

June 6, 2008

BUSINESS ALERT

**New Federal Law Prohibits Discrimination by
Employers Based on Genetic Information**

The Genetic Information Nondiscrimination Act ("GINA" or "the Act") was signed into law by President Bush on May 21, 2008. GINA arose out of concerns that advances in and wider use of genetic testing could lead to new forms of discrimination. The employment provisions of GINA become effective eighteen months after the date of enactment. The Act applies to employers with fifteen or more employees. Employers should be aware of two key provisions in the new law.

First, GINA makes it unlawful for employers to refuse to hire, to discharge, or to otherwise discriminate against an employee (including applicants) with respect to compensation, terms, conditions, or privileges of employment because of that employee's genetic information. The federal law further prohibits the segregation or classification of employees because of their genetic information in any way that would deprive those employees of employment opportunities or otherwise adversely affect their status as employees. GINA, like Title VII of the Civil Rights Act of 1964, includes an "anti-retaliation" provision that prohibits discrimination because an individual has exercised his or her rights under the law.

Second, in addition to prohibiting discrimination and retaliation, The Act includes a provision making it unlawful, with very limited exceptions, for employers to request, require, or purchase genetic information about an employee. These exceptions include: an employers' inadvertent request or requirement that an employee provide his or her family's medical history; certification requirements for family and medical leave under Federal Statute laws; and the use of genetic information to monitor biological effects of toxic substances in the workplace.

The language of the Act raises a number of questions for employers. For example, while employers may not, unless an exception applies, request "genetic information" concerning their employees. That term is defined quite broadly. This may raise issues for employers when processing leave and accommodation requests. While GINA includes an exemption for employers who request family medical history information under the Family and Medical Leave Act ("FMLA"), an employer's request for family medical information related to other types of leave or in relation to an accommodation request under the Americans with Disabilities Act ("ADA") may not be exempted.

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Employers will need to evaluate and make necessary adjustments to their policies and practices. Employers and benefit plan administrators should take steps to ensure that they are in compliance with the Act's requirements, to make sure that they do not inadvertently request or receive genetic information about their employees, and to maintain compliance on an ongoing basis. Some practical steps to take include:

- Revise medical request forms to specify that they are requesting only non-genetic information and make reference to the Act.
- Train employees who typically collect information about co-workers and applicants about the restriction on the collection of genetic information.
- Ensure new-hire interviewers avoid questions or discussions with applicants that may elicit the medical conditions of the applicants' extended family members.
- As with other discrimination laws, take steps to insure that managers and supervisors are not making employment-related decisions based on genetic information.
- Examine existing policies for handling medical information to determine if they are adequate to address genetic information and develop a policy that separates genetic information from other accessible records.
- Make sure that health benefit plans comply with the GINA. Both sponsors and issuers of plans are subject to penalties for any violation.

GINA does not preempt other state and federal statutes that may provide equal or greater protection for individuals in the area of genetic information discrimination. Oregon already has laws that provide protection for genetic information in certain instances. The regulations that will be promulgated by the EEOC and other federal agencies should be of assistance in determining additional ways in which employers must modify their behavior to be compliant with GINA. We will provide an update on GINA when the regulations are issued.

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Our firm's Business Alerts are intended to provide general information regarding recent changes and developments in the insurance law area. These publications do not constitute legal advice, and the reader should consult legal counsel to determine how this information may apply to any specific situation.

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Business Practice Group
HARRANG LONG GARY RUDNICK P.C.

John A. Riherd
(503) 242-0000
john.riherd@harrang.com

Mark A. Amberg
(541) 485-0220
mark.amberg@harrang.com

David R. Denecke
(503) 242-0000
david.denecke@harrang.com

Randall L. Duncan
(503) 242-0000
randall.duncan@harrang.com

Christine S. Cusick Nesbit
(541) 485-0220
christine.nesbit@harrang.com

Arden J. Olson
(541) 485-0220
arden.j.olson@harrang.com

Bob Steringer
(503) 242-0000
bob.steringer@harrang.com

Doug Chiapuzio
(503) 242-0000
doug.chiapuzio@harrang.com

Robert A. Kerr
(503) 242-0000
robert.kerr@harrang.com

Marjorie A. Berger
(503) 242-0000
marjorie.berger@harrang.com

Nicole Commissiong
(541) 485-0220
nicole.commissiong@harrang.com

Jillian R. Bruce
(503) 242-0000
jillian.bruce@harrang.com

HARRANG LONG GARY RUDNICK P.C.

360 East 10th Avenue
Suite 300
Eugene, OR 97401-3273
Telephone (541) 485-0220
Fax (541) 686-6564

1001 SW Fifth Avenue
16th Floor
Portland, OR 97204-1116
Telephone (503) 242-0000
Fax (503) 241-1458

333 High Street, N.E.
Suite 200
Salem, OR 97301-3632
Telephone (503) 371-3330
Fax (503) 371-5336

www.harrang.com