

# Labor & Employment Advisory

From the Buchanan Ingersoll & Rooney Labor and Employment Group

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## Genetic Information Nondiscrimination Act of 2008

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On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA) into law, following overwhelming support in both the House and Senate. GINA, which will take effect in 18 months, prohibits discrimination on the basis of genetic information, and makes changes to numerous laws.

Specifically, GINA prohibits: (1) employers from failing to hire, discharging, classifying or segregating, or otherwise discriminating against an employee because of genetic information; (2) employment agencies from failing to or refusing to refer an individual for employment; (3) labor organizations from excluding or expelling a member on the basis of genetic information; (4) employment or labor organizations from causing an employer to discriminate against an employee in violation of GINA; and (5) retaliation against employees alleging violations of GINA or participating in the investigation of alleged violations.

GINA also makes it unlawful for an employer to request, require or purchase an employee's genetic information, except in limited circumstances. These circumstances include: (1) compliance with family and medical leave laws; (2) genetic monitoring of the effects of toxic substances in the workforce; and (3) DNA analysis for law enforcement purposes at a forensic laboratory.

Under the terms of GINA, employers possessing genetic information about employees must keep the information confidential and maintain it in separate files. GINA also prohibits employers from disclosing genetic information except (1) to the employee upon request; (2) to a health researcher; (3) as directed by a court order; (4) to a government official investigating compliance with GINA; or (5) in connection with federal and state family and medical leave act provisions.

In addition, GINA prohibits group health insurance plans from adjusting premiums based on genetic information. It also prohibits group health plans from requesting or requiring that a person undergo genetic testing, and from requesting, requiring or purchasing genetic information for underwriting or enrollment purposes. However, GINA does not prohibit group health plans from using the results of genetic information in making payment determinations.

### Changes to Existing Laws

In addition to the changes directed at employers and health insurance providers, GINA amends several federal laws, including the Employee Retirement Income Security Act (ERISA), the Public Health Service Act (PHSA), the Health Insurance Portability and Accountability Act (HIPAA), the Internal Revenue Code and the Social Security Act. Some of these changes are as follows:

**ERISA.** GINA prohibits issuers of group health insurance from denying or conditioning the issuance of coverage or from discriminating in policy or premium pricing due to genetic information. GINA also prohibits issuers of group health insurance from requesting or requiring a person (pre or post enrollment) to undergo genetic testing, or requesting, requiring or purchasing genetic information regarding such person for underwriting (e.g., determining an individual's eligibility, payment amount, or exclusion of pre-existing conditions).

**PHSA.** GINA amends the PHSA to prohibit health insurance companies that offer coverage to individuals from basing eligibility on genetic information, from discriminating against individuals on the basis of genetic information, and from excluding coverage of preexisting conditions on the basis of genetic information.

**HIPAA.** GINA requires that genetic information be treated as health information under HIPAA, subjecting it to the same requirements as health information, and prohibits the use or disclosure of genetic information for health insurance or Medicare underwriting purposes.

## **Enforcement**

GINA's health insurance provisions generally will be enforced through the various laws that it amends. For example, GINA's privacy provisions will be enforced through HIPAA, which imposes civil penalties of \$100 per violation and criminal penalties of up to \$250,000 and 10 years in prison for commercial and malicious violations. GINA's discrimination provisions will be enforced primarily through ERISA and the PHSA, which will be amended to authorize penalties of \$100 per day/per person, with minimum penalties of \$2,500 (for de minimis violations) or \$15,000 (for more serious violations) and a maximum of \$500,000 for unintentional violations. The Secretary of Labor also will be authorized to waive penalties for violations due to reasonable cause and not to willful neglect.

GINA's employment discrimination provisions will be enforced through Title VII of the Civil Rights Act of 1964 and the Government Employee Rights Act of 1991. Notably, however, GINA explicitly precludes any cause of action based on a disparate impact theory of genetic discrimination.

Because GINA's various enforcement mechanisms encompass numerous statutes and government agencies, the act requires the secretaries of Health and Human Services, Labor and the Treasury to coordinate to prevent duplicate enforcement strategies. While some members of Congress raised concerns that the act would subject certain entities to double enforcement as both insurance providers and employers, a recent amendment clarifying the scope of liability under GINA's insurance and employment provisions has assuaged these concerns and facilitated the act's ultimate passage into law.

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