



## GENETICS NON-DISCRIMINATION BILL NEEDS CLARIFICATION TO PREVENT EXCESSIVE DAMAGES ON EMPLOYER SPONSORS OF GROUP HEALTH PLANS AND HEALTH INSURERS

Employers and insurers are seeking an important clarification to the Genetics Information Nondiscrimination Act ("GINA") so that employer sponsors of group health plans and health insurers are not subject excessive litigation and damages for matters related to the administration of health benefit plans. Unfortunately, changes made to the House version of GINA (H.R. 493) prior to its approval by the House on April 25 -- 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.

Without a clarification, it is very likely that every genetics information claim for civil penalties under ERISA will be accompanied by a lawsuit against employers for compensatory and punitive damages under title II of GINA. This result 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.

### **Brief Summary of the Legislation**

- Title I of GINA sets specific rules barring discrimination based on certain uses of genetic information by group health plans and insurers. For example, group health plans and health insurers are broadly prohibited from using genetic information in setting premiums and contributions and determining eligibility or enrollment. Title I of GINA includes specific new civil penalties added to both ERISA and the Public Health Services Act (PHSA) for violations of these new rules, in addition to other remedies which are available under these two acts under current law.
- Title II of GINA makes it an unlawful employment practice for an "employer" to discriminate with respect to "compensation, and terms and conditions of employment" based on the use of genetic information. Section 207 of the bill provides that the remedies under the Civil Rights Act will apply to violations of title II. The legislation also includes a cross reference which specifically incorporates the compensatory and punitive damages remedies that were added by the Civil Rights Act of 1991.

### **How Employers and Insurers Have Interpreted the Legislation**

- 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.
- It was not the goal of title II to regulate the operation and terms of health plans and insurance policies. Requirements on the use of genetics information by an employer's group health plan or by a health insurer are found only in title I of the legislation.
- That said, because 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. Moreover, an "employer" (subject to regulation under title II of GINA) could be interpreted broadly so as to include not just traditional employers, but also persons administering a group health plan.

### **The Need for Clarification of the Remedies Available under GINA**

- Absent a clarification of GINA, there is a substantial risk that employers -- as well as insurers or third party administrators (TPAs) -- could be sued under title II for conduct that is comprehensively regulated and prohibited by title I and for which title I provides new remedies. Importantly, plaintiffs will have a huge incentive to pursue claims under title II because the Civil Rights Act remedies are significantly greater than the existing ERISA and PHSA remedies, as well as the new ERISA and PHSA remedies added by GINA under title I.
- In negotiations prior to House passage of GINA, employers and insurers asked that a provision be added to make clear that title I of GINA establishes the exclusive rules and remedies for genetic discrimination by employer-sponsored group health plans or insurers. This clarification would state unambiguously that an act that would violate the requirements under title I of GINA would not result in a claim against an employer's group health plan or insurer 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.
- Further, in a statement on the House floor on the day H.R. 493 was approved, Rep. Rob Andrews (D-NJ), the chairman of the subcommittee with jurisdiction over ERISA for the House Education and Labor Committee, explained the House bill in a manner that increases the likelihood that employers will be subject to suits for compensatory and punitive claims under title II at the very same time their group health plan and plan fiduciaries are subject to suit under title I. Rep. Andrews stated that "the bill is intended to provide 2 comparable but distinct causes of action for violations of the Act with respect to genetic information. Health plans and insurers generally are subject to the requirements of title I. *Employers, including to the extent employer control or direct health benefit plans, are subject to the requirements of title II of the bill.*"

### **Action Now Needed to Limit Excessive Damages on Employer-Sponsored Group Health Plans and Insurers**

- The final bill must be clarified to make sure that employer-sponsored group health plans and health insurance coverage are exclusively regulated by title I of the bill. Otherwise, it is very likely that every genetics information claim for civil penalties under ERISA will be accompanied by a lawsuit against employers for compensatory and punitive damages under title II of the bill. This will lead to an increase in costly litigation, fuel frivolous lawsuits and create excessive legal risk for employers who sponsor health benefits for their employees.

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