

December 9, 2009

Genetic Information Nondiscrimination Act: Federal Law Prohibits Discriminating on the Basis of Genetic Information

On November 21, 2009, the employment provisions of the Genetic Information Nondiscrimination Act (GINA) became effective. GINA bars employers, labor organizations, and employment agencies from discharging, refusing to hire, or otherwise discriminating against employees on the basis of genetic information. Moreover, GINA generally prohibits employers from requesting, requiring, or purchasing genetic information about applicants and employees. The law only allows requesting or acquiring genetic information in very limited circumstances, such as monitoring the adverse effects of toxic exposure in the workplace or in certain circumstances to certify an employee absence for FMLA purposes. If an employer is entitled to possess genetic information, the information must be maintained confidentially in a file separate from the personnel file.

GINA creates a federal cause of action, including a right to a jury trial, for violations of these restrictions. As with other federal discrimination claims, an individual is required to file his or her claim with the Equal Employment Opportunity Commission before proceeding to federal court.

New York State law already prohibits employers from discriminating on the basis of a genetic predisposition under New York Executive Law § 296 and on

the basis of specific genetic disorders under New York Civil Rights Law Article 4-C. The New York Executive Law also generally prohibits employers from soliciting, requiring, or administering genetic tests. In contrast, however, GINA prohibits discrimination on the basis of *genetic information*. GINA defines “genetic information” as 1) information about an individual's genetic tests; 2) the genetic tests of family members of such individual, and 3) the manifestation of a disease or disorder in family members of such individuals. GINA's coverage is therefore broader, and New York employers should review their employment policies and practices to ensure that they remain in compliance.

In addition, GINA amends several federal statutes including the Employee Retirement Income Security Act of 1974 (ERISA), the Public Service Health Act, the Health Insurance Portability and Accountability Act (HIPAA) and others. Accordingly, all health insurance programs, including those under ERISA, state-regulated plans, and individual plans are prohibited from discriminating on the basis of genetic information. GINA prohibits health insurers from restricting enrollment or adjusting premiums on the basis of genetic information or genetic services and prevents health plans and insurers from requesting or requiring genetic testing. However, these prohibitions are subject

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to certain limitations. For instance, a health care professional who is providing health care services to an individual is entitled to request that such individual undergo a genetic test. Moreover, if a group health plan or health insurance issuer offering health insurance coverage obtains genetic information incidental to the collection of other information concerning the individual, such request, requirement, or purchase will not be considered a violation of GINA.

Finally, GINA includes a separate provision that amends the Fair Labor Standards Act. It increases the penalty for child labor violations from \$10,000 to \$11,000 per violation and adds a provision allowing the Department of Labor to assess penalties up to \$50,000 when a violation results in death or serious injury. Employers may also be

subject to a penalty of up to \$100,000 for repeat violations. Generally, however, the amount and appropriateness of any penalty depends on the size of the business and the gravity of the violation.

If you need further advice on this matter please contact [John Keil](#) at (212) 758-7862 or [Rebecca Fischer](#) at (212) 758-7793.

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