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## SCIENCE LEADS THE WAY TO NEW FEDERAL ANTIDISCRIMINATION LAW

By Bethanie Thau

In May, President Bush signed into law the Genetic Information Nondiscrimination Act ("GINA"), which prohibits employers and insurance companies from discriminating against individuals on the basis of genetic information. Touted as the "first civil rights bill of the new century of life sciences," GINA was adopted in response to an alleged increasing concern that fear of discrimination is preventing the general public from taking full advantage of genetic testing that could result in preventative medical treatments. However, detractors have argued that GINA is a wholly unnecessary remedy in search of a problem.

### What GINA Prohibits

Under GINA, insurance companies may no longer restrict enrollment or adjust premiums based on genetic information. GINA also prevents insurance companies from requesting or requiring individuals to take genetic tests.

With respect to workplace discrimination, GINA incorporates many aspects of the Civil Rights Act of 1964 ("Title VII") - effectively granting genetic information the same protected status as race and gender. Specifically, GINA prohibits employers from using genetic information to discriminate against employees or applicants in the terms and conditions of employment.

GINA also bans employers from collecting or maintaining genetic information of an employee *or employee's family member*. There are exceptions to this general prohibition where:

- ♦ the employer inadvertently collects the information;
- ♦ the employer acquires genetic information in connection with a wellness program and certain privacy precautions are taken;
- ♦ the employer requires family medical history in compliance with family and medical leave law certification provisions;
- ♦ the employer acquires the information through publicly available documents containing family medical history information;
- ♦ the employer conducts genetic monitoring of biological effects of toxic substances in the workplace and certain privacy precautions are taken; or
- ♦ the employer provides DNA analysis services for law enforcement and the information is necessary to rule out employee sample contamination.

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**Q:** WHAT IS "GENETIC INFORMATION"?

**A:** "GENETIC INFORMATION" IS INFORMATION ABOUT (1) AN INDIVIDUAL'S GENETIC TESTS, (2) THE GENETIC TESTS OF THE INDIVIDUAL'S FAMILY MEMBERS, OR (3) THE MANIFESTATION OF A DISEASE OR DISORDER IN THE INDIVIDUAL'S FAMILY MEMBERS. "FAMILY MEMBER" IS DEFINED TO INCLUDE DEPENDENTS AND ANY OTHER INDIVIDUAL WHO IS A FIRST-DEGREE, SECOND-DEGREE, THIRD-DEGREE, OR FOURTH-DEGREE RELATIVE OF THE INDIVIDUAL OR THE INDIVIDUAL'S DEPENDENTS. *EXCLUDED* FROM THE DEFINITION OF "GENETIC INFORMATION" IS MEDICAL INFORMATION ABOUT AN EMPLOYEE'S MANIFESTED DISEASE OR DISORDER.

**Q:** IF GINA CONFLICTS WITH STATE OR OTHER FEDERAL LAW ON THE ISSUE OF GENETIC DISCRIMINATION IN EMPLOYMENT, WHICH DO I FOLLOW?

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Any genetic information collected in connection with the approved circumstances outlined above must be maintained in the same type of separate confidential files required for medical information under the Americans with Disabilities Act (“ADA”). Genetic information may not be disclosed without employee consent except in very limited circumstances.

GINA also applies to employment agencies, labor organizations, and joint labor-management committees.

#### Enforcement and Remedies

GINA adopts Title VII enforcement procedures and remedies. Accordingly, an employee claiming violation of GINA may, after filing a claim with the Equal Employment Opportunity Commission (“EEOC”) and receiving a right-to-sue letter, bring a civil action against his or her employer for the full spectrum of remedies permitted in federal civil rights claims (such as reinstatement and back pay, compensatory damages, punitive damages, costs, and attorneys’ fees). As currently drafted, only disparate treatment (intentional discrimination) claims may be brought under GINA. However, the law authorizes a commission to evaluate in the future whether GINA should be expanded to permit “disparate impact” claims as well. (“Disparate impact” claims involve employment practices or decisions that are facially nondiscriminatory, but adversely affect members of a protected class.)

The insurance portion of GINA becomes effective in one year, with the employment provision following six months later in November 2009. Employers should, however, not wait to examine their current practices regarding use of genetic information as many states already have laws prohibiting genetic discrimination and the EEOC has previously taken the position that genetic information discrimination can be actionable under the ADA.

The EEOC is expected to issue regulations regarding the interpretation and enforcement of GINA within the year.

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**A:** EMPLOYERS MUST COMPLY WITH WHICHEVER LAW PROVIDES EMPLOYEES WITH THE GREATEST AMOUNT OF PROTECTION.

**Q:** CAN AN EMPLOYER BE HELD LIABLE FOR ITS INSURANCE PROVIDER’S FAILURE TO COMPLY WITH GINA?

**A:** NO. GINA EXPRESSLY PROVIDES THAT THERE IS NO CAUSE OF ACTION AGAINST EMPLOYERS FOR HEALTH INSURANCE DISCRIMINATION.

**Q:** CAN WE EXPECT ADDITIONAL FEDERAL LAWS CREATING NEW CATEGORIES OF WORKERS PROTECTED FROM EMPLOYMENT DISCRIMINATION?

**A:** CURRENTLY BEFORE THE U.S. SENATE IS A PROPOSED BILL, THE EMPLOYMENT NON-DISCRIMINATION ACT, WHICH WOULD PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF “ACTUAL OR PERCEIVED” SEXUAL ORIENTATION.

*This alert is provided as a service to our clients and friends. While the information provided in this publication is believed to be accurate, it is general in nature and should not be construed as legal advice.*

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