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**GENETIC NONDISCRIMINATION
BILL EXPECTED TO BE SIGNED
INTO LAW**

The Genetic Information Nondiscrimination Act (GINA) won quick approval in the House of Representatives and the Senate in recent weeks and is expected to be signed into law shortly. In approving GINA, Congress recognized that although individuals may wish to gain genetic information to be warned of potential health problems, protections must be put in place to avoid misuse of that information for employment or health insurance purposes. GINA is intended to protect individuals from discrimination by employers, employment agencies, labor organizations and health insurers. GINA is far-reaching in that it amends or touches upon many laws including the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act, the Internal Revenue Code of 1986, Title XVIII (Medicare) of the Social Security Act, the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and Title VII of the Civil Rights Act.

Specifically, GINA prohibits employers, employment agencies, labor organizations and joint labor-management committees from discriminating based on genetic information in the following circumstances:

- Employers and employment agencies may not discriminate based on genetic information in hiring, termination or referral decisions or in other decisions regarding compensation, terms, conditions or privileges of employment. They also may not limit, segregate or classify employees so as to deny employment opportunities to an employee based on genetic information.
- Labor organizations may not exclude, expel or otherwise discriminate against individuals based on genetic information.
- Employers, employment agencies and labor organizations may not request, require or purchase genetic information of an employee or an employee's family member unless it falls within certain limited exceptions, such as when the genetic information is needed to satisfy certification requirements of family and medical leave laws or will be used to monitor the biological effects of toxic substances in the workplace.
- Employers, labor organizations and joint labor-management committees may not discriminate based on genetic information in any decisions related to admission or employment in training or retraining programs, including apprenticeships.
- In the limited cases where genetic information is obtained by these entities, they must maintain the information on separate forms in separate medical files and treat the information as a confidential medical record. The information may only be disclosed in certain limited



situations as defined by GINA. GINA also requires that all genetic information be treated as health information under HIPAA and therefore subject to HIPAA's privacy regulations.

GINA grants employees and individuals remedies similar to those provided under Title VII of the Civil Rights Act of 1964 and other nondiscrimination laws and provides that no person shall retaliate against an individual for opposing an act or practice made unlawful by GINA.

GINA also addresses health insurance programs, including group plans, state-regulated plans, ERISA plans and those in the individual market. Specifically, group health plans and health insurance issuers may not:

- Adjust premiums or contribution amounts of the group based on genetic information;
- Request or require an individual or family member to undergo a genetic test, with limited exceptions (*e.g.*, for research purposes with the permission of the insured); or
- Request, require or purchase genetic information for underwriting purposes or in advance of an individual's enrollment.

In the individual health insurance market, insurers may not establish rules for eligibility, adjust premiums or contribution amounts for an individual, or impose preexisting condition exclusions based on genetic information. Insurers also may not request or require individuals or family members to undergo genetic testing.

While GINA is well-intentioned, it raises significant questions for employers and insurers. The definition of genetic information is very broad:

IN GENERAL— The term “genetic information” means, with respect to any individual, information about –

- (i) such individual's genetic tests,
- (ii) the genetic tests of family members of such individual, and
- (iii) the manifestation of a disease or disorder in family members of such individual.

The breadth of the definition raises numerous questions. For example, an employee seeking time off to care for a family member under the Family and Medical Leave Act must provide certification of the family member's serious health condition in order to qualify for leave. This knowledge would qualify as “genetic information” under the statute's definition. Will employees be able to claim that subsequent disciplinary actions were founded on genetic information discrimination? Does the collection of family health history for a company-sponsored wellness program put the employer at risk for claims of a GINA violation? Hopefully, such questions will be clarified in the



regulations that GINA requires various agencies to promulgate within a year of passage: the Equal Employment Opportunity Commission (employment issues), the Department of Labor (ERISA issues), the Secretary of Health and Human Services (HIPAA and certain group health insurance issues) and the Secretary of Treasury (IRS issues). In any case, the statute is sure to generate litigation after it takes effect 18 months from the date that it is signed into law.

FOR MORE INFORMATION

If you would like more information about GINA, please contact Staci Jenkins at 513.352.6734 or **Staci.Jenkins@ThompsonHine.com**, or your primary Thompson Hine Labor & Employment lawyer. Go to **www.ThompsonHine.com/practices/Labor_Employment/lawyers** for a list of our Labor & Employment lawyers.

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