

The Genetic Information Nondiscrimination Act of 2008

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Congress recently passed the Genetic Information Nondiscrimination Act (“GINA”), a new federal law that will prohibit employers from using genetic screening to make employment decisions. This legislation enjoyed widespread support, with the final version of the bill passing the House 414 to 1 and the Senate 95 to 0. [Note: The legislation was still waiting for the signature of President Bush as of 5/14/08]

As medical science has advanced, scientists have devised genetic tests that can be used to predict the likelihood that a specific individual will develop a particular disease, perhaps even decades in the future. Some movies have pictured a fictional future where individuals’ career paths are determined by their genetic profiles. Though in reality this technology is still in its infancy, an emerging concern about the use of such information motivated Congress to pass GINA, which limits the use of genetic data by health insurers, employers, employment agencies and labor organizations.

With respect to employers, Section 202 of GINA makes it unlawful to discriminate against employees (including applicants) based on genetic information. Such information includes not only genetic tests of employees themselves but also tests of employees’ relatives and/or diseases or disorders experienced by relatives. Genetic information may not be used as a basis for discharging or failing to hire an employee, nor may it be used to make decisions regarding compensation or the terms, conditions, or privileges of employment. Employers also may not limit, segregate, or classify employees because of genetic information in ways that would deprive or tend to deprive them of employment opportunities or otherwise adversely affect their employment status.

The legislation not only prohibits employers from using genetic information, it also prohibits employers from requesting, requiring, or purchasing genetic information of employees or their family members. GINA allows limited exceptions to this rule where genetic information is required to meet certification requirements of family and medical leave laws; where it is used in connection with health/genetic services or “wellness programs” offered by the employer but not provided to the employer in an individually identifiable way; where it is published in commercially available documents such as newspapers or magazines (but excluding medical databases and court records); for genetic monitoring of the effects of toxins in the workplace; or for law enforcement purposes at forensic laboratories. As with other types of medical information under the Americans with Disabilities Act, genetic information must be treated as a confidential medical record and must be maintained in separate files. Disclosure of such genetic information by an employer is illegal except in limited circumstances involving employee requests, certain scientific research, court orders, government investigations relating to GINA compliance, in connection with certification requirements of the FMLA or similar state laws, or to a public health agency.

Claims under GINA are limited to “disparate treatment” claims, that is, those claims that are supported by evidence that a specific individual or individuals were treated differently based on a legally protected characteristic. Claims based on a “disparate impact” against a particular group relying on statistical evidence showing that a particular group received less favorable treatment, rather than on specific acts of discrimination, are specifically disallowed by the Act. Finally, while the ADA and other laws may apply to currently existing diseases, GINA does not apply to “a manifested disease, disorder, or pathological condition that has or may have a genetic basis.” In other words, an employer would still be able to make employment decisions based upon an employee’s ability to perform the essential functions of a job with or without reasonable accommodation consistent with the ADA.