



New Federal Law Prohibits Employment Discrimination on the Basis of Genetic Information and Increases Penalties Under the Fair Labor Standards Act

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA) into law.

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GINA applies to all employers that are covered under Title VII. GINA prohibits these employers from discriminating on the basis of genetic information in hiring, firing, compensation, promotion and other personnel decisions. It also prohibits retaliation against covered individuals for exercising their rights under GINA. These nondiscrimination provisions go into effect November 21, 2009.

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GINA defines "genetic information" to include information about: (1) an individual's genetic test; (2) genetic tests of an individual's family member; and (3) the manifestation of a disease or disorder in family members of the individual. "Genetic information" does not include information about the sex or age of any individual; however, it does include genetic information of any fetus carried by an individual or family member and genetic information of any embryo legally held by an individual or family member utilizing an assisted reproductive technology.

GINA prohibits employers from requiring, requesting or purchasing genetic information of covered individuals and their family members, except in the limited circumstances where: (1) an employer inadvertently requests or requires the family medical history; (2) genetic or health services are offered by an employer; (3) an employer requests or requires family medical history to comply with medical certification requirements of federal or state family and medical leave laws; (4) genetic information and family medical history are "commercially and publicly available"; (5) the information is to be used for genetic monitoring of the biological effects of toxic substances in the workplace; or (6) an employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification.

GINA also prohibits covered employers from disclosing genetic information other than in the following limited circumstances: (1) upon an employee's written request; (2) to an occupational or other health researcher in compliance with the



law; (3) pursuant to court order; (4) to government officials who are investigating compliance with GINA; (5) if such disclosure is made to comply with the certification provisions of federal or state family and medical leave laws; or (6) to a public health agency with respect to information that concerns a contagious disease that presents an imminent hazard of death or life-threatening illness.

Pursuant to GINA, an employer must confidentially maintain any genetic information it possesses in a separate file and treat that information as a confidential medical record.

GINA provides for the same remedies and procedures that exist under Title VII. Thus, compensatory and punitive damages will be available to successful plaintiffs. Depending on an employer's number of employees, the statutory cap on these combined damages may be as high as \$300,000. As with Title VII, individuals who believe they have been subject to employment discrimination based on genetic information must file their charges with the U.S. Equal Employment Opportunity Commission (EEOC) prior to proceeding to court. A plaintiff can request a jury trial if compensatory or punitive damages are sought.

Unlike Title VII, GINA does not allow for disparate impact claims. However, the Act provides that a study commission shall be created six years after GINA's enactment to review whether GINA should provide a cause of action for disparate impact.

Some states have their own genetic nondiscrimination laws. Wisconsin is one such state. Wisconsin law prohibits employers from requiring or administering genetic tests as a condition of employment, as well as from using the results of a genetic test to discriminate against a covered individual. Under this law, employers are permitted to engage in genetic testing if an employee voluntarily requests the test in relation to a worker's compensation claim or if the testing is necessary to determine the employee's susceptibility to potentially toxic substances in the workplace. GINA does not preempt state law on genetic testing in the workplace, to the extent a particular state's law is more protective.

Finally, GINA amends the Fair Labor Standards Act (FLSA) to increase the penalties for child labor violations. This amendment increases the penalty from \$10,000 to \$11,000 for each violation. It also includes a provision allowing the U.S. Department of Labor to penalize employers \$50,000 for each violation that results in the death or serious injury of a minor. This penalty may be increased to \$100,000 for repeated and willful violations. GINA also amends the FLSA to



increase the civil penalty for any repeated or willful violation of the minimum wage or maximum hours requirement to a maximum of \$1,100 per violation. These FLSA provisions went into effect May 21, 2008.

As a result of this new law, employers should begin implementing a policy that prohibits discrimination on the basis of genetic information. Employers who do possess genetic information should create a policy to ensure that such information is kept confidential and properly stored. Because GINA's nondiscrimination provisions do not go into effect for almost 18 months, employers have sufficient time to adopt policies and practices to ensure compliance with the requirements of GINA. The EEOC will release regulations providing further guidance on GINA by May 21, 2009, including an indication as to how broadly the EEOC will interpret the Act. The attorneys in [Reinhart's Labor and Employment Department](#) would be pleased to assist you in determining your obligations under GINA.

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