

December 7, 2009

FEDERAL LAW BANNING GENETIC BIAS TAKES EFFECT FOR EMPLOYERS

The employment provision of the Genetic Information Nondiscrimination Act (the Act), enacted May 21, 2008, took effect on November 21, 2009. The Equal Employment Opportunity Commission (EEOC) has enforcement authority with procedures and remedies modeled on Title VII of the Civil Rights Act. A final rule proposed by the EEOC to implement the Act remains under review at the White House Office of Management and Budget.

The Act is designed to bar employers with 15 or more employees, unions and employment agencies from requiring genetic testing or collecting an applicant's or employee's genetic information when making decisions pertaining to hiring, firing, job placement or promotion.

The Act defines genetic information as information concerning: an individual or family members genetic tests; genetic testing done on a fetus or embryo being utilized through assisted reproductive technology; the manifestation of a disease or disorder in an individual's family member; or any request, or receipt of, genetic services while participating in clinical research. The Act does not include information regarding the sex or age of any individual. An aggrieved employee may seek reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-pecuniary damages, attorneys' fees and costs.

If employers do obtain genetic information, all records must be kept private (and maintained in the same manner as confidential medical records under the Americans with Disabilities Act), except under limited circumstances including: (1) a request in writing for the data from an employee or labor organization; (2) to an occupational or health researcher if the research is conducted in compliance with certain regulations and protections set forth in 45 CFR Part 46; (3) to government officials investigating compliance with 45 CFR part 46 if information is relevant to the investigation; (4) to a Federal, State, or local public health agency regarding information describing a contagious disease that presents a hazard; and (5) if disclosure is made in connection with an employee's compliance with certification provisions of the FMLA or state family and medical leave laws.

Employers must now comply with the law and post the updated EEO poster (see McMahon Berger news November 5, 2009; supplement available on the United States Department of Labor's website). Training on how to deal with medical and health-related information under the Act may be necessary for managers, supervisors, and human resources staff.

Please contact a McMahon Berger attorney with questions about these or any other issues.

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