution amounts. It also prohibits group health plans (and health insurance issuers) from requesting or requiring genetic testing of an individual or of any family member of an individual (including fetuses and embryos). Such prohibition does not (1) limit the ability of a healthcare professional to request that an individual undergo a genetic test or (2) preclude a group health plan (or health insurance issuer) from obtaining or using the results of a genetic test to make a payment determination as long as only the minimum amount of information needed is requested. In addition, if certain conditions are satisfied, group health plans may request (but may not require) voluntary genetic testing for research purposes. GINA also prohibits group health plans from requesting, requiring, or purchasing genetic information (1) for underwriting purposes or (2) with respect to any individual prior to such individual's enrollment in connection with such enrollment (although information incidentally obtained is not a violation).

GINA authorizes a penalty of \$100 per day against any sponsor of a group plan (or health insurance issuer) for any failure to meet the requirements of GINA (beginning on the date such failure first occurs and ending on the date the failure is corrected) for each participant or beneficiary to whom such failure relates. No penalty will be imposed if (1) the failure would not have been discovered through the exercise of reasonable diligence or (2) such failure was due to reasonable cause and not to willful neglect and such failure is corrected during the 30-day period beginning on the first date the person otherwise liable for the penalty knew (or exercising reasonable diligence would have known) that such failure existed. Additionally, in the case of failures that are due to reasonable cause and not to willful neglect, the penalty will not exceed the lesser of (1) 10% of the aggregate amount paid or incurred by the plan sponsor during the preceding taxable year for the group health plans and (2) \$500,000. If a violation is not corrected before the plan receives a notice from the Department of Labor, the minimum penalty for such failure with respect to each participant or beneficiary to whom such failure relates is \$2,500, and if the violations are more than *de minimis*, the minimum penalty for each such failure is \$15,000. The Secretary of Labor may fully or partially waive the penalty in the case of a failure due to reasonable cause and not willful neglect to the extent that the payment of such penalty would be excessive relative to the failure involved.

GINA also amends the Health Insurance Portability and Accountability Act of 1996 (HIPAA) to treat genetic information as protected health information, thereby subjecting such information to HIPAA's rules protecting the privacy of protected health information and rules limiting the use and disclosure of such information.

## **Conclusion**

The health insurance provisions of GINA take effect in 12 months and the employment provisions in 18 months. It remains to be seen if this law will have a significant impact on the practices of insurance companies and employers. In the meantime, we encourage all employers to become familiar with the requirements of the statute. Members of our firm's Labor and Employment or Employee Benefits practice teams are available to consult with you about GINA.

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