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BUSH SIGNS GENETIC PROTECTIONS LAW

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President Bush signed into law yesterday the Genetic Information Nondiscrimination Act, which will become effective 18 months after enactment (November 21, 2009). The law prohibits employers, employment agencies, labor organizations, and health insurance providers from misusing individuals' genetic information.

Enactment of GINA has been expected for some time. The employment provisions will be enforced by the U.S. Equal Employment Opportunity Commission. The EEOC has been authorized to issue regulations within a year.

Purpose of GINA

Congress noted that genetic research has created "major new opportunities for medical progress," but also that genetic information has been abused in the past. As examples, the congressional statement of purpose cites eugenics laws, which required sterilization of individuals with certain "undesirable" conditions, and laws that targeted certain sexes or racial groups for mandatory screening, such as laws requiring African-Americans to be screened for sickle-cell anemia. In addition, Congress expressed concern about genetic discrimination in the workplace and inconsistencies in existing laws regarding genetic information in the insurance and employment contexts.

"Genetic Discrimination"

The employment provisions prohibit discrimination against applicants or employees based on their genetic information or the genetic information of their family members, as defined in GINA. It is also unlawful to "limit, segregate, or classify" employees on this basis. Equivalent provisions apply to employment agencies, labor organizations, and joint labor-management committees. (*For convenience, this bulletin will refer only to "employers" and "employees."*)

GINA also prohibits employers from requesting or requiring genetic information from employees, or from their family members. The exceptions are as follows:

*Where the employer has "inadvertently" requested or required family medical history;
or

*Where the information is requested in connection with a wellness program, *and* the employee has provided "prior, knowing, voluntary, and written authorization," *and* any individually identifiable genetic information is disclosed only to the employee/appli-

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cant/family member and the health care professional or genetic counselor involved, *and* any information provided to the employer is provided only in aggregated form; *or*

*Where the employer requests or requires family history from an employee to comply with the medical certification provisions of the Family and Medical Leave Act or state law equivalent; *or*

*Where the employer obtains family medical history through documents that are “commercially and publicly available” (such as newspapers or magazines but not medical databases or court records); *or*

*In the law enforcement context, where the employer requests or requires genetic information only “for analysis of DNA identification markers for quality control to detect sample contamination.”

Toxic substances in the workplace

GINA allows an employer to conduct “genetic monitoring of the biological effects of toxic substances in the workplace,” but only if it meets all of the following conditions:

*The employer must provide written notice to the employee; *and*

*Either the employee must have provided “prior, knowing, voluntary, and written authorization,” or the monitoring must have been required by federal or state law; *and*

*The employee must be informed of the individual monitoring results; *and*

*The monitoring must be in compliance with applicable federal or state genetic monitoring regulations; *and*

*The employer receives the information only in aggregated form.

Confidentiality

Genetic information in the possession of an employer must be kept on separate forms and in separate medical files and must be treated as a confidential medical record. The employer will be deemed to be in compliance with GINA’s confidentiality provisions if it maintains the records in accordance with the confidentiality provisions of the Americans with Disabilities Act. Disclosure of genetic information is prohibited except under the following circumstances:

*To the employee or, if applicable, family member pursuant to a written request from the employee; *or*

*To an occupational or health researcher under certain circumstances; *or*

*In response to a court order, provided that the disclosure is limited to the information expressly authorized in the order. If the court order was issued without the knowledge of the affected individual, then the disclosing party must inform the individual of both the order and the genetic information that was disclosed; *or*

*To government officials investigating compliance with GINA *if the information is relevant to the investigation*; *or*

*To the extent necessary to allow an employee to comply with the medical certification requirements of the FMLA; *or*

*Information about the *manifestation* of a contagious disease in a family member of the employee “that presents an imminent hazard of death or life-threatening illness” to a federal, state, or local public health agency, provided that the employee is notified of the disclosure.

Disparate impact

The statute explicitly states that GINA provides no cause of action for “disparate impact” – a facially neutral policy or practice that disproportionately affects a certain legally protected group. However, the statute provides for establishment of a commission six years hence “to review the developing science of genetics and to make recommendations to Congress regarding whether to provide” such a cause of action.

More generous federal or state laws

GINA does not limit the rights of individuals under more-generous state or federal laws, including the ADA and the Rehabilitation Act of 1973.

Health insurance

GINA also amends the Employee Retirement Income Security Act, making it unlawful for group health plans or health insurance issuers offering group health insurance coverage to adjust premium or contribution amounts for the group covered because of genetic information. However, it is still lawful to increase premiums for employers based on the *manifestation* of a disease or disorder of an individual who is enrolled in the plan. Health insurers are also prohibited from requesting, requiring, or purchasing genetic information for underwriting purposes or before an individual’s enrollment under the plan or coverage in connection with such enrollment.

GINA also provides that genetic information is “protected health information” within the meaning of the Health Insurance Portability and Accountability Act.

This ‘n’ that

GINA defines “genetic test” as “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.” Analysis of proteins or metabolites that do not detect this type of information are not “genetic tests” within the meaning of the law.

A “family member” is the individual’s spouse, dependent child (including adopted child), parent, grandparent, and great-grandparent. Where the individual or family member is a pregnant woman, GINA also protects genetic information related to the woman’s unborn child. Where the individual or family member is undergoing “assisted reproductive technology,” GINA protects genetic information related to any embryo “legally held by the individual or family member.”

The foregoing is only a summary of GINA. For a copy of the statute, [click here](#). If you have specific questions regarding the application of GINA to your employment practices or health insurance programs, please contact any member of Constangy’s Litigation Practice Group or Employee Benefits Group, or the Constangy attorney of your choice.

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