

Publication

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President Bush Signs New Genetic Testing Law

As employers should be well aware, federal and state laws prohibit discrimination against employees based on various protected categories such as race, age, gender and the like. That list of federally-protected categories has just expanded. Specifically, Congress overwhelmingly approved a bill titled the *Genetic Information Nondiscrimination Act of 2008* (the "Genetic Act"), which President Bush officially signed into law yesterday, May 21, 2008. The Genetic Act provides a ramp-up period for employers, as Title II of the Act – regulating employment practices – does not officially become effective for another 18 months. (Section 213). Employers will be well served to assess their applicable policies and procedures now, to ensure that they will be in full compliance with the Act's requirements upon its effective date.

The nearly unanimous congressional support for the Genetic Act belies a hard-fought 13-year battle to pass comparable measures, as certain health insurers and employment groups objected to its enactment. On the other hand, the bill had strong support from the medical community – particularly medical research groups and biotech companies – who argued that fear of genetic discrimination discouraged people from participating in clinical trials and other testing which was integral to medical advances.

The Genetic Act contains provisions regulating how "genetic information" – which is generally defined as

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genetic test results of an individual and/or his/her family members, as well as the “manifestation” of any disease/disorder – can (or more precisely, can *not*) be considered by employers. Of particular note in the employment context, the Act contains express provisions prohibiting employers’ “Discrimination Based on Genetic Information” (Section 202(a)), and regulating employers’ “Acquisition of Genetic Information” (Section 202(b)). These provisions were intended to track the Congressional “Findings” articulated at the outset of the bill, where it was expressly noted that “Congress has been informed of examples of genetic discrimination in the workplace.”

Borrowing from the “employer” definition in Title VII, the Genetic Act applies to employers with 15 or more employees. In addition to the provisions governing “employer” practices, the Genetic Act also contains provisions separately addressing the practices of “Employment Agencies” and “Labor Organizations.” Additionally, the Act regulates various health insurance programs and practices, ranging from the collection of genetic information for eligibility purposes to the setting of premiums based on genetic test results.

Of particular note in the employment context, with limited and narrowly-defined exceptions, it will be unlawful for employers to *request or acquire* genetic information regarding employees and/or their family members. Furthermore, it now will be an “unlawful employment practice” under federal law for any covered employer:

(Section 202(a)). In short, employers should not take into account an individual’s genetic information when setting terms and conditions of employment or otherwise making employment-related decisions.

Issues concerning employees’ and applicants’ medical information can arise for employers in a variety of



contexts, including employment position requirements, workplace injuries, fitness-for-duty exams, accommodation requests and leaves-of-absence. Employers should be diligent to ensure that genetic information/indicators are not included in these processes, so as to avoid even the appearance of discrimination or impropriety. Accordingly, employers are encouraged to review their applicable policies and practices to ensure that medical leave and data collection policies and related practices do not run afoul of the Genetic Act.