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EMPLOYMENT LAW UPDATE

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Genetic Nondiscrimination Bill Signed Into Law

On May 21, 2008, President Bush signed the "Genetic Information Nondiscrimination Act," or "GINA." GINA is far-reaching in that it intersects with many federal laws including Title VII of the Civil Rights Act, The Health Insurance Portability and Accountability Act of 1996 (HIPAA), and the Employee Retirement Income Security Act of 1974 (ERISA). Title I of GINA prohibits all health insurers from basing eligibility or premium determinations on genetic information. Title II bans employers, labor unions, and employment agencies from using an individual's genetic information when making hiring, firing, compensation, and other employment-related decisions. Employers also may not limit, segregate, or classify an employee in a manner that denies employment opportunities based on genetic information. Labor unions may not exclude, expel or otherwise discriminate against an individual based on genetic information. In addition, employers, employment agencies, and labor unions may not request, require, or purchase an employee's or an employee's family member's genetic information unless it falls within specific limited circumstances, such as when the genetic information is needed to meet certification requirements of family and medical leave laws, or will be used to monitor the biological effects of toxic substances in the workplace.

GINA broadly defines "genetic information" not just to include the genetic test results of an individual and his or her family members, but also the "manifestation" of a disease or disorder in an individual's family members. For example, information regarding an employee's mother's breast cancer or father's sickle cell anemia would constitute "genetic information" for purposes of the Act. The definition does not include a "manifested disease" in an individual, so that insurers can continue to underwrite health insurance coverage based on an existing illness. The definition does not include information about an individual's age or sex, which are already protected classes.

Title II of GINA applies to employers covered by Title VII of the Civil Rights Act and contains provisions that are similar to many provisions of Title VII. For example, an employee must file a charge with the EEOC before filing a discrimination lawsuit and GINA provides for the right to a jury trial and compensatory and punitive damages. It also provides for the recovery of attorney's fees for the prevailing plaintiff under the fee-shifting statute applicable to Title VII claims. However, unlike Title VII, GINA does not create a disparate impact cause of action for genetic discrimination.

The new legislation includes provisions that are intended to provide increased protection for patient privacy. GINA requires employers, employment agencies, and labor unions that possess any genetic information about employees to maintain that information in separate files and to treat it as confidential medical records. Employers also are prohibited from disclosing an employee's genetic

information except upon a specific written request, in response to a court order, to comply with the Family and Medical Leave Act's (FMLA) certification procedures, or other very limited circumstances.

Practical Implications

GINA's prohibitions on employment discrimination take effect in November 2009, or 18 months after the date of its enactment. The provisions barring genetic discrimination in health insurance apply to health coverage for plan years beginning after the one-year anniversary of enactment of GINA, in May 2009. GINA is significant in that it marks the first major statutory change to the federal discrimination laws since 1991. Employers should review their current policies and human resources practices to make sure that they account for this new protected class. While the practical implications of GINA may be difficult to foresee, the Act itself suggests that employers take the following actions:

- Equal employment opportunity statements should include non-discrimination on the basis of genetic information;
- Discontinue any requests to job applicants and employees to provide a family medical history;
- Evaluate whether any changes are necessary in connection with the employer's administration of health benefits;
- Do not request information about the manifested disorders or diseases of an employee's family members for leave requests that are unrelated to the FMLA or state analogues of the FMLA; and
- Implement policies and procedures to prevent the inadvertent disclosure of genetic information.

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