

LETTER CONCERNING REMEDIES UNDER GENETIC INFORMATION
NONDISCRIMINATION ACT

May 3, 2007

The Honorable Edward M. Kennedy
Chairman
Committee on Health, Education, Labor and Pensions
U.S. Senate
Washington, D.C. 20510

The Honorable Michael B. Enzi
Ranking Republican
Committee on Health, Education, Labor and Pensions
U.S. Senate
Washington, D.C. 20510

Dear Chairman Kennedy and Senator Enzi:

We are writing to urge the U.S. Senate to ensure that an important clarification be included in the Genetic Information Nondiscrimination Act ("GINA" H.R. 493/S. 358) so that employer sponsors of group health plans and health insurers are not subject to excessive litigation and damages for matters related to the administration of health benefit plans.

As explained in the attached summary, GINA contains two titles. Title I establishes specific rules barring genetic discrimination by group health plans and insurers (*e.g.*, using genetic information in setting premiums). Violations of Title I are subject to specific new civil penalties under ERISA and the Public Health Services Act, in addition to existing remedies under these two laws. Title II bars unlawful employment discrimination with respect to "compensation, and terms and conditions of employment" based on the use of genetic information. The remedies for these violations are much more substantial, including the compensatory and punitive damages that are generally available under the Civil Rights Act and other federal employment discrimination laws.

Since employee benefit plans are likely to be viewed as part of an employee's "compensation and terms and conditions of employment" there has been a significant concern that if an employer's group health plan or a health insurer were to use genetic information to discriminate based on genetic information in enrollment, eligibility, premiums, etc. (all of which are tightly regulated under title I), these actions could be deemed violations of title II.

The understanding of employers and insurers has been that the intent of Congress in establishing title II of GINA was to regulate traditional employment practices -- hiring, firing, promotions -- in order to prohibit the use genetics information for these purposes. Employers and insurers have understood that the broad remedies available under the Civil Rights Act were only to be available for practices related to these prohibited employment practices under title II.

A clarification of this issue was included in section 106 of the Energy and Commerce Committee version of GINA. However, the Energy and Commerce Committee provision

was dropped prior to the April 25 House vote on H.R. 493. In its place, a new provision was included in section 209 of H.R. 493 which unfortunately fails to clarify whether an employer's group health plan or an insurer could face claims under both title I and title II for any violation of title I requirements.

Unfortunately, these changes -- and statements made on the House floor immediately before the House vote on the measure -- increase the likelihood that employer sponsors of group health plans (and potentially insurers) could face lawsuits for compensatory and punitive damages related to the use of genetics information, a result which could lead to excessive litigation, damages and legal risk for those who sponsor health benefits for their employees or for the insurers who administer these plans.

Because Congress is moving very quickly on this legislation, it is critical that the Senate clarify the bill to ensure that the remedies for Title I violations remain exclusive to those in that title. We are especially concerned that the Senate may simply pass the House-passed legislation to avoid a conference. We urge you to express concerns to the Senate leadership that GINA be clarified in this regard before the Senate passes any bill.

Sincerely,

American Benefits Council
HR Policy Association
National Business Group on Health
ERISA Industry Committee
National Retail Federation
U.S. Chamber of Commerce
College and University Professional Association for Human Resources
Retail Industry Leaders Association
Society for Human Resource Management
National Association of Manufacturers
American Bakers Association
The Financial Services Roundtable

Attachment