More Workers Suffering DNA-based Discrimination

Recent years have seen unimaginable advances in genetics, including the sequencing of the human genome. As a result, genetic markers have been identified for a number of chronic health conditions, and hopes have been raised that the knowledge gained through such scientific research will lead to new treatments, cures or even prevention of a host of fearsome diseases not too far off in the distance.

The dark side of these mind-boggling developments is the possibility of misuse and abuse of an individual's genetic information. Already, numerous individuals have suffered discrimination based on their genetic makeup.

Congress struggled with the question of whether prohibiting genetic discrimination is truly necessary or just a solution in search of a problem.

The executive branch took the first major step in this arena in 2000 when President Bill Clinton signed an executive order prohibiting discrimination in federal employment based on genetic information.

After more than a dozen years of investigation, debate and hearings that included wrenching testimony from people who had been tested secretly by their employers and/or suffered from the misuse and abuse of their genetic information, Congress took its first crack at Aldous Huxley's brave new world by enacting the Genetic Information Nondiscrimination Act of 2008 (GINA).

The statute proceeds from the premise that advances in genetics create the possibility of discriminatory use of genetic information in both health insurance and employment.

There are more than 15,500 recognized genetic disorders. Each provides the basis for possible discrimination.

The problem with basing insurance and employment decisions on genetic information is that, except in rare cases, genetic information does not prove anything. Rather, it merely seeks to predict the likelihood of a certain outcome.

In Congress' ultimate view, decisions regarding an individual's career, or the person's very employability, should not be based on unquantifiable predictions that the individual will develop a disease or condition in the future. Ditto for the cost of the employee's health insurance or that of the group to which the employee belongs.

Accordingly, Congress has sought to prevent such discrimination by regulating the acquisition and use of "genetic information."

It is now illegal under federal law for an employer to request, require or purchase genetic information pertaining to an employee or an employee's family member.

An employer that has 15 or more employees for each working day for 20 or more calendar weeks during the current or preceding year is subject to the strictures of GINA.

There are some exceptions to the prohibition regarding the acquisition of genetic information.

One is where the request or requirement by the employer for genetic information is “inadvertent.”

I suppose it is possible to envision a scenario in which an employer’s acquisition of an employee’s genetic information is accidental, but I would not want to be the one making that argument in defense of a claim of discrimination under GINA.

Another exception is where the employer offers health or genetic services.

However, in such a case, the employee must provide prior knowing and voluntary authorization in writing, and only the employee and the provider can receive individually identifiable information concerning the results of those services.

An employer may request that an employee provide family medical history in order to comply with the certification requirements of the Family and Medical Leave Act, including the state versions of that law.

Not surprisingly, there are confidentiality requirements with respect to genetic information. However, GINA does not prohibit the use or disclosure of health information that is authorized by the Health Insurance Portability and Accountability Act.

Regardless, it is impermissible for an employer to use the genetic information to discriminate against an employee. Several types of discrimination based on genetic information are banned.

First, an employer may not fail or refuse to hire an applicant and may not discharge an employee. Second, an employer may not discriminate with respect to compensation, terms, conditions or privileges of employment.

Third, an employer may not limit, segregate or classify its employees in any way that would deprive an employee of employment opportunities or otherwise adversely affect the employment status of an employee.

GINA’s other target is health insurance providers. No group health insurance provider may adjust premiums or contribution amounts for the group based on genetic information.

Congress brings to GINA the full weight of Title VII’s enforcement powers, including an individual right of action in federal court after administrative remedies have been exhausted.

Not much has happened on that front as yet, but as the science of genetics marches on and people become more comfortable with the idea of peeking into their potential futures, the smart money says this will become one of the next great battlegrounds in labor and employment law.