



THE WORKPLACE WORD

www.swlaw.com

June 2007

contacts

DENVER

Kristen Mix
303.634.2091
kmix@swlaw.com

LAS VEGAS

Kelly Evans
702.784.5222
kevans@swlaw.com

ORANGE COUNTY

Christy Joseph
714.427.7028
cjoseph@swlaw.com

PHOENIX

Kate Hackett
602.382.6444
khackett@swlaw.com

SALT LAKE CITY

Mark Morris
801.257.1904
mmorris@swlaw.com

TUCSON

John A. Robertson
520.882.1206
jrobertson@swlaw.com

Genetics: The newest potential protected class?

In today's business environment, most employers understand that federal and many state laws prohibit an employer from discriminating against its employees on the basis of certain attributes, which include race, color, religion, sex, national origin, age and disability. But what about genetic discrimination? What is it and is it also prohibited?

H.R. 493, The Genetic Information Nondiscrimination Act of 2007

Advances in genetics, including the deciphering of the sequence of the human genome, have opened up major new opportunities for medical progress in areas such as earlier disease detection, the development of more successful and effective therapies to treat disease, and the reduction in the likelihood of disease contraction. These advances, however, also give rise to the potential misuse of genetic information, as well as discrimination against individuals with certain genetics. The unwarranted use of genetic information may threaten the utilization of existing genetic tests, as well as the ability to conduct further scientific research.

As a result, on April 25, 2007, the United States House of Representatives passed H.R. 493, the Genetic Information Nondiscrimination Act of 2007 ("the bill"), to prohibit discrimination on the basis of genetic information with respect to health insurance and employment. Five days later, the bill was placed on the United States Senate Legislative Calendar and is currently awaiting a vote in the Senate. If H.R. 493 is passed by the United States Senate, the bill will most likely be signed by the President. The Executive Office of the President has already voiced approval for the bill.

What does H.R. 493 require of employers?

H.R. 493 defines "genetic information" as "information about (1) an individual's genetic tests; (2) the genetic tests of family members of the individual; or (3) the occurrence of a disease or disorder in family members of the individual." This term, however, does not include information about the sex or age of an individual.

H.R. 493 applies to employers with fifteen or more employees. If passed, the bill would make it an unlawful employment practice for an employer to: (1) fail or refuse to hire or to discharge any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment, because of genetic information with respect to the



employee; or (2) to limit, segregate or classify employees in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee, because of the employee's genetic information.

H.R. 493 also makes it an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee. The bill provides exceptions to this policy where: (1) an employer inadvertently requests or requires family medical history of the employee or a family member of the employee; (2) an employer offers health or genetic services as part of a bona fide wellness program and the employee provides prior, knowing, voluntary and written authorization for the disclosure of genetic information in aggregate terms that do not disclose the identity of the specific employee; (3) an employer requests or requires family medical history from the employee to comply with the certification provisions of the Family and Medical Leave Act of 1993 or similar requirements under State family and medical leave laws; (4) an employer purchases documents that are commercially and publicly available that include family medical history; or (5) the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace.

Although no genetic discrimination case has been brought before a federal or state court, in 2001 the Equal Employment Opportunity Commission ("EEOC") settled the first lawsuit alleging this type of discrimination. The EEOC filed suit against Burlington Northern Santa Fe ("BNSF") Railroad for secretly testing its employees for a rare genetic condition that causes carpal tunnel syndrome. The EEOC utilized the Americans with Disabilities Act ("ADA") to argue that the genetic testing was unlawful because it was not job-related, and that any condition of employment based on such test would be cause for illegal discrimination based on disability. The EEOC obtained an injunction against BNSF to end the genetic testing of

employees. The EEOC was also permitted to seek compensatory and punitive damages up to \$300,000 per individual for its 20-30 class of claimants.

The ADA protects individuals with disabilities, and defines a disability as: (1) a physical or mental impairment that substantially limits one or more of the major life activities of an individual; (2) a record of such an impairment; or (3) being regarded as having such an impairment. While the ADA does not explicitly address genetic information, it does protect persons who are regarded as having a disability and individuals with symptomatic genetic disabilities. As such, not all genetic discrimination cases overlap with ADA cases. For example, an individual with a genetic predisposition to a disease may not find protection under the ADA if he or she is not presently disabled, does not have a record of being disabled, and is not regarded as being disabled. This loophole in the ADA is exactly why Congressional representatives are pushing for the passage of H.R. 493.

Conclusion:

If passed, H.R. 493 will prohibit discrimination on the basis of genetic information. The bill is still awaiting approval from the United States Senate and the President. Even if the bill does not pass, employers must be aware that individuals with genetic mutations are currently protected (albeit to a more limited extent) under the ADA and may have additional protections under state laws. As a result, any employer considering genetic testing should make sure that the testing does not run afoul of the ADA or any genetic discrimination bill, should it become law, including, but not limited to, H.R. 493.