

Employment & Immigration Law

You Can't Wear Your Genes to Work New federal act bars genetic discrimination in workplace

By Jakob B. Halpern

On November 21, Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA) took effect, prohibiting discrimination on the basis of genetic characteristics or traits in the employment setting. The law also delineates important requirements and prohibitions concerning the use, storage and dissemination of genetic information. GINA sets a baseline level for protection of genetic information, but allows the states to fill in gaps or provide greater protections and although New Jersey has long prohibited genetic discrimination through state law, the new federal act differs in several important ways. Given these variations, it is imperative that employers take all necessary steps to ensure compliance with GINA, and to avoid liability under both the federal and state statutes.

GINA, passed last year, also regulates the use of genetic information in health care coverage in Title I, which is partially in effect and will be fully implemented as of May 21, 2010. Title I prohib-

Halpern is an associate of Saiber in Florham Park and Newark, where he litigates and counsels clients concerning employment law and privacy issues.

its health insurers or plan administrators from requesting genetic information to make decisions about coverage, rates or pre-existing conditions.

Who is subject to GINA? GINA prohibits genetic discrimination by private and state government employers with 15 or more employees and certain federal government employers. It also prohibits genetic discrimination by employment agencies and labor organizations.

What "genetic information" does GINA protect? "Genetic information" protected by GINA includes information about "genetic tests" of the employee or his or her "family members," defined as the employee's dependents and up to his or her fourth-degree relatives, as well as any fetus or embryo of an employee or family member. "Genetic tests" are tests that analyze "human DNA, RNA, chromosomes, proteins or metabolites genotypes, mutations or chromosomal changes." GINA also protects information about an employee or family member's request for or the receipt of genetic services. Importantly, GINA does not cover information about routine tests that do not measure genetic changes and does not protect information concerning sex or age.

Under GINA, "genetic information"

also includes information about the manifestation of a disease or disorder in employee's family members. (In contrast, manifestation information of the employees themselves is not protected by GINA, so long as their underlying genetic information is not requested or provided.)

What actions are prohibited or required by GINA? GINA was modeled on Title VII of the Civil Rights Act of 1964 and therefore employers are prohibited from genetic discrimination in the same manner as other forms of discrimination under that Act. In other words, GINA prohibits discrimination in hiring, termination and decisions related to compensation and training programs, as well as other terms and conditions of employment. Employers may neither limit, segregate nor classify an employee in any way that would deprive the employee of employment opportunities or affect his or her employment status. Nor can employers retaliate against an individual for exercising rights under GINA. Moreover, GINA prohibits employment agencies and labor organizations from causing or attempting to cause an employer to discriminate based on genetic information.

GINA also prohibits employers from requesting, requiring or purchasing genetic information with respect to an employee or family members, as such information might suggest whether an individual is genetically predisposed to certain disorders. However, several exceptions to this rule, with which an employer should become familiar, apply:

- Inadvertent requests for family medical history;
- Where the employer offers health or genetic services, the employee consents, only the employee and the health care professional receive individual genetic information, and the genetic information will only be used for such services;
- Employer requests for family medical history to comply with FMLA or similar state laws;
- Purchases of commercially and publicly available documents, such as newspapers, with family medical history;
- Where the information is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, subject to certain conditions; and
- Where a law enforcement forensic laboratory needs such information to avoid contamination of its workspace.

If these exceptions apply and employers obtain or possess genetic information about employees or family members, they must maintain the information confidentially, on separate forms and in separate medical files. This may be done by complying with Americans with Disabilities Act provisions relating to confidential medical records, which should lessen the employers' administrative burden. Retained confidential genetic information can only be disclosed in limited circumstances: (1) to the employee by written request; (2) to an occupational researcher, subject to strict regulations; (3) in response to a court order; (4) to government officials investi-

gating compliance with GINA; (4) to the extent necessary for compliance with the FMLA or similar state laws; or (5) to a governmental public health agency, if it is information about the manifestation of a contagious disease in an employee's family member that presents an imminent hazard of death or life-threatening illness, subject to the employee's notification.

What remedies are available for violations of GINA? GINA expressly relies upon Title VII's enforcement procedures and remedies concerning private employers covered thereby. That means an employee may file a charge with the Equal Employment Opportunity Commission and the commission may elect to follow up or issue a "right to sue" letter enabling the employee to sue in federal court. GINA provides for the same types of damages as in other cases of employment discrimination; for most private employers, this includes possible injunctive relief, reinstatement, lost wages and benefits, compensatory damages up to the statutory cap, punitive damages and attorneys' fees.

Because GINA mirrors Title VII, it seems likely that courts will utilize the *McDonnell Douglas* burden-shifting scheme when reviewing claims of genetic discrimination. However, "disparate impact" claims are not currently cognizable under GINA.

Is the employer still subject to New Jersey's LAD? Unlike GINA, the New Jersey Law Against Discrimination applies to all employers, regardless of number of employees. Therefore, employers subject to GINA must still be compliant with LAD's requirements, and those not subject to GINA must still review their practices concerning the use of employees' genetic information.

Most of LAD's requirements or prohibitions overlap with GINA, but there are several important differences. For instance, although GINA's protected "genetic information" includes information about the manifestation of a disease or disorder in an employee's family members, LAD does not expressly protect such manifestation information. In this respect, GINA confers broader protection in family members. LAD also differs from GINA in the exceptions that permit an employer to obtain or retain genetic information; under LAD, this

may be done with the employee's informed consent, and may not be disclosed except in limited circumstances set forth in that statute.

The remedies under LAD for other types of discrimination are likewise available for discrimination based upon genetic information. Furthermore, disclosure of an employee's genetic information in violation of the LAD may not only subject an employer to actual damages but also criminal liability, including a potential one-year prison term.

What are some potential pitfalls for employers? As with any new statute, some terms and applications cannot be anticipated. However, given the rapid evolution of the science and technology involved in genetic testing, unpredictable issues in GINA's application are likely. One potential issue that will need to be addressed is what constitutes a "manifestation" of a disease or disorder sufficient to trigger the act.

Furthermore, adherence to only GINA, without further compliance efforts, may provide false security to an employer. All employers should keep in mind that other laws may impact their retention and use of genetic information and be especially mindful of LAD's additional requirements for protection of genetic information.

Employers must be particularly cognizant of how they gather or use what might seem like innocuous employee familial or health information. Two examples suffice. First, employee performance reviews often note "extenuating issues," such as a relative's medical issue that weighed on the employee throughout the year. Requesting information about or referring to this medical problem by name would likely run afoul of GINA. Likewise, although employers are expressly permitted to request family medical history to comply with FMLA, a similar request to provide information for an employer-sponsored leave plan is no longer permitted under GINA.

Finally, GINA is not retroactive. However, once it takes effect, it applies to all conduct, meaning an employer must cease all activities that violate the act and segregate such information in accordance with the act. Some commentators have suggested immediately

destroying any genetic information on file, but instead employers should carefully consider other ramifications of such actions. The better practice is probably to segregate existing retained genetic information in accordance with GINA.

What can an employer do now?

To ensure its compliance when GINA becomes effective, an employer should prepare in advance. Proper training, espe-

cially of human resources personnel, is essential. Any audit must include determinations of whether the employer currently conducts or requires any genetic tests or information, and whether it possesses any genetic information as defined by GINA. It must review and, if necessary, alter its process of gathering information for health insurance and wellness programs, and restructure its wellness

programs to comply with the statute. All of these steps should be completed under the supervision of a qualified in-house Privacy Officer or competent outside counsel.

Although GINA presents potential pitfalls, a prepared employer will avoid violations and potential liability while properly respecting and safeguarding its employees' confidential information. ■