

# GINA Establishes Protection for Claims of Genetic Bias

**E**mployees filing charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") will have one more protected class they can check off as a basis of discrimination. On

May 21, 2008, President George W. Bush signed into law the Genetic Information Nondiscrimination Act ("GINA"). The new law prohibits employers and health insurance providers from discriminating against individuals based on their genetic information.

Over the last several years, there has been a dramatic rise in the availability of genetic tests to determine possible "pre-disposition" for diseases such as breast and prostate cancer, diabetes, heart disease, Parkinson's disease, cystic fibrosis, and many others. More and more people have expressed an interest in such testing, but fear losing a job, a promotion, or health or life insurance as a result if the information suggests such a genetic pre-disposition. So, many choose to either forgo the testing or obtain the testing under an assumed name. GINA is designed to prohibit the disclosure and adverse use of such personal health information.

GINA prohibits an employer from discriminating against an individual in hiring, firing, compensation, terms, or privileges of employment on the basis

of genetic information of the individual or family member of the individual. The law defines genetic information as (1) an individual's genetic tests; (2) an individual's family member's genetic tests; or (3) the manifestation of a disease or disorder in the individual's family member. "Family member" is defined as (1) a spouse of the individual; (2) a dependent child of the individual, including a child who is born to or placed for adoption with the individual; or (3) parent, grandparent, or great-grandparent.

GINA prohibits an employer from requesting, requiring, or purchasing genetic information of the individual or family member except (1) where the employer inadvertently requests or requires the information (such as asking for a doctor's note to support a request for sick leave), (2) for genetic services offered by the employer (including wellness programs), (3) for purposes of complying with the Family and Medical Leave Act ("FMLA"), and (4) where the employer purchases documents that are commercially available.

GINA does allow for genetic monitoring of biological effects of toxic substances in the workplace, but only if (1) the employer provides written notice of the monitoring to the employee; (2) the employee agrees to the monitoring in writing or the monitoring is required by federal, state, or local law;

(3) the employee is informed of the results of the test; (4) the monitoring conforms to any federal or state law, including rules promulgated by Occupational Safety and Health Administration ("OSHA"); and (5) the employer receives the results of the tests in aggregate terms. This provision prohibits any secret testing on unsuspecting employees.

Under GINA, employers must protect genetic information they come to possess and may only reveal such information to: (1) the employee (or family member at issue) at the written request of the employee; (2) an occupational or other health researcher if the research is conducted in compliance with the regulations and protections under federal law; (3) in response to an order of a court (with some exceptions); (4) government officials who are investigating compliance with GINA if the information is relevant to the investigation; (5) the extent that such disclosure is made in connection with the employee's compliance with the certification provisions of the FMLA or a comparable state law; or (6) a government public health agency regarding concerns that a contagious disease presents an imminent hazard of death or life-threatening illness, at which time, the employee whose family member is the subject of a disclosure must be notified of such disclosure. However, GINA does not change the rules or application of the Health

This client alert, published by the Labor & Employment Group of Akerman Senterfitt, with offices in Florida, California, New York, Virginia, Wisconsin and the District of Columbia, is intended to inform firm clients and friends about legal developments in the areas of labor and employment law, including recent decisions of various courts and administrative bodies. Nothing in this publication should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this publication without seeking the advice of legal counsel.

Insurance Portability and Accountability Act ("HIPAA") regarding the use or disclosure of health information by entities covered by HIPAA.

## Enforcement

Both enforcement of and the damages available under GINA are similar to Title VII of the Civil Rights Act of 1964 ("Title VII") and other federal employment laws. As under Title VII, individuals claiming discrimination based on genetic information must first file a charge at the administrative agency level with the EEOC. If the dispute is not resolved under the EEOC's jurisdiction, an aggrieved party may then seek redress in court, where, if the employee were to prevail, he or she would be entitled to collect back pay, front pay, compensatory and punitive damages and attorney's fees.

However, unlike claims brought pursuant to Title VII, GINA expressly provides that disparate impact claims are not available. Disparate impact claims are those that allege discriminatory effect on a protected class that is caused by an employment

policy or practice that appears to be neutral on its face. GINA requires that six years after enactment, Congress will appoint an eight-member commission to review the developing science of genetics and make recommendations as to whether to add liability for neutral employment practices that may have an adverse impact on individuals based on their genetic information.

## Practical Implications

In the first place, know what your state law is. GINA does not preempt other federal or state laws that may provide equal or greater protection against genetic bias. Employers must, therefore, be aware of whether each state in which they conduct business has a law comparable to GINA. More than 30 states have laws that prohibit discrimination based on genetic information. This means employers may have to develop policies for each state in which they conduct business. Further, GINA requires employers in possession of genetic information about an employee to maintain that information in

separate medical files and the information should be treated as a confidential medical record.

## Potential Traps

GINA is not clear on how employers who disclose genetic information inadvertently, e.g. outside of the FMLA process, from a basic sick leave form, or pursuant to conversations between employees about the health of family members, will be regarded. Currently, litigation with respect to state laws protecting against discrimination based on genetic information is relatively low. The EEOC has been charged with promulgating regulations to provide some clarification on the statute, with such regulations due out within the next 12 months. Nonetheless, employers should be mindful that possession or knowledge of genetic information could expose them to liability.

The employment provisions of GINA become effective in November 2009, and the health care provisions become effective in May 2009.

Akerman Senterfitt, one of Florida's leading law firms, has more than 500 attorneys and consultants servicing the needs of domestic and international clients. The firm represents private and public companies, governmental entities, educational institutions and high net-worth individuals in a wide range of practice areas. The firm's longstanding commitment to diversity has been recognized most recently by the Minority Corporate Counsel Association, which presented the firm with the 2006 Thomas L. Sager Award for diversity leadership.

Founded in 1920, the firm now has offices in Florida's major business centers: Miami, Orlando, Fort Lauderdale, Tampa, Jacksonville, Tallahassee, and West Palm Beach, as well as in Washington, D.C., Northern Virginia, New York and Los Angeles.

For more information about our practice groups and attorneys, visit [www.akerman.com](http://www.akerman.com).

### FT. LAUDERDALE

Las Olas Centre II  
350 East Las Olas Boulevard  
Suite 1600  
Ft. Lauderdale, FL 33301-2229  
Main: 954.463.2700  
Fax: 954.463.2224

### JACKSONVILLE

50 North Laura Street  
Suite 2500  
Jacksonville, FL 32202-3646  
Main: 904.798.3700  
Fax: 904.798.3730

### LOS ANGELES

725 South Figueroa Street  
38th Floor  
Los Angeles, CA 90017-5438  
Main: 213.688.9500  
Fax: 213.627.6342

### MADISON

222 West Washington Avenue  
Suite 380  
Madison, WI 53703  
Main: 608.257.5335  
Fax: 608.257.2029

### MIAMI

One Southeast Third Avenue  
25th Floor  
Miami, FL 33131-1714  
Main: 305.374.5600  
Fax: 305.374.5095

### NEW YORK

335 Madison Avenue  
Suite 2600  
New York, NY 10017  
Main: 212.880.3800  
Fax: 212.880.8965

### ORLANDO

CNL Center II at City Commons  
420 South Orange Avenue  
Suite 1200  
Orlando, FL 32801-4904  
Main: 407.423.4000  
Fax: 407.843.6610

### TALLAHASSEE

Highpoint Center  
106 East College Avenue  
12th Floor  
Tallahassee, FL 32301  
Main: 850.224.9634  
Fax: 850.222.0103

### TAMPA

SunTrust Financial Centre  
401 East Jackson Street  
Suite 1700  
Tampa, FL 33602-5803  
Main: 813.223.7333  
Fax: 813.223.2837

### TYSONS CORNER

8100 Boone Boulevard  
Suite 700  
Vienna, VA 22182-2683  
Main: 703.790.8750  
Fax: 703.448.1801/1767

### WASHINGTON, D.C.

801 Pennsylvania Avenue N.W.  
Suite 600  
Washington, DC 20004  
Main: 202.393.6222  
Fax: 202.393.5959

### WEST PALM BEACH

Esperante Building  
222 Lakeview Avenue  
Suite 400  
West Palm Beach, FL  
33401-6183  
Main: 561.653.5000  
Fax: 561.659.6313