President Bush has signed legislation known as the Genetic Information Nondiscrimination Act of 2008 ("GINA") that prohibits employers and health insurers from discriminating against individuals based on the genetic predisposition toward a disease. More than a decade in the making, GINA is the result of bipartisan efforts to encourage genetic testing, and allay individuals’ privacy fears. Supporters of the legislation have claimed that many individuals have failed to get necessary testing about their genetic predisposition toward specific diseases because they were afraid that they would suffer adverse consequences with their insurers or their employers if genetic markers were disclosed.

The legislation is sprawling, complex, and in many respects highly technical. It amends multiple federal statutes and creates entirely new causes of action and potential penalties for employers, insurance companies, labor organizations, and employment agencies. Its impact on all of these entities — particularly employers — likely will be substantial. Some studies show that nearly two-thirds of large U.S. employers require some sort of pre-hire medical examination, and in some instances, those tests include screening for susceptibility to workplace hazards and diseases such as breast and colon cancer and sickle cell anemia. Other employers regularly ask about family medical history.

**Non-Discrimination**

Using language borrowed from Title VII of the Civil Rights Act of 1964, GINA makes it an unlawful employment practice for an employer to fail to hire, to discharge, or otherwise to discriminate against an individual because of genetic information. As with Title VII, this language prohibits discrimination regarding compensation, terms or conditions of employment as well as admission to, and referrals from, labor organizations and training programs. In addition, employers may not classify or segregate individuals based on genetic information in any way that would tend to deprive those individuals employment opportunities. Significantly, however, the law expressly provides that no disparate impact theory of recovery is permitted under its terms. As with Title VII, the Act imposes parallel prohibitions on employment agencies and labor organizations.

With few exceptions, employers cannot request, require, or buy genetic information about an employee (or an employee’s family members), except in limited circumstances such as when necessary to comply with federal or state family and medical leave laws. Employers that legitimately possess any genetic information about an employee (or the employee’s family members) must maintain that information in separate, confidential files and cannot disclose that information except in limited circumstances. These private sector non-discrimination provisions are enforced through Title VII’s administrative and remedial scheme.
Health Care Premiums

GINA also amends the Employee Retirement Income Security Act of 1974 ("ERISA"), the Public Health Service Act ("PHSA"), and the Internal Revenue Code to prohibit any group health plan from “adjust[ing] premium or contribution amounts for the group covered under such plan on the basis of genetic information.”

The law also prohibits plans from asking or requiring an individual or his family member to undergo a genetic test. The Act, however, does not prohibit a health care professional from requesting that an individual be given a genetic test, nor does it "limit the ability of a . . . group health plan to increase the premium for an employer based on the manifestation of a disease or disorder of an individual who is enrolled in the plan."¹ Group health plans, however, are required to request only the minimum amount of information to serve the intended purpose. All of the Act’s provisions become effective in 18 months.

Although most in Congress and the business community have long agreed with the general principle of non-discrimination embodied in the legislation, the Act’s passage was slowed over the years by concerns about a potential flood of civil lawsuits against employers and group health plans. And indeed, the resulting legislation’s many detailed and technical requirements likely will create traps for the unwary. It will require many employers to adjust their current practices and may have a significant impact on pre-hire physical examinations and questionnaires. It will also impose substantial record-keeping obligations.

Given the breadth of this legislation, group health plans and employers will need to ensure their policies and procedures do not improperly request or use genetic information.

₁ Note, however, that Title I of ERISA already prohibits group health plans from discriminating against employees and participants on account of “health factors” with respect to eligibility for coverage, the cost of coverage or the benefits provided. See Section 702 of ERISA and 29 C.F.R. §2590.702. Under ERISA, an adverse health factor includes "genetic information" as defined under 29 C.F.R. §2590.701-2. See 29 C.F.R. 2590.701(a)(vi). These nondiscrimination rules were enacted under HIPAA and apply under ERISA, the Public Health Services Act and the Internal Revenue Code.

For more information on GINA, please contact the Paul Hastings lawyers listed below.

Chicago
Kenneth W. Gage
312-499-6046
kennethgage@paulhastings.com

Los Angeles
Maria A. Audero
213-683-6307
mariaaudero@paulhastings.com

New York
Stephen P. Sonnenberg
212-318-6414
stephensonnenberg@paulhastings.com

Orange County
Stephen L. Berry
714-668-6246
stephenberry@paulhastings.com

San Francisco
Maureen Bogue
415-856-7262
maureenbogue@paulhastings.com

Washington, D.C.
Neal D. Mollen
202-551-1738
nealmollen@paulhastings.com

¹