



## **Title II of the Genetic Information Nondiscrimination Act Goes Into Effect**

On November 21, 2009, Title II of the Genetic Information Nondiscrimination Act ("GINA") goes into effect. GINA will prohibit employers' use of genetic information, restrict employers' acquisition of genetic information, and strictly limit disclosure of genetic information. As an amendment to Title VII of the Civil Rights Act of 1964, GINA promises to be a factor in the still rising number of employment discrimination claims across the country.

Essentially, Title II of GINA prohibits employers from using genetic information to make decisions regarding any terms, conditions, or privileges of employment, bans them from intentionally obtaining genetic information, requires confidentiality with respect to genetic information (with limited exceptions), and prohibits employer retaliation.

Congress enacted GINA into law in 2008, largely due to developments in the field of genetics, the decoding of the human genome, and advances in the field of genomic medicine. There are genetic tests that can inform individuals whether they may be at risk for developing a specific disease or disorder. Therefore, as the number of genetic tests increase, so do the general public's concerns about whether they may be at risk of losing access to health coverage or employment if insurers or employers have their genetic information.

GINA's enactment has enabled Congress to address these concerns as this statute prohibits discrimination based on genetic information and restricts employer acquisition and disclosure of such information. As a result, the public would not fear unfavorable consequences regarding their employment or health coverage for having a genetic test or participating in research studies that examine genetic information.

Genetic information includes information regarding an individual's or family members' genetic tests, family history of a disease or disorder, an embryo or a fetus, genetic services, and participation in clinical research studies that involve genetic services. Genetic information does not include the following: an individual or his/her family members' sex or age, information that an individual currently has a disease or disorder, and tests for alcohol or drug use.

Employers cannot use genetic information to make employment decisions under any circumstances. They must treat genetic information that they have about applicants or employees the same way they treat medical information. They must keep the information confidential and, if the information is in writing, must keep it in separate medical files and not with personnel information. Employers may keep genetic information in the same file as medical information determined by the Americans with Disabilities Act (ADA).

Title II of GINA does not protect employers from liability for their decisions and actions that violate Title II, including employment decisions based on health benefits. These benefits are within the definition of compensation, terms, conditions, or privileges of employment. For example, an employer that fires an employee because of anticipated high health claims based on genetic information is subject to liability under Title II. In addition, Title I of GINA exclusively enforces acts or omissions relating to health plan eligibility, benefits, premiums, or a health plan's request for or collection of genetic information.

Many observers are referring to GINA as "a new frontier in employment law." The late Senator Ted Kennedy called GINA the "first major new civil rights bill of the new century." Recently, US Labor Secretary Hilda L. Solis proclaimed, "No one should have to fear that disclosure of their medical data will put their job or health coverage at risk."

Employers who are already following good employment and HR practices in complying with existing laws such as Title VII, the Americans with Disabilities Act (ADA), and the Family and Medical Leave Act (FMLA) should find GINA's prohibitions consistent with those laws in terms of procedures and enforcement. Nevertheless, employers should avoid asking employees about the results of genetic testing, requesting employees and/or applicants to undergo genetic testing, and asking whether a condition "runs in the family."

For additional information regarding GINA and Employment Practices Liability Insurance matters, please e-mail Philip R. Voluck, Esq. at [pvoluck@kdvglaw.com](mailto:pvoluck@kdvglaw.com) or call him at (215)-461-1100.

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