Health Law Bulletin

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GENETIC INFORMATION DISCRIMINATION ACT LIMITS INFORMATION AVAILABLE TO INSURANCE COMPANIES AND EMPLOYERS

While there is increased availability of genetic testing for certain kinds of medical conditions (or predispositions for those medical conditions), some people remain reluctant to undergo testing because they worry the results may be used as a basis to cancel their insurance, raise their premiums, or even to deny them a job.

To address this issue, Congress passed the Genetic Information Nondiscrimination Act of 2008, also known as GINA. The Equal Employment Opportunity Commission (EEOC) recently released proposed regulations for how GINA will be implemented once the law takes effect in November 2009. Those in the medical care professions should be aware of these regulations, in both their roles as medical professionals and as employers. The rules under HIPAA still apply. GINA simply provides another layer of protection for persons who obtain genetic testing.

Genetic information is defined as information about an individual's genetic tests, genetic tests of family members of the individual, and the manifestation of a disease or disorder in family members of such individual.

The general rule is very simple: An employer may not obtain genetic information from employees, prospective employees, or family members. Insurance companies are prohibited from acquiring genetic testing information for underwriting purposes.

The statute contains six exceptions to the prohibition on an employer obtaining genetic information:

1. Information received during casual conversations between employees and employers or overheard between co-workers. Congress called this the "water cooler" exception.
2. Genetic testing services that are provided as part of a voluntary wellness program.
3. Information received from an employee who is requesting leave under the Family and Medical Leave Act (FMLA).
4. Genetic information acquired by an employer through purchased documents, such as magazines and newspapers, that are publicly and commercially available. For example, an employer might learn through a local newspaper article about Huntington's disease that an employee comes from a family that has several

members with the disease. However, this exception does not include medical databases or court records.

5. An employer can perform genetic monitoring of the effects of toxic substances in the workplace under certain conditions.
6. Employers engaged in law enforcement or human remains identification may request or require genetic information from their employees in limited circumstances.

Arkansas has its own laws, passed in 2001, that prohibit the use of genetic information for insurance coverage purposes and that prohibit employers from seeking or using genetic information to impact the terms or conditions of employment, including benefits.

Now is the time to review how your practice or business handles information flow to insurance companies and to employers who request examinations of their employees. Physicians who fill out employment-related forms for their patients, *i.e.,* a form requesting an accommodation under the Americans with Disabilities Act, should not answer any questions on an employer's form about a patient's family medical history or about other genetic information.

In your role as an employer, you should examine your personnel policies to ensure that they comply with the requirements of GINA and with Arkansas laws. Employers should maintain a separate file for any genetic information that is received on an employee. Employment applications should not request genetic information. In short, employers should be sure they do not have any policies or procedures that require the collection of genetic information and that do not meet one of the six exceptions. You may want to request assistance from your lawyer in reviewing and revising your policies, procedures, and handbooks.