Complying With the Genetic Information Nondiscrimination Act

The act, signed into law in 2008, goes into effect on November 21, 2009. Employers need to be familiar with its requirements to ensure that their business is in compliance.

By Tina M. Maiolo

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Beginning November 21, 2009, hiring and employment decisions will become even more complex for employers. The Genetic Information Nondiscrimination Act, which was signed into law by President George W. Bush on May 21, 2008, is intended to prevent employers, employment agencies, labor unions and health insurers from discriminating against individuals based on genetic tests and information. Here's what you need to know about the effect the law will have on employers and their hiring and employment decisions.

Who is subject to the Genetic Information Nondiscrimination Act?

As they are under Title VII of the Civil Rights Act of 1964, private employers with 15 or more employees are subject to the Genetic Information Nondiscrimination Act's requirements. Unlike Title VII, however, the Genetic Information Nondiscrimination Act also covers certain public-sector employers, such as the U.S. Postal Service and the Library of Congress. Employment agencies and labor organizations are also subject to the act.

The Genetic Information Nondiscrimination Act is a federal statute that offers a base-line level of protection for employees against discrimination based on genetic information. It also authorizes states to enact laws granting additional protection.

What is genetic information?

The act broadly defines genetic information to include:

1. An employee's genetic tests.
2. An employee's family members' genetic tests.
3. The manifestation of a disease or disorder in the individual's family members.
4. Genetic tests of any fetus of an individual or family member who is pregnant, and genetic tests of any embryo legally held by an individual or family member utilizing assisted reproductive technology. For the purposes of the act, genetic information does not include information about the sex or age of any individual.

Employers should pay particular attention to No. 3. The term "family member" encompasses varying degrees of relatives (up to the fourth degree), including, without limitation, the employee's parents, siblings, children, first cousins, grand nephews and nieces, and great-great grandparents, to name a few. Moreover, the term "manifestation" is so broad that employees can be deemed covered simply because a family member is symptomatic of some genetic disease or disorder.

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Furthermore, genetic information includes any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling or education) by an individual or family member. The statute further defines "genetic test" as an analysis of human DNA, RNA, chromosomes, proteins or metabolites that detects genotypes, mutations or chromosomal changes. The Genetic Information Nondiscrimination Act does not protect routine tests that do not measure DNA, RNA or chromosomal changes, such as complete blood counts, cholesterol tests and liver function tests. Also, under the act, genetic tests do not include the analysis of proteins or metabolites that are directly related to a manifested disease, disorder or pathological condition that could reasonably be detected by a health care professional with appropriate training and expertise in the field of medicine involved.

What acts are prohibited under the act?

The Genetic Information Nondiscrimination Act, like Title VII, prohibits discrimination in hiring, termination and decisions related to compensation, as well as other terms and conditions of employment. Specifically, it prohibits employers from requesting, requiring or purchasing genetic information on an employee or the employee's family members. There are, however, exceptions to this prohibition that an employer should be familiar with. Some limited of these exceptions include inadvertent requests or requirements for an employee's family medical history and family medical history information requested in compliance with Family and Medical Leave Act certification procedures.

Furthermore, when the exceptions like the ones listed above apply, the employer must keep the genetic information confidential. More specifically, when an employer maintains genetic information concerning an employee or family member, the employer must keep the information on separate forms and in separate files as a confidential medical record. These medical records can be disclosed under limited circumstances, such as at the employee's request, pursuant to court order or to determine compliance with the act and other nondiscrimination statutes like the Family and Medical Leave Act. Genetic information is also subject to HIPAA privacy requirements.

The act also protects employees from retaliation for opposing or complaining about unlawful employment practices, and from retaliation for filing a claim under the act.

What are the remedies under the act?

The act's remedies are much like those in Title VII. An employee can recover compensatory damages, which are capped at $300,000 for employers with 500 or more employees, and punitive damages, which have no cap. An employee can also be entitled to recover back pay, reinstatement and attorney fees.

What does the act mean for employers?

Employers need to be familiar with the Genetic Information Nondiscrimination Act's requirements to ensure that their business is in compliance with it, as well as any similar state laws, since it is possible the state law will afford an employee more protection than the federal law. Furthermore, employers will need to assess their compliance with the act in relation to their obligations under other employment anti-discrimination laws such as ADA, FMLA and the Pregnancy Discrimination Act.

Finally, the Genetic Information Nondiscrimination Act can mean more complicated hiring and firing decisions for employers. Consider these examples:

1. An employee takes FMLA leave to care for a mother suffering from Alzheimer's disease. The employee uses all available protected leave and returns to work, so that there is no FMLA violation. Six months

later, the employee is terminated. Under the act, the employee could sue the employer, alleging that the employer knew the employee's mother had a genetic disorder and terminated the employee on the assumption that she could be afflicted with Alzheimer's disease as well.

2. An employee has decided to get the BRCA gene tests, to determine whether she is at a higher risk for developing breast or ovarian cancer. The employee requests time off from her job to attend the appointment and tells the employer the specific reason for needing the leave. The employer allows the employee to take the time off and the employee promptly returns to work. After the employee receives her results, she shares with some co-workers that the BRCA gene tests came back positive; she is at a higher risk for breast cancer. Six months later, the employee is terminated. Under the Genetic Information Nondiscrimination Act, the employee could sue, claiming that (1) the employer fired her because she is more susceptible to breast cancer or (2) the employer assumed she was more susceptible to breast cancer and that breast cancer ran in her family since she decided to have the elective genetic testing done.

As if the current anti-discrimination laws did not give employers enough to think about when hiring or firing employees, the Genetic Information Nondiscrimination Act will add a new level to this decision-making process. As such, employers need to be informed of the law's requirements. Training and education are the keys to this process. Employers should ensure that their HR departments and their management-level employees are aware of the new law and its detailed provisions. Otherwise, employers run the risk of being caught up in the genetic-discrimination litigation that is sure to develop.

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The information contained in this article is intended to provide useful information on the topic covered, but should not be construed as legal advice or a legal opinion. Also remember that state laws may differ from the federal law.

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