The Legal Intelligencer
THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2009
PHILADELPHIA, WEDNESDAY, OCTOBER 14, 2009 VOL 240 • NO. 75 An ALM Publication

EMPLOYMENT LAW

The New Employment Laws in Town: GINA AND MHPAEA

The Legal Intelligencer
By Carolyn M. Plump And Christine V. Bonavita
October 14, 2009

Carolyn M. Plump

Christine Bonavita

On May 21, 2008, former President George W. Bush signed the Genetic Information Nondiscrimination Act of 2008, or GINA, into law. The act, which consists of two major titles, prohibits the improper use of genetic information and family medical history in health insurance coverage and employment decisions. Title I prohibits group health plans and health insurers from denying coverage to individuals or charging higher premiums based solely on genetic predispositions to developing diseases or disorders. Title II prohibits employers from collecting or using an individual's genetic information or family medical history when making hiring, firing, placement or promotion decisions. Title I, which is not discussed in this article, takes effect between May 22, 2009, and May 21, 2010. The effective date depends on the nature of the group health plan at issue. Title II goes into effect Nov. 21, 2009.

Title II of the act, which contains three main provisions, applies to all private and state and local government employers with 15 or more employees, as well as employment agencies and labor organizations. GINA prohibits employers from discriminating against applicants, employees and former employees based on genetic information or family medical history. There is, however, no cause of action under GINA for disparate impact discrimination. GINA also prohibits employers from limiting, classifying or segregating employees based on genetic information. Finally, GINA prohibits employers from retaliating against individuals who oppose discrimination.

The statute defines the term "genetic information" expansively to include: an individual's genetic tests (including tests done as part of a research study); genetic tests of an individual's family member (defined as dependents and relatives up to and including fourth-degree relatives — e.g., a person's great, great grandmother); genetic tests of any fetus of an individual or family member who is a pregnant woman, and genetic tests of any embryo legally held by an individual or family member utilizing assisted reproductive technology; the manifestation of a disease or disorder in family members; and any request for, or receipt of, genetic services or participation in clinical research that includes genetic services (genetic testing, counseling or education) by an individual or

family member. Genetic information does not include information about the gender or age of an employee or family member, information that the employee currently has a disease or disorder or any test for drug or alcohol abuse.

The act contains a number of exceptions to the general provision prohibiting employers from requesting, requiring or purchasing genetic information. Specifically, the following are not unlawful: inadvertently acquired information (e.g., casual conversations between a supervisor and a subordinate as to how the employee or a family member is feeling that reveals a family medical condition or a genetic predisposition); aggregate information acquired in the provision of health or genetic services, including wellness programs, provided such information does not disclose the identity of individual employees; information needed to comply with certification provisions of the Family and Medical Leave Act or other similar state family and medical leave laws; publicly available information (e.g., a newspaper obituary indicating that an employee's relative died of a certain disease or disorder); genetic monitoring required by law (such as occupational safety and health laws), provided the employer complies with the law, provides written notice, obtains the employee's prior consent and informs the employee of the results; and information obtained for the purpose of law enforcement or military circumstances to assist with genetic identification. However, even when an employer obtains genetic information in a valid manner, the employer still must not use the genetic information to make any adverse employment decisions.

The act also contains various exceptions regarding the disclosure of genetic information. Specifically, employers may disclose information: to the person to whom the information relates; to an occupational health researcher, provided the research comports with federal regulations; in response to a court order (as opposed to a discovery request); to government agencies investigating compliance with GINA; in conjunction with a request for leave under applicable federal or state medical leave laws; and to officials in the event of a contagious disease if the disease presents an imminent danger of death or life-threatening illness.

Title II of GINA is enforced by the Equal Employment Opportunity Commission, but individuals also have the right to pursue private litigation. Remedies for violations include corrective action and monetary penalties.

What Steps Must Employers Take To Comply with Title II?

Although GINA is not retroactive, once GINA becomes effective it will prohibit the use of genetic information in connection with employment regardless of when the information was collected. Accordingly, employers should take the following affirmative measures to ensure their compliance.

• Update equal employment opportunity policies to prohibit discrimination based on genetic information or family medical history.

• Review and modify all employment applications to delete any questions regarding family medical history.

• Ensure that all legally authorized medical examinations, fitness-for-duty examinations and reasonable accommodation inquiries comply with GINA.

• Evaluate leave policies to ensure such polices seek only information needed to certify leave requests, and include a statement on leave forms that family medical history and other genetic information should not be provided.

• Screen all employee information to ensure that, as with other individual medical data, genetic information is kept in confidential files separate from personnel files and access is limited only to those people with a need to know.

• Implement internal controls to prohibit supervisors with decision-making authority from accessing medical or genetic information regarding applicants or employees.

• Post new compliance posters in the workplace that contain information regarding GINA.

• Continue to comply with all state or local laws that provide individuals with greater protection of genetic information and medical history because GINA does not pre-empt such laws.

Mental Health Parity and Addiction Equity Act

In addition to taking appropriate measures to comply with GINA, organizations with 50 or more employees that offer group health plans must also take into account the requirements of the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008, or MHPAEA. Although there is no legal mandate for employers to provide mental health or substance abuse benefits to its employees, the act requires a covered employer that does offer either or both types of benefits to do so, in parity, with medical and surgical benefits offered under the benefit plan. The MHPAEA's requirements are effective for plan years beginning on or after Oct. 3, 2009, and for calendar year plans, Jan. 1, 2010. For group health plans maintained pursuant to a collective bargaining agreement, the plan must comply with the act the later of Jan. 1, 2009, or the date upon which the applicable collective bargaining agreement expires.

To meet the underlying purpose of the MHPAEA, which is to ensure that employees have greater access to mental health and substance use disorder benefits, plan sponsors must confirm that the plan does not impose more restrictive financial requirements for those benefits, when compared to medical and surgical benefits. For instance, co-pays, co-insurance, deductibles and out-of-pocket expenses that relate to mental health or substance use disorders benefits cannot be more expensive or more restrictive than those

applicable to medical and surgical benefits. This also means that a covered plan cannot impose cost-sharing requirements only to mental health or substance use disorder benefits.

Additionally, group health plans cannot mandate treatment limitations for mental health or substance use disorder benefits unless the same limitations apply to medical and surgical benefits. Any out-of network coverage must also be applied equally. Finally, benefit plans that offer mental health and or substance use disorder benefits must provide, upon request, the criteria for medical necessity determinations.

There is a limited exemption under the act for group health benefit plans that meet the "increased cost exemption." For example, if a plan can demonstrate, through a written report prepared by a licensed actuary, that compliance with the parity rules increases the total cost of coverage for all benefits by 2 percent or more in the first year (1 percent or more in later years), the exemption will apply for that year only. Annual testing is required. Therefore, prior to making any changes, plan sponsors should determine whether the exception can be met.

What Steps Must Employers Take To Comply With MHPAEA?

Employers offering group health plans or self-funded plans that fall within the requirements of the MHPAEA must promptly take affirmative measures to meet the new legal mandates. This should include, but is not limited to:

• A comprehensive review of group health plans to evaluate the type and level of benefits offered to determine whether equality exists between mental health and substance abuse benefits and medical/surgical benefits.

• Evaluation, by a licensed actuary, whether the cost of compliance triggers the exemption.

• If parity does not exist and the exemption is inapplicable, amendments to group health benefit plan designs and plan documents should be made to reflect any necessary changes.

• Amendments to enrollment documents and related materials should be completed to accurately reflect changes to benefits.

• Communication with employees regarding changes in benefits should be completed on or before the effective date of the act with respect to each covered plan. •

Carolyn M. Plump *is a partner in Mitts Milavec's labor and employment law practice group. Plump has successfully negotiated labor contracts, counseled clients regarding regulatory compliance, prepared corporate employment policies and handbooks,*

conducted investigations and advised companies regarding the hiring, firing and disciplining of employees. She has represented clients in litigation, mediation and arbitration matters in federal court and before administrative agencies.

Christine V. Bonavita *is also a partner in the labor and employment law practice group of the firm. She has extensive experience providing companies and not-for-profit entities with training, counseling and litigation avoidance strategies related to reductions in force, the WARN Act, FMLA, discrimination and harassment, employee termination and discipline, wage and hour compliance and the administration of personnel policies.*