LABOR & EMPLOYMENT LAW ALERT

THE GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008

By Thomas F. Doherty and Bridget M. Bourque

Background

Recently, President Bush signed the Genetic Information Nondiscrimination Act of 2008 ("GINA"). GINA's employment provisions, which become effective on November 21, 2009, prohibit employers, employment agencies, labor organizations, and health insurers from discriminating against individuals on the basis of "genetic information," or, in other words, on the basis of information that suggests that an individual or an individual's family member may be predisposed to suffer from a disease or disorder which he or she does not presently have. The definition of "genetic information" in GINA is very broad and includes the following:

- the results of genetic testing for an individual or that individual's family member; and
- the *manifestation* of a disease or disorder in an individual's family member, as is often revealed in family medical history documentation or by the request of an employee to take leave to care for a sick family member.

GINA also defines "family member" broadly to include an individual's dependent and any first-degree, second-degree, third-degree, or fourth-degree relative of the individual or the individual's dependent.

GINA's reach is extensive, amending several laws, including the Employee Retirement Income Security Act of 1974 ("ERISA"), the Internal Revenue Code, the Public Health Service Act, Title XVIII of the Social Security Act, the Health Insurance Portability and Accountability Act ("HIPAA"), and Title VII of the Civil Rights Act. Without delving into all of the insurance-related ramifications, suffice it to say that GINA prohibits group health plans from mandating an individual or family member to undergo genetic testing and bars insurers from conditioning enrollment eligibility or adjusting premiums based on genetic information. These insurance provisions take effect in May of 2009. From the employment perspective, GINA's amendments to Title VII not only involve certain prohibitions, but also impose requirements on employers, employment agencies and other labor organizations with respect to requesting and maintaining genetic information, like an employee's family medical history.

Restrictions

Employers and employment agencies may not refuse to hire, discharge, or treat differently with respect to compensation, privileges, or the terms and conditions of employment, any employee on account of the employee's genetic information. Additionally, employers and employment agencies may not limit, segregate, or classify an employee in any way that would deprive the employee of employment opportunities or otherwise adversely affect the status of that employee because of genetic information. It is also unlawful for employers, employment agencies, or other labor organizations to request, require, or purchase genetic information of an employee or the family member of an employee, except in limited circumstances in which the request for an employee's genetic information is unavoidable or required by law.

The limited circumstances in which requests for genetic information will not violate GINA include situations where (1) an employer inadvertently requests or requires family medical history of an employee or family member; (2) an employer requests family medical history to comply with certification provisions of the Family and Medical Leave Act ("FMLA") and similar state laws; (3) an employer purchases employee information that is commercially and publicly available; and (4) the employer requires the genetic information of an employee in order to monitor the biological effects of toxic substances in the workplace pursuant to state or federal law or the employee's written authorization.

Additionally, a request for genetic information will not contravene GINA if the request is part of a health or genetic awareness service offered by the employer (e.g., part of a wellness plan), provided that (1) the employee provides written authorization; (2) only the employee or employee's family member receiving the genetic services and the licensed healthcare professional or certified genetic counselor involved in those services actually receive any individually identifiable genetic information; and (3) any individually identifiable genetic information is used solely for the services provided and is not disclosed to the employer in a way that reveals the identity of specific employees.

Requirements

To the extent that an employer or employment agency does obtain individually identifiable genetic information of an employee or an employee's family member, GINA mandates that the information be classified as part of the confidential medical record of that employee, in accordance with the protections

of medical information outlined in the Americans With Disabilities Act ("ADA"). Under the ADA, an employer must maintain all medical information, now including genetic information, on separate forms and in separate medical files, and must strictly control access to those files. Employers and employment agencies may not disclose an employee's genetic information to a third party except in very limited circumstances outlined in detail in the statute itself, such as to the employee at his or her written request or in response to a court order.

Incorporation into Title VII of the Civil Rights Act

As for GINA's other legal implications, GINA specifically amends Title VII of the Civil Rights Act to incorporate genetic information discrimination as an actionable offense within the employment law framework of Title VII. This amendment also prohibits retaliation against employees who oppose genetic information discrimination or because the individual made a charge, assisted or participated in an investigation under the new law. Notably, GINA makes available to a successful claimant all remedies and damages permitted by Title VII. However, as required by Title VII, an employee who alleges genetic information discrimination must exhaust administrative remedies prior to filing suit. Importantly, unlike other Title VII claims, GINA specifically precludes the use of the disparate impact theory as a basis for genetic information discrimination claims. Finally, GINA does not preempt other Federal or State statutes that provide equal or greater protections.

Ramifications for Employers

The good news is that GINA's employment-related provisions do not take effect until November 2009. The bad news is that the definition of genetic information under GINA is so broad that employers may inadvertently violate GINA, or at least may face a colorable claim of genetic information discrimination, any time medical information is shared with an employer by an employee. Employers must proactively monitor their policies and procedures with regard to pre-employment physicals, the FMLA, and even absence reporting to ensure that genetic information obtained from an employee is carefully segregated and not used for any employment decisions. Further guidance is expected from the U.S. Equal Employment Opportunity Commission, which is required to issue regulations within one year of GINA's enactment.

Employers are encouraged to address their concerns with legal counsel. Any employer with questions or concerns regarding the future impact of GINA and the practical steps necessary to comply with the Act when it takes effect in November of 2009 should feel free to contact an attorney in the McCarter & English Labor and Employment Department.

Labor & Employment Practice Group

M. Carolina Avellaneda
Boston
617.449.6565
cavellaneda@mccarter.com

Patrick J. Bannon
Boston
617.449.6529
pbannon@mccarter.com

Bridget M. Bourque
Boston
617.449.6523
bbourque@mccarter.com

Peter J. Boyer
Philadelphia
215.979.3826
pboyer@mccarter.com

C. Bryan Cantrell
Newark
973.639.7949
bcantrell@mccarter.com

Patrick M. Collins
New York
212.609.6849
pcollins@mccarter.com

Sydney Denny Dickey
Newark
973.639.2073
sdickey@mccarter.com

Thomas F. Doherty
Newark
973.639.2078
tdoherty@mccarter.com

Robert J. Gallo
Hartford
860.275.6722
rgallo@mccarter.com

Amy Haberman
Stamford
203.399.5950
ahaberman@mccarter.com

Zlatko Hadzismajlovic
New York
212.609.6843
zhadzismajlovic@mccarter.com

Paul J. Homer
Hartford
860.275.6733
phomer@mccarter.com

David S. Kim
New York
212.609.6819
dkim@mccarter.com

Christopher S. Mayer
Newark
973.848.5393
cmayer@mccarter.com

John M. McKelway, Jr.
Boston
617.449.6560
jmckelway@mccarter.com

Pamela J. Moore
Hartford
860.275.6714
pmoore@mccarter.com

Brian J. Mullin
Boston
617.449.6531
bmullin@mccarter.com

Colin D. Munro, II
Stamford
203.399.5939
cmunro@mccarter.com

Peter D. Roberts
Stamford
203.399.5910
proberts@mccarter.com

Berin S. Romagnolo
Boston
617.449.6585
bromagnolo@mccarter.com

Adam N. Saravay
Newark
973.639.2023
asaravay@mccarter.com

Aimee Sato
New York
212.609.6827
asato@mccarter.com

Marisa J. Steel
Newark
973.639.2020
msteel@mccarter.com

Peter D. Stergios
New York
212.609.6848
pstergios@mccarter.com

Richard Voigt
Hartford
860.275.6776
rvoigt@mccarter.com

Disclaimer by McCarter & English, LLP: This publication is for informational purposes only and is not offered as legal advice as to any particular matter. No reader should act on the basis of this publication without seeking appropriate professional advice as to the particular facts and applicable law involved.

© 2008 McCarter & English, LLP All Rights Reserved.