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PRATT'S  
**PRIVACY &  
CYBERSECURITY  
LAW**  
REPORT



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# Scary as Dinosaurs: California's Genetic Information Discrimination Code

*By Marjorie Clara Soto and Kristen Peters\**

*Genetic discrimination lawsuits can result in substantial costs. California employers should regularly review their hiring and employment policies and procedures to ensure that they are not exposing themselves to potential liability on the basis of genetic information discrimination. The authors of this article discuss the issue and what employers can do to comply with the California Genetic Information Nondiscrimination Act.*

For most of us, exposure to “DNA” dates back to high school science class or dinosaur theme park movies. Many of us would not know how to begin to explain the intricacies of the human genome, including how different nucleotides form the basis of DNA, or how they cause characteristics in multi-cellular organisms. Luckily, for purposes of California employment law, all that you need to understand are the basics of what is permissible and impermissible when it comes to the use of genetic information for employment purposes in California.

## **WHAT'S THE RULE?**

Since January 1, 2012, the California Genetic Information Nondiscrimination Act (“CalGINA”) has prohibited genetic discrimination in employment, housing, mortgage lending, education, and public accommodations. CalGINA provides broader protections for employees than does the federal Genetic Information Nondiscrimination Act (“GINA”) of 2008, which is limited to health insurance and employment discrimination coverage. Additionally, CalGINA, unlike GINA, allows for an employee to seek *unlimited damages* if they have been the victim of genetic discrimination. This prospect can be scarier than a reconstituted velociraptor, and makes it significantly more important for employers to ensure that they are not using genetic information improperly.

CalGINA added “genetic information” as a basis for discrimination to California’s Fair Employment and Housing Act (“FEHA”), which now states that “[i]t is an unlawful employment practice, unless based upon a bona fide occupational qualification, or, except where based upon applicable security regulations established by the United States or the State of California . . . [f]or an employer, because of the . . . *genetic information*. . . of any person, to refuse to hire or employ the person or to refuse to select

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the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.”<sup>1</sup>

CalGINA defines<sup>2</sup> “genetic information” as (1) the individual’s genetic tests, (2) the genetic tests of family members of the individual, or (3) the manifestation of a disease or disorder in family members of the individual. This definition includes any gene or chromosome (or combination or alteration thereof) that is known to cause a disease or disorder in a person or the person’s offspring, as well as inherited characteristics that are associated with a statistically increased risk of developing a disease or disorder. The definition does not include information about a person’s age or sex.

### **WHY SHOULD EMPLOYERS CARE?**

Although discrimination on the basis of “genetic information” may seem like an obscure proposition, it is easier than an employer might think to be exposed to liability on these grounds. Genetic employment discrimination can occur when you—as the employer or potential employer—gain information about an applicant or employee (or his or her family) related to genetic tests or family medical history, and then use that information as a factor in making an employment decision. You do not necessarily have to have access to a medical file. Think about conditions that are generally known to have a genetic or inherited component, such as some forms of cancer, sickle cell anemia, Huntington’s disease, cystic fibrosis, and Down syndrome. Once you know of such a condition, you can’t “unknow” it, so it is better to avoid being the recipient of such information, when possible.

Employers should also be very careful if they canvass social media profiles of applicants or employees. Social media sites can reveal all kinds of personal information about a candidate that would be illegal to request during the hiring process. For example, an employer could glean from a Facebook post that an applicant has a daughter or sibling with cancer. If not hired, that applicant might bring a claim for association discrimination under the Americans with Disabilities Act, the FEHA, or even the CalGINA/GINA.

### **WHAT CAN EMPLOYERS DO TO COMPLY WITH CALGINA?**

Generally, employers should make sure that:

- Policies and procedures specifically include prohibitions on discrimination, harassment and retaliation based on genetic information.

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<sup>1</sup> Cal. Gov’t Code § 12940 et seq.

<sup>2</sup> [https://geneticprivacynetwork.files.wordpress.com/2013/11/sb\\_559\\_bill\\_20110906\\_chaptered.pdf](https://geneticprivacynetwork.files.wordpress.com/2013/11/sb_559_bill_20110906_chaptered.pdf).

- Applications, medical leave certifications, and other employment-related forms do not, even inadvertently, seek genetic information.
- Pre-employment physical examinations do not inquire about family medical histories.
- Managers and supervisors are trained on how GINA and CalGINA affect the company's policies and procedures. For example, teach managers and supervisors how to respond to an employee who discloses family genetic information, such as "my father has cancer," and encouraging them not to do any digging on social media on applicants or employees, lest you may discover some information you really do not want to know.