Trucker ✦ Huss

Benefits Report

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New Genetic Nondiscrimination Act Creates Restrictions for Health Plans, Insurers and Employers

MICHELLE L. SCHULLER

On May 21, 2008, in an effort to protect individuals from discrimination on the basis of their genetic information, President Bush signed into law the Genetic Information Nondiscrimination Act ("GINA") (H.R. 493). One of the primary goals of GINA is to promote genetic research by reducing fears that an individual's genetic information may be used against him or her in health insurance coverage or in employment. GINA is significant for group health plans, health insurers and employers because it restricts their use of genetic information and will require changes in how they collect this information.

Overview

Recognizing the impact of GINA first requires an understanding of the scope of information protected under the law and whose genetic information is at issue.

GINA is intended to protect an individual from the use of "genetic information" against him or her. "Genetic information" is defined under GINA as

- a genetic test of an individual or his or her family members (a genetic test includes analyses of DNA, RNA, chromosomes, proteins or metabolites that detect genotypes, mutations or chromosomal changes); and
- the manifestation of the disease or disorder in an individual's family members. Under GINA, family medical histories and genetic services, such as genetic counseling and education, are deemed to contain genetic information.

GINA protects individuals from discrimination through the use of genetic information of any of the following:

- first, second, third and fourth degree relatives (*e.g.*, mother, grandmother, great-grandmother and great-great-grandmother);
- the fetus of a pregnant individual; or
- the embryo legally held by an individual or family member who used assisted reproductive technology.

With these definitions in mind, the following explains how GINA will affect group health plans and health insurers and employers. We note that the Department of Labor and the Treasury Department

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are expected to issue regulations regarding the implementation of GINA by May 21, 2009.

Impact on Group Health Plans and Health Insurers

Title I of GINA applies to group health insurance plans and health insurers. It expands on the protections already available under the HIPAA nondiscrimination rules by placing four additional restrictions on group health plans and health insurers with respect to genetic information.

First, GINA prohibits plans and insurers from adjusting premiums or employer contribution amounts for the group as a whole based on genetic information. This provision, however, would not bar a plan or insurer from increasing the premium for a group if a covered individual's genetic information is manifested as a disease or disorder.

Second, GINA prevents plans and insurers from requiring or requesting any individual or family member to undergo genetic testing. We note that GINA does not specify the types of tests that would or would not be considered "genetic tests." Any such clarification in the implementing regulations would be welcome — for example, that routine blood and cholesterol tests are not "genetic tests."

We note that the genetic testing provision does not place any limits on a health care professional's authority to request genetic testing. Moreover, the provision does not bar plans and insurers from using the results of any genetic test to make claims payment determinations. To the extent that such information is integral to a payment determination, however, GINA requires that plans and insurers only request the minimum amount of genetic information necessary to make the determination.

Third, GINA restricts the collection of genetic information. Plans and insurers may not request, require or purchase such information for underwriting purposes or for any individual's enrollment in the plan. Underwriting is defined to include rules for benefit eligibility determinations, the computation of premiums or contributions, the application of preexisting condition exclusions and any other activity related to creation, renewal or replacement of health benefits.

This restriction should have a significant impact on health risk assessments ("HRA") that are used for underwriting or enrollment purposes. Under GINA, HRAs cannot include questions related to the manifestation of a genetic disease or disorder of family members. For example, questions about an individual's family medical history of heart disease or cancer would need to be eliminated because they would require the employee to disclose his or her genetic information. Plans and insurers should review their HRA forms to determine whether any of the information requested would constitute the collection of genetic information. We note that the incidental collection of genetic information by a plan or insurer would not constitute a violation of GINA (*e.g.*, if an employee voluntarily discloses his or her family medical history to the employer).

Finally, GINA requires the Secretary of Health and Human Services to amend the HIPAA privacy regulations to:

- treat genetic information as "protected health information;" and
- prohibit the use or disclosure of such information for underwriting purposes.

Plans and insurers should review and amend their HIPAA privacy and security policies to reflect these new rules.

Enforcement

Violations of GINA by plans and insurers come at a significant cost. The Department of Labor may assess penalties of $100 per day per affected individual beginning on the first day the violation occurred and ending on the date the violation is corrected. If a violation is not corrected following receipt of a notice of violation from the Department of Labor, a minimum penalty of $2,500 may be imposed for de minimus violations, and $15,000 for significant violations. Unintentional violations are capped at the lesser of 10% of the amount paid by the employer for its group health plans during the prior year or $500,000. There is no cap on violations resulting from willful neglect or intentional misconduct.

Impact on Employers

Title II of GINA prohibits employers from using genetic information to discriminate against an individual with respect to the terms and conditions of that individual's employment (*e.g.*, in hiring or firing decisions or in determining compensation). Employers are also prohibited from retaliating against employees based on their genetic information.

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Finally, employers are generally prohibited from collecting an employee's genetic information subject to certain exceptions. For instance, an employer may request genetic information to administer leaves protected by the Family Medical Leave Act, to monitor toxic substances in the workplace or when offering health or genetic services (as part of a wellness program, for example). Such information may only be collected pursuant to an employee's written authorization and only if it is disclosed to the employer in an aggregated format that does not identify any individual employees.

Next Steps

Title I of GINA, which impacts all group health plans and health insurers, becomes effective on May 21, 2009, while the employment discrimination provisions of Title II of GINA become effective on December 21, 2010. Although regulations are expected within a year, health plans, insurers and employers should begin reviewing their policies and procedures relating to the treatment and collection of genetic information now to ensure timely compliance. If you would like assistance to review your policies and procedures, please contact our office.

Heroes Earning Assistance and Relief Tax Act Adds Benefits for Those in Military Service

JIM ELKUS AND KEVIN E. NOLT

On June 17, 2008, the Heroes Earning Assistance and Relief Tax Act of 2008 (HEART) (Pub. L. 110-245) was signed into law by the President. The HEART Act deals principally with the tax treatment of military personnel, with provisions applying to a wide range of Internal Revenue Code ("Code") provisions. This article will deal primarily with those provisions which have an effect on qualified retirement or Section 125 plans, and IRAs.

Death and Disability Benefits while under USERRA-Qualified Military Service

Plan Qualification Requirement: Additional Death Benefits

Section 104(a) of the HEART Act adds a new paragraph (36) to Section 401(a) of the code, requiring a tax qualified plan to provide that in the event a participant dies while performing "qualified military service" (as defined in the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")), that participant must be treated as if he or she had resumed employment and then terminated employment on account of death. The participant's survivors would then be entitled to any additional benefits that would otherwise be provided in the case of a participant who died while actively employed. Additional benefits, in this case, include benefits such as accelerated vesting, ancillary life insurance benefits, and any other benefits that are conditioned on the participant's death, but do not include benefit accruals relating to the participant's period of qualified military service. Conforming amendments made by Sections 104(c) of the HEART Act extend this requirement to Section 403(b) plans and Section 457 governmental plans, and add this requirement as a condition to the deduction timing rule of Section 404(a)(2) of the Code.

This provision is effective for deaths occurring on or after January 1, 2007. Plans must be amended to comply with the provision by the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012 for governmental plans). This extended remedial amendment period is available only if the plan has been operated in accordance with the requirement beginning as of the effective date.

Optional Benefit Accruals for Death or Disability

Section 104(b) of the HEART Act provides that a retirement plan qualified under Sections 401(a),

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403(b) or 457 of the Code may (but is not required to) treat an employee who leaves employment with the sponsoring employer for qualified military service and cannot be reemployed because of either death or disability (as defined in the plan), as if the individual had been reemployed on the day preceding death or disability and terminated employment because of death or disability. The employer would then be allowed to make contributions or additional benefit accruals on behalf of that individual as if he or she had survived and returned to employment. The amount of employee contributions and/or deferrals would be determined on the basis of the employee's actual contributions or deferrals for the 12-month period of service immediately prior to the beginning of the individual's qualified military service or, if the individual had been employed for less than 12 months, the full length of the employee's continuous service with the employer. If an employer elects to apply these rules, all similarly situated individuals must be credited with service and benefits on a reasonably equivalent basis.

A plan may apply these rules for deaths or disabilities occurring on or after January 1, 2007, or as of any later date. If these rules are applied, the plan must be amended by January 1, 2010 (January 1, 2012 for governmental plans), subject to the rules for the extended remedial amendment period as set forth above.

Differential Military Pay Treated as Wages

At present, differential pay (generally, the difference between the employee's military compensation and the amount of compensation the employee would have received from the employer during the same period) is not treated as wages for federal income tax purposes, and must be reported by an employer on a Form 1099. Section 105 of the HEART Act amends Section 3401 of the Code to provide that if an employer pays differential pay to an employee during a period of service in the uniformed service lasting more than 30 days, that:

- differential pay must be reported as wages on the employee's W-2;
- the individual receiving the differential pay will be treated as an employee of the employer; and
- the differential pay will be treated as compensation for both qualified plan and IRA purposes.

The employee will, therefore, be able to make contributions to a qualified plan or an IRA based on this compensation.

This provision is effective for differential pay paid after December 31, 2008. Plans must be amended to comply with these provisions by the last day of the first plan year beginning on or after January 1, 2010 (January 1, 2012 for governmental plans).

Withdrawals from Qualified Plans and IRAs

Qualified Plans

- **Military Service Treated as Severance from Employment**

  Section 105 of the HEART Act also provides that, effective for plans years beginning after December 31, 2008, an individual performing service in the uniformed service for a period of more than 30 days will be treated as having severed from employment. The limitations on in-service distributions of tax-deferred contributions will, therefore, not apply. However, if an individual takes such a distribution, he or she will be barred from making elective deferrals or employee contributions during the 6-month period beginning on the date of distribution.

- **Ability to Withdraw Elective Deferrals without Penalty**

  The Pension Protection Act of 2006 amended Section 72(t) of the Code to provide that a "qualified reservist distribution" would not be subject to the 10% penalty on early withdrawals. A qualified reservist distribution is a distribution of a reservist's elective deferrals from a 401(k) or 403(b) plan, or an IRA, made to a reservist who was called to active duty after September 11, 2001, and before December 31, 2007 for a period in excess of 179 days (or for an indefinite period), if the distribution is made while the reservist is on active duty. Section 107 of the HEART Act makes the exemption from the penalty tax permanent for all individuals called to duty on or after December 31, 2007.

Individual Retirement Accounts

- **Rollover of Death Benefits to Roth IRA**

  Section 109 of the HEART Act amends Sections 408A and 530 of the Code to provide that a beneficiary who receives a military death gratuity or

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a payment from the Servicemembers' Group Life Insurance ("SGLI") program may contribute up to the full amount of the gratuity or SGLI payment to one or more Roth IRAs or Coverdell education savings accounts, regardless of the contribution limitations otherwise applicable to those accounts (*i.e.*, the annual contribution limit and the income phase-out of the contribution dollar limit). The contribution will be treated as a qualified rollover contribution to the account. This special treatment applies if the contribution is made within one year of the date the beneficiary receives the gratuity or SGLI payment. In the event of a subsequent distribution from the Roth IRA or Coverdell education savings account that is not a qualified distribution, the amount of the distribution related to the gratuity or SGLI payment is treated as nontaxable investment in the contract.

This provision is generally effective for payments made with respect to death from injuries occurring on or after June 17, 2008, except that this special treatment is also available for payments made with respect to death from injuries resulting from an injury occurring on or after October 7, 2001, as long as the contribution to the account is made no later than June 17, 2009.

- **Ability to Withdraw Elective Deferrals without Penalty**

  A "qualified reservist distribution" made to reservist from an IRA will be exempt from the 10% penalty tax subject to the same conditions set forth above for distributions from 401(k) and 403(b) plans.

Tax Rules on Expatriation of Individuals

Title III of the HEART Act also contains provisions imposing a new tax on some US citizens who give up their US citizenship, and some long-term residents who give up their US residency. The core of this provision is that expatriation is regarded as resulting in a "deemed sale," and the expatriated individual is subject to a tax on the gains from that sale in excess of $600,000 (to be adjusted for inflation). While this new tax does not, on the whole, directly affect retirement plans, there are separate provisions that apply to "deferred compensation items." A deferred compensation item is, generally, any interest in a plan or arrangement described in Section 219(g)(5) of the Code. Plans or arrangements described in Section 219(g)(5) of the Code are:

- plans qualified under Section 401(a) of the Code;
- 403(b) plans;
- annuity plans described in Section 403(a) of the Code;
- governmental deferred compensation plans (with the exception of eligible deferred compensation plans (within the meaning of Section 457(b) of the Code)); and
- SEPs and Simple IRAs.

Also included as deferred compensation items are any interest in a foreign pension plan, any nonqualified deferred compensation, or any right to property which has not been previously been taken into account under or taxed under Section 83 of the Code.

Withholding on "Qualified Deferred Compensation Items"

The HEART Act requires an employer to withhold 30% of any payment that is payment from a "qualified deferred compensation item." A qualified deferred compensation item is any deferred compensation item with respect to which:

- the payor (employer) is either a US person or a person who elects to be treated as a US person for the purposes of income tax withholding; and
- the expatriate notifies the payor of his status as a covered expatriate and irrevocably waives any claims for a reduction in the amount of withholding under any treaty with the US.

If the deferred compensation item is not a qualified deferred compensation item, and is not subject to Section 83, it will be treated as having been received on the day before the expatriation date. If the item is subject to Section 83, it will be treated being transferable and no longer subject to a substantial risk of forfeiture on the date before the expatriation date. Adjustments will be made to subsequent distributions to reflect the foregoing treatment.

Treatment of Other Individual Accounts

If the expatriate maintains an IRA, a health savings

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account, an Archer MSA, a Section 529 qualified tuition plan, or Coverdell education savings account, that expatriate is treated as receiving a distribution of his entire interest in those accounts on the day before the expatriation date. Adjustments will be made to subsequent distributions to reflect this treatment.

Distributions from Health Flexible Spending Accounts

Section 114 of the HEART Act amends Section 125 of the Code to permit health flexible spending accounts ("health FSAs") to provide for "qualified reservist distributions" of unused health FSA balances to reservists who are called to active duty and who may be unable to use up the funds they have contributed prior to the end of the year. This new provision is an exception to the "use-it-or-lose-it rule," which mandates the forfeiture of an employee's health FSA account balance at the end of a plan year and related grace period, if any, if the employee fails to use up the full amount he or she contributed.

A qualified reservist distribution is a distribution made to a participant-reservist who is called to active duty for a period of more than 179 days of "all or a portion of the balance in the employee's account." We assume that "balance in the employee's account" means the total amount contributed to the account by the employee (rather than the amount the reservist had elected to contribute for the plan year) minus the amount of any prior reimbursements. The distribution must be made at any time during the period from the date the reservist was called to active duty and the last date that reimbursements could otherwise be made by the health FSA for that plan year. In other words, the distribution must be made as of the last day of the plan year or related grace period, if any. To the extent that the health FSA provides for a run-out period, it appears that a qualified reservist distribution may be made as of the last day of the run-out period.

Because contributions to a health FSA are wages and the HEART Act does not address the taxability of qualified reservist distributions, we presume that such distributions will be taxable to the participant.

Because this provision is optional, plan sponsors must decide if they wish to amend their plans to include it. If the plan sponsor decides to do so, the amendment may apply to qualified reservist distributions made as early as June 17, 2008.

Parity of Mental Health Benefits

In the most recent of a series of extensions of the provisions of the Mental Health Parity Act of 1996, Title IV of the HEART Act extends those mental health parity requirements through December 31, 2008.

Attorney Profile:

Jennifer Dack Brooks

Jennifer Dack Brooks recently joined Trucker ✦ Huss, where her practice focuses primarily on design and compliance issues related to qualified retirement plans. Prior to joining Trucker ✦ Huss, Jennifer practiced as an employee benefits attorney in the San Francisco offices of two prominent law firms. In addition, Jennifer has worked as an employee benefits consultant for two of the big-4 accounting firms. Jennifer received her undergraduate degree from Scripps College, and her JD, cum laude, from Seattle University School of Law.

Jennifer is a member of The State Bar of California, the American Bar Association, the Western Pension & Benefits Conference, and the Bar Association of San Francisco.

Jennifer can be contacted at 415-788-3111, and at jbrooks@truckerhuss.com

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FIRM NEWS

Brad Huss will be speaking on *Qualified Default Investment Alternatives* at the 2008 Annual Western Benefits Conference on July 14 at the Washington State Convention & Trade Center in Seattle. Brad also spoke to the Orange County Chapter of the Western Pension & Benefits Conference on May 15 on *401(k) Fees Under Attack* and to the San Francisco Chapter of the National Institute of Pension Administrators on June 19 on *DOL Proposed Service Provider Disclosure Regulation*.

Matt Gouaux is currently featured in a "Quick Take" on *The Impact of Gay Marriage Ruling on Benefits* in Kiplinger's online Business Resource Center, with a link to his recent article on same-sex marriage. Matt's article was also reprinted in the Summer Edition of *Pension & Benefits Today*, the newsletter of the San Francisco Chapter of the Western Pension & Benefits Conference.

An outline on *Fiduciary Responsibility* by **Saswati Paul** was recently published by the Practicing Law Institute in their volume entitled *Understanding ERISA 2008*.

Ronald Triche spoke on PPA: *What We Know Now* at the Putnam "Golden Scale" meeting in Boston on June 16.

Julie Burbank was reappointed Vice-Chair of the HIPAA, COBRA and State Insurance Regulation of Welfare Plans subcommittee of the Employee Benefits Committee of the ABA Section of Taxation.

The **Trucker ✦ Huss** ***Benefits Report*** is published monthly to provide our clients and friends with information on recent legal developments and other current issues in employee benefits. Back issues of *Benefits Report* are posted on the Trucker ✦ Huss web site (**www.truckerhuss.com**).

Editor: Jim (Telk) Elkus *email:* jelkus@truckerhuss.com

TRUCKER ✦ HUSS

A PROFESSIONAL CORPORATION

ERISA AND EMPLOYEE BENEFITS ATTORNEYS

120 Montgomery Street, 23rd Floor San Francisco, California 94104-4398

Telephone: (415) 788-3111 Facsimile: (415) 421-2017 Email: info@truckerhuss.com www.truckerhuss.com

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Jennifer D. Brooks
jbrooks@truckerhuss.com
415-277-8053

Julie Burbank
jburbank@truckerhuss.com
415-277-8046

Barbara B. Creed
bcreed@truckerhuss.com
415-277-8036

Matthew L. Gouaux
mgouaux@truckerhuss.com
415-277-8047

Christian W. Hofstadter
chofstadter@truckerhuss.com
415-277-8012

R. Bradford Huss
bhuss@truckerhuss.com
415-277-8007

Clarissa A. Kang
ckang@truckerhuss.com
415-277-8014

Elizabeth L. Loh
eloh@truckerhuss.com
415-277-8056

Kevin E. Nolt
knolt@truckerhuss.com
415-277-8017

Saswati Paul
spaul@truckerhuss.com
415-277-8019

Virginia H. Perkins
vperkins@truckerhuss.com
415-277-8005

Barbara P. Pletcher
bpletcher@truckerhuss.com
415-277-8040

Ina L. Potter
ipotter@truckerhuss.com
415-277-8009

Tiffany N. Santos
tsantos@truckerhuss.com
415-277-8039

Robert F. Schwartz
rschwartz@truckerhuss.com
415-277-8008

Michelle L. Schuller
mschuller@truckerhuss.com
415-277-8038

Benjamin F. Spater
bspater@truckerhuss.com
415-277-8011

Charles A. Storke
cstorke@truckerhuss.com
415-277-8018

Ronald J. Triche
rtriche@truckerhuss.com
415-277-8016

Lee A. Trucker
ltrucker@truckerhuss.com
415-277-8020

Deborah Judith Wiener
dwiener@truckerhuss.com
415-277-8037

LEGAL ASSISTANTS

Jim (Telk) Elkus
jelkus@truckerhuss.com
415-277-8044

Renay W. Washington
rwashington@truckerhuss.com
415-277-8052