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LABOR & EMPLOYMENT

MAY 21, 2008

New Federal Law Prohibits Employment Discrimination Based on Genetic Information

Genetic testing can identify predisposition to a wide range of diseases and conditions, allowing individuals to take action with respect to potential medical conditions early, when preventive measures and treatment are most likely to succeed. However, many individuals have shied away from utilizing genetic tests for fear that they could be subject to discrimination on the basis of the results. In a move aimed at reducing such fears, Congress recently enacted the Genetic Information Nondiscrimination Act by overwhelming majorities in both the House and the Senate. President Bush signed the Act on May 21, 2008, and the new law will go into effect 18 months after that date.

Provisions of the Act Related to Employment Discrimination

The purpose of the Genetic Information Nondiscrimination Act (the "Act") is to prevent discrimination in health insurance and employment based on genetic information. With respect to employment, Title II of the Act prohibits covered employers from discriminating against applicants and employees on the basis of genetic information in much the same way that Title VII of the Civil Rights Act of 1964 prohibits discrimination on account of race, sex, or other protected factors. The Act applies to persons and entities that qualify as employers under Title VII (basically, those with fifteen or more employees), as well as employment agencies and labor organizations. Covered employers may not discharge, fail or refuse to hire, or otherwise discriminate against an individual with respect to compensation, terms, conditions, or privileges of employment because of genetic information with respect to the individual. The Act further prohibits the limitation, segregation, or classification of employees in such a way "that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee."

The Act also prohibits the acquisition of genetic information about an employee or his or her family member by request, requirement, or purchase. However, an employer will not be penalized for genetic information learned (1) by reading a magazine or publication, (2) through health or genetic services offered as part of a wellness program, provided the employee has given prior written authorization and any genetic information disclosed to the employer in connection with the program is in the aggregate so that it does not identify the individual, (3) inadvertently from medical history information, or (4) in response to a request for information to comply with the certification requirements of the Family and Medical Leave Act. Employers may lawfully obtain genetic information to monitor the genetic effects of exposure to hazardous workplace substances, provided they comply with certain disclosure, consent, and monitoring standards. Finally, the Act mandates the confidentiality of genetic information, permitting disclosure only in the following circumstances: (1) in response to a court order, (2) as part of a governmental investigation, (3) to the employee or a labor organization at the written request of the employee, or (4) in other very limited circumstances specified in the Act.

An employee or applicant who believes that an employer has violated the employment-discrimination provisions of the Act has essentially the same remedies as individuals alleging a violation of Title VII, including a right to recover compensatory and punitive damages subject to certain statutory caps. However, the Act specifically excludes a cause of action for disparate impact discrimination – that is, a claim that a facially neutral policy or practice disproportionately affects individuals in the protected class.

The Act also addresses discrimination in health insurance based on genetic information. Please refer to the Kilpatrick Stockton Employee Benefits Legal Alert entitled “**Landmark Genetic Nondiscrimination Legislation**” for an in-depth analysis of Title I of the Act, which applies to group health plans and health insurers offering health coverage.

Other Employment-Related Provisions

In addition to addressing the use of genetic information by employers, labor organizations, employment agencies, and insurers, the Act contains a totally unrelated provision amending the child labor provisions of the Fair Labor Standards Act (“FLSA”). This provision increases the maximum employer penalties for violations involving the FLSA’s oppressive child labor provisions or its child labor safety requirements. The new maximum penalty is \$11,000 for each employee who was the subject of such violation. Additionally, the provision adds a \$50,000 penalty for each violation that causes the death or serious injury of any employee under the age of eighteen. The \$50,000 penalty may be doubled for repeated or willful violations.

Practical Implications

Although many states have already enacted similar legislation, the Genetic Information

Nondiscrimination Act creates a federal baseline for protection against employment discrimination based on genetic information. Employers should update their policies prohibiting employment discrimination and addressing the confidentiality of employee information to reflect the new federal law. Employers that sponsor employee wellness programs should also review those programs to ensure that they comply with the confidentiality provisions of the Act insofar as genetic information is concerned.

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