

## ALERTS AND UPDATES

### **New California Law Prohibits Genetic Discrimination and Can Result in Significant Damages If Violated**

September 23, 2011

On September 6, 2011, California Gov. Jerry Brown signed into law the California Genetic Information Nondiscrimination Act (CalGINA), which will take effect on January 1, 2012. CalGINA amends anti-discrimination laws already in effect to prohibit genetic discrimination in areas, such as housing; mortgage lending; employment; education; and public accommodations. CalGINA provides broader protections from genetic discrimination than does the federal Genetic Information Nondiscrimination Act (GINA) of 2008, which is limited to employment and health insurance coverage. This *Alert* focuses on CalGINA's potential impact on employers in California.

#### **General Prohibitions**

California and federal laws already prohibit employers and businesses from discriminating against individuals on the basis of race, gender, age, religion and disability, among other protected classifications. In a statement detailing [Senate Bill 559](#), CalGINA, State Sen. Alex Padilla (D-Pacoima) said, "Discrimination on the basis of genetic information is no less offensive than discrimination based on race, gender, or sexual orientation." "California has a compelling interest in promoting and fostering the medical promise of genomics while relieving the fear of discrimination by strengthening laws to prevent it." Genomic sequencing is quickly approaching the point where it will be widely affordable to the general public and, potentially, a covered insurance benefit.

Senator Padilla sponsored CalGINA in the wake of its federal predecessor, GINA, which took effect on November 21, 2009. Title II of GINA prohibits the use of genetic information in making decisions related to any terms, conditions or privileges of employment. GINA also prohibits covered entities from intentionally acquiring genetic information; requires confidentiality with respect to genetic information; and prohibits employers from retaliating against individuals who complain about acquisition, use or disclosure of their genetic information or the genetic information of their family members. (See [Alert, December 9](#),

2009.) In November 2010, the U.S. Equal Employment Opportunity Commission (EEOC) published its final regulations for Title II of GINA, codified at 29 C.F.R. Part 1635, which took effect on January 10, 2011. (See [Alert, November 22, 2010](#).)

### **Amendment of the California Fair Employment and Housing Act**

Of relevance to California employers, CalGINA amends the California Fair Employment and Housing Act (FEHA) (Cal. Gov't Code, § 12920 *et seq.*). FEHA protects the right and opportunity of all persons to seek, obtain and hold employment, regardless of the person's race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age or sexual orientation. On these bases, an employer cannot refuse to hire or employ a person; exclude a person from a training program; harass; discharge a person from employment; or discriminate against a person in compensation or in terms, conditions or privileges of employment. Employers should also take all reasonable steps necessary to prevent discrimination and harassment from occurring.

CalGINA adds "genetic information" as a prohibited basis for discrimination. "Genetic information" means, with respect to any individual, information about: (1) the individual's genetic tests; (2) the genetic tests of family members of the individual; or (3) the manifestation of a disease or disorder in family members of the individual. This includes any request for or receipt of genetic services, or participation in clinical research that includes genetic services, by an individual or any family member of the individual. Genetic information does not include information about a person's sex or age.

Before filing a lawsuit under FEHA for genetic or any other type of discrimination, an employee needs to exhaust her administrative remedies with the California Department of Fair Employment and Housing.

### **Damages for Genetic Discrimination**

The remedies available under FEHA may be considerably greater than under GINA. In a civil action under FEHA, the employee may recover *unlimited* monetary damages, such as back pay; future lost earnings; emotional distress damages; punitive damages; and attorneys' fees and costs, including expert witness fees. By comparison, damages under GINA are the same as those available under Title VII of the Civil Rights Act of 1964 and are limited to reinstatement, hiring, promotion, back pay, injunctive relief, and

pecuniary and non-pecuniary damages (including compensatory and punitive damages, together capped at between \$50,000 and \$300,000, depending on the size of the employer). Thus, an employer liable for genetic discrimination under California law may be required to pay damages in excess of those available under federal law.

### **What Does CalGINA Mean for California Employers?**

For California employers, the differences between GINA and CalGINA will not impact those who are already in compliance with GINA. Ways to ensure compliance with both laws include the following:

- Revise policies and procedures to include genetic information as a prohibited basis for discrimination, harassment and retaliation.
- Review and revise applications, medical leave certifications and other employment-related forms and questionnaires that may seek genetic information. Ensure that the specific safe-harbor language stated in the GINA regulations—which cautions healthcare providers not to provide a company with genetic information—is included on all lawful requests for medical information.
- Ensure any pre-employment physicals are conducted in compliance with GINA and CalGINA—*e.g.*, do not request family medical histories.
- Ensure the EEOC's revised "EEO Is the Law" poster is posted at the workplace.
- Treat any genetic information that may exist as confidential by placing it in a confidential medical file, separate from an employee's personnel file or an applicant's application file. Implement procedures to prevent the disclosure of genetic information.
- Train managers and supervisors on how GINA and CalGINA impact the company's policies and procedures.

## **For Further Information**

If you have any questions about this *Alert* or would like more information, please contact any [member](#) of the [Employment, Labor, Benefits and Immigration Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

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