



GENETIC DISCRIMINATION LAW BILL BECOMES LAW



Patty Wheeler

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A new law moved rapidly through Congress with bipartisan support. The Genetic Information Non-Discrimination Act passed the U.S. Senate by a 95-0 vote on April 24, and on May 1, the bill passed the House of Representatives by a vote of 414-1. President Bush signed the law on May 21, 2008.

The bill imposes new requirements on employers and health plans or health insurers. First, the bill would amend the Employee Retirement Income Security Act (ERISA) to prevent group health plans from adjusting premiums on the basis of genetic information, would not allow the insurer to require genetic testing, and would not allow the collection of genetic information for underwriting purposes. Second, the bill would amend Title VII of the 1964 Civil Rights Act to prohibit employers from refusing to hire, from discharging, or from otherwise discriminating against employees on the basis of genetic information.

According to sponsors, many persons that decline to participate in genetic research or genetic testing fear that a prospective health insurance company or employer would reject the person because of concerns that the person could suffer a costly disease.

BACKGROUND

There are supposedly over 1,000 tests now available regarding genetic testing. These tests are designed to determine if an employee is more susceptible to develop some type of disease one day. Some argue that it is appropriate to look at genetic screening as a possible way to curb rising healthcare costs, reduce worker's compensation claims and protect workers' safety.

The EEOC has taken the position that genetic discrimination is covered under the ADA, but there is no court authority for that proposition. There was a major settlement of some \$2.2 million a number of years ago by railroad company Burlington Northern Santa Fe Corp., which was sued by federal regulators for submitting its employees to genetic testing. *EEOC v. Burlington Northern Santa Fe R.R. Co.* (E.D. Wis.). Laws banning genetic discrimination by employers are in place in over 30 states, but the scope of these laws varies widely. The concept of genetic discrimination does not fit neatly into the concepts of the ADA.

DEFINITIONS

The bill defines genetic information to include information about an individual's genetic tests; the genetic tests of family members of the individual; or the occurrence of a disease or disorder in family members of the individual. Genetic information does not include information about the sex or age of an individual for purposes of this legislation. A genetic test is defined as an analysis of DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes. A genetic test does not mean an analysis of (1) proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes or; (2) an analysis of proteins or metabolites that is 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. The second exception to genetic tests applies only to Title I of the legislation.

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EMPLOYER MAY DISCHARGE EMPLOYEE FOR EXCEEDING FMLA CAP



Mary Moffat Helms

"A federal appeals court ruled that these contentions were premised on misconceptions about workers' compensation, the FMLA, and retaliatory discharge."

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The employer discharged the employee after he used up his remaining FMLA leave, pursuant to its policy of discharging employees who exceed 12 weeks of FMLA leave. The employee alleged the employer wrongfully required him to take the leave and asserted he was discharged in retaliation for exercising his right to claim workers' compensation benefits. The appeals court granted summary judgment to the employer, stating that the employee was fired for exceeding his leave entitlement and not for filing a workers' compensation claim.

Editor's Note: While the employer's policy limiting medical leave to 12 weeks as required by FMLA, was upheld in this case, most employers wisely choose to grant broader rights to medical leaves. Some of the main concerns are based upon concepts of fairness to the workplace, as most employees expect to be allowed to have medical leaves. Further, employers do not want to be in a position of denying medical leaves to employees due to pregnancy, and do not want to be accused of denying sufficient medical leave to employees with disabilities as defined by the ADA. However, most employers do create maximum medical leave periods, such as one year, sometimes subject to exceptions. The second principle in the Dotson case, that an employee can be terminated for a lawful attendance policy even though absenteeism is due to a workers' compensation injury, is a position recognized by most of the states.

It has long been settled that workers' compensation-related leaves of absence may run concurrently with FMLA leave, but occasionally plaintiff-employees still challenge the practice. Recently, a plaintiff argued that an employer may not force an employee to take FMLA leave or discharge an employee for absences resulting from a work-related injury. However, a federal appeals court ruled that these contentions were premised on misconceptions about workers' compensation, the FMLA, and retaliatory discharge. *Dotson v. BRP US, Inc.* (C.A. 7, 2008).

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NEW EEOC RULE

ALLOWS REDUCTION IN HEALTH INSURANCE BENEFITS FOR RETIREES 65 AND OLDER



Suzanne Roten

"In upholding the EEOC final regulation that took effect last December, the appeals court had ruled that Congress delegated authority to the EEOC to develop reasonable exceptions to the age discrimination law."

Historically, employers that had retiree health care plans designed such plans to offer one set of benefits for retirees under 65, and another set for those who were 65 and older and eligible for Medicare. Subsequently, various plaintiffs' groups, particularly the AARP, sued contending that the age discrimination laws prohibited age discrimination in employee benefits, and challenged an EEOC-proposed regulation that would allow employer-sponsored benefit plans to reduce or eliminate health benefits when the participant became eligible for Medicare or a state-sponsored health plan. Most recently, the AARP sued to prohibit the introduction of the new rule. In March of this year the U.S. Supreme Court denied review of an appeals court ruling upholding the EEOC's age discrimination exemption for employer-sponsored retiree health plans that reduce or eliminate benefits once a retiree becomes eligible for Medicare. *AARP v. EEOC*, No. 07-662, cert. denied, 3/24/08. In upholding the EEOC final regulation that took effect last December, the appeals court had ruled that Congress delegated authority to the EEOC to develop reasonable exceptions to the age discrimination law. The reasoning for the exemption is that many employers, labor unions, and similar groups informed EEOC that complying with the AARP position would force companies to reduce or eliminate retiree health benefits they currently provided.

Editor's Note: Although the ruling allows employers to continue to maintain retiree health plans that coordinate with Medicare and similar state programs, the limited exemption does not allow employers to differentiate based on age for other benefits beyond medical benefits. Similarly, if employers have made promises to employees or retirees through contracts, a legal promise may be enforceable regardless of the new EEOC regulation.

ADVICE GIVEN

TO FAITH-BASED EMPLOYERS



Kelly Campbell

"The company seeks to balance its faith-based beliefs with a promotion of tolerance for differences of religious beliefs."

A paper was presented at the American Bar Association's Mid-Winter Meeting of the Employment Rights and Responsibility Committee dealing with the do's and don'ts of allowing more religious expression in the workplace. One important legal point mentioned in the paper is that faith-based employers should not mandate attendance at religious services, and should not base accommodation decisions on one particular religion, or give overly generous accommodations to workers of one religion, unless willing to do so for employees of all faiths.

Much of the discussion related to the practices of a Charlotte-based distributor of Coca-Cola products, Coca-Cola Bottling Co. consolidated. The company prominently displays in its mission statement that "our values honor God" and contracts with a chaplain service to have chaplains who meet regularly with all employees for encouragement. The mission statement also includes a list of values the company expects of its workers, including honesty, tolerance, and accountability.

According to a company spokesman, participation in any religious activity is voluntary, and no benefits accrue to employees for participating in faith-related activities, nor are there disadvantages to those who do not. The company also prohibits proselytizing in the workplace. The company seeks to balance its faith-based beliefs with a promotion of tolerance for differences of religious beliefs.

The company has not had any religious discrimination claims filed against it since it instituted these policies, and believes that employee morale, worker retention, and other positive measurements have improved.

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TITLE IIC EMPLOYMENT PROVISIONS

Prohibition on Discrimination - The legislation prohibits the use of genetic information in employment decisions, such as hiring, firing, job assignments, and promotions. This prohibition extends to employers, unions, employment agencies, and labor-management training programs.

Limitation on Acquisition - Employers are prohibited from requesting, requiring, or purchasing genetic information about an employee or family member, except for the following legitimate reasons: (1) for genetic monitoring of biological effects of toxic substances in the workplace, (2) if the employer provides genetic services, such as through a wellness program, with the employee's prior consent, or (3) for compliance with the certification provision of the Family and Medical Leave Act or its State equivalent. The purchase of commercially and publicly available documents (except medical databases or court records) or inadvertently requesting or requiring family medical history would not violate this title. Under each of these exceptions, however, the genetic information still could not be used or disclosed.

Confidentiality Protections - The legislation safeguards the confidentiality of genetic information in the employment setting. If an employer (acting as an employer) acquires genetic information, such information shall be treated and maintained as part of the employee's confidential medical records. Moreover, such information shall not be disclosed except in limited situations, such as to the individual or in order to comply with the certification provisions of Federal or State family and medical leave laws, or a court order.

Enforcement - The legislation protects applicants or employees of employers defined under the Title VII of the Civil Rights Act of 1964. Claimants are required to file a charge with the appropriate enforcement agency within a certain time period, prior to filing a suit in court. The bill provides for the same compensatory and punitive damages available to prevailing plaintiffs under 42 U.S.C. 1981a, which are progressive with the size of the employer and limited to cases of disparate treatment.

Effective Date - The provisions of Title II are effective eighteen months after date of enactment.

PRACTICAL IMPLICATIONS

Employers who use genetic testing in making employment decisions generally will be subject to liability if they continue that practice. According to published reports, a 2001 study by the American Management Association showed that nearly two-thirds of major U.S. companies require medical examinations of new hires, some 14% conducting tests for susceptibility to workplace hazards, and 20% collecting information about family medical history. These type tests and inquiries would apparently be prohibited by the new legislation.

BUT DNA MAY BE USEFUL IN CIVIL CASES



Patty Wheeler
"DNA testing has already been used in a number of workers' compensation cases in California by mutual agreement between the parties."
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Although mandatory DNA testing may soon be prohibited by new federal legislation, it may not affect the increasing use of such testing in litigation. The first major use of DNA testing in nationally publicized cases might have been the Atlanta child murders from 20 years ago, but it is now increasingly used in civil litigation as well. Some type DNA testing allegedly can show with near certainty whether an individual has been physically injured from exposure to a particular chemical or substance. If so, it might be used as evidence in workers' compensation and toxic tort cases, which otherwise would be determined based on circumstantial evidence. Such testing might also offer employers a tool for improving workplace safety and monitoring employee health, which, of course, would be subject to the requirements of the new federal legislation.

DNA testing has already been used in a number of workers' compensation cases in California by mutual agreement between the parties. In one case, for example, a DNA test revealed that a nurse who claimed to be in chronic pain and permanently disabled from a back injury on the job exhibited none of the physical signs of the cellular information associated with pain.