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Stop Looking at my Genes!

The Genetic Information Nondiscrimination Act of 2008

By Bethany C. McCurdy, Esq.

"Genetic information." In recent years, the meaning of this term has been dramatically transformed. Significant advances in the science of unraveling the human genome have been accompanied by ever-growing concerns about how information regarding an individual's genetic code can and should be used. These include concerns over discrimination in employment and health insurance. For example, if, at the time of hire, you could learn the genetic probability that an applicant would develop a debilitating (and expensive) medical condition a few years into his or her employment, would you want to know?

Recently, Congress took a step in addressing some of these concerns. On May 1, 2008, by an overwhelming vote, Congress passed the Genetic Information Nondiscrimination Act of 2008 (GINA). This law prohibits health insurers and employers from discriminating against an individual on the basis of his or her genetic information. While many states, including Wisconsin, already prohibit genetic discrimination in employment, GINA is more specific and may be farther-

reaching than existing laws.

The Basics of the New Law

GINA prohibits employers with 15 or more employees from discriminating in hiring, firing, providing raises, promotions, and in other terms, conditions and privileges of employment based upon a person's genetic information. GINA also prohibits an employer from requesting or acquiring a person's genetic information or the genetic information of the person's family members. "Family member" extends to dependents and relatives up to four degrees (so, for example, even distant cousins could be included).

"Genetic information" is fairly narrowly defined by GINA. "Genetic information" includes genetic tests of the individual and the individual's family members and the manifestation of a disease or disorder in family members of such individual. It also includes genetic services such as genetic education or counseling. It specifically does not include information about an individual's age or gender. Because GINA restricts both the *use* and the *acquisition of* genetic information ("acquisition of" defined as the request, require or purchase), it casts a large net in which employers may become ensnared.

GINA's Exceptions

GINA does include exceptions to its restrictions, and seems to contemplate some legitimate employer acquisition and use of genetic information. For instance, GINA includes an exception for information provided to an employer as part of the certification requirements under the Family and Medical Leave Act (FMLA). While such an exception makes sense, it may not go far enough. The exception very specifically applies to the FMLA (and comparable state laws) and not to information provided in other requests for leave that may fall outside of the scope of the FMLA. So what about the situation where an employee is requesting a medical leave or accommodation, but is not FMLA eligible (or the employer is not covered under the FMLA)? An employer in this situation certainly still needs information about an employee's medical condition, which may include "genetic information." It is not at all clear how GINA would impact the acquisition and use of such information.

The law also includes another important exception for information that the employer requests or receives from an employee when the employee has provided prior, knowing, voluntary and written authorization. While employers should generally not receive medical information about an employee

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without that employee's consent, GINA provides another incentive for employers to seek such consent.

Another, more curious, exception in the law is that an employer may not be liable under GINA if it *inadvertently* requests or requires the medical history of the employee or the employee's family member. This exception provides at least two issues to consider. The first is that the term "inadvertent" is undefined and open to many interpretations. The second issue is that the exception seems to offer employers the defense of asserting that, while its conduct may have violated the law, it didn't mean to do it. This issue is likely to be disputed in future cases.

There are other exceptions and exclusions with regard to workers compensation cases, genetic monitoring by government agencies, and companies that may monitor their employees for exposure to toxic substances in the workplace.

How Employers May Be Impacted

GINA is to be enforced by the Equal Employment Opportunity Commission (EEOC) with similar processes and remedies as Title VII and other federal antidiscrimination laws. Like these laws, GINA also prohibits an employer from retaliating against employees who assert their rights under the law.

What impact GINA will have on employers is yet to be determined. Unlike other anti-discrimination laws, GINA was not passed in response to any actual, specific cases of discrimination. Rather, GINA was passed *in anticipation* of discrimination that could now occur given technological developments. Although there are positive arguments in favor of such foresight, it is difficult for employers to know what kind of specific actions or inquiries could lead to a lawsuit.

It will be some time before we realize the long-term impact of GINA. The EEOC is not slated to issue regulations interpreting GINA for one year, and the law will not go into effect until 18 months after the effective date. This presents employers with time to have their employment counsel review their practices and policies to make sure they are in compliance with the new law.

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