

May 2008

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A NEW DISCRIMINATION LAW: THE GENETIC INFORMATION NON-DISCRIMINATION ACT

It started when a railroad had certain employees submit a blood test. The employees later learned that the railroad ran a genetic test to see if the employees had a genetic predisposition to carpal tunnel syndrome. When the employees learned of their employer's actions, they went public, and Congress took action.

President Bush will soon sign into law the Genetic Information Non-Discrimination Act ("GINA"), which prohibits (1) health insurance companies from using genetic information to set premiums or determine enrollment eligibility; and (2) employers, employment agencies and labor organizations from using genetic information about employees or their family members in making employment or membership decisions.

GINA's employment provisions also prohibit employers, employment agencies and labor organizations from requesting, requiring or purchasing genetic information relating to an employee, union member or a family member of an employee or union member, except in situations where:

1. A covered entity inadvertently requests or acquires such information;
2. Health or genetic services are offered by a covered entity, including such services offered as part of a wellness program, and the employee or member provides prior, knowing, written authorization to release such information to the health care professional or genetic counselor providing such services, and individually identifiable information is only available for such purposes and is not disclosed to the covered entity;
3. A covered entity purchases documents that are commercially and publicly available that include family medical history;
4. The information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace that is required by law, the covered entity provides written notice of the monitoring, and the covered entity informs the employee or member of the results of such monitoring;

Labor and Employment E-Alert *cont.*

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5. The information is acquired by a covered entity in conjunction with the certification provisions of the Family Medical Leave Act; or
6. The employer conducts DNA analysis for law enforcement purposes as a forensic laboratory and the DNA of employees is a necessary quality control measure to detect sample contamination.

If genetic information is lawfully obtained, GINA requires that it be maintained on separate forms and in separate medical files and be treated as a confidential medical record of the employee or member.

For most covered entities, GINA will not trigger any change in existing practices concerning the gathering and storage of employee or member medical or genetic information. However, the broad definition of “genetic information” in GINA could pose traps for the unwary, as it includes not only genetic testing results but also information regarding “the manifestation of a disease or disorder” in family members of the employee or member as well. In other words, information that an employee or member’s parent or sibling has a genetic disease or disorder could be transformed from a topic of everyday conversation into a much more sensitive matter requiring appropriate safeguards, and could also have important implications for self-insured health plans.

If you have any questions about this or any other employment-related issue, please contact your Vorys lawyer.

This alert contains information necessarily of such a general nature that it cannot be regarded as legal advice. Vorys, Sater, Seymour and Pease LLP is available to provide additional information and to discuss matters contained herein as they may apply to specific situations. Vorys, Sater, Seymour and Pease LLP, ©2008. For additional information, visit www.vorys.com.