Significant Labor and Employment Initiatives of the Obama Administration and 111th Congress

By Harry I. Johnson III, Mark D. Kemple and Robert A. Naeve

With the decisive victory of President Barack Obama and large Democratic gains in both houses of Congress, American businesses are bracing for significant changes in labor and employment legislation and regulation. Based upon the President's track record in the Senate, his comments during the campaign, and long-pending bills in the House and Senate, it is highly likely that the new administration will seek to implement legislative and regulatory changes related to wages, civil rights, executive compensation and benefits, taxes, union elections and collective bargaining, and immigration, focusing heavily on measures designed to support and strengthen the middle class. Many of these initiatives will, if enacted as proposed in the prior Congress, affect the workplace, both in terms of new regulatory measures and potential liability. And, despite the difficult economic environment, swift passage of the Lilly Ledbetter Fair Pay Act indicates that the economic climate may not deter quick action by the new administration and the 111th Congress on these issues. Accordingly, to successfully navigate the new legal landscape, employers should remain apprised of both recently enacted legislation and also proposed legislation and regulatory measures. (President Obama has also been active in the field of executive orders, signing three on January 30, 2009 that significantly impact government contractors. The most wide-reaching of the three, entitled "Economy In Government Contracting," forbids reimbursement of the union-organizing-related expenses of federal contractors. Because all of these executive orders will become effective only through implementing regulations that have not yet been proposed, we note the orders here but do not discuss them below.)

111th CONGRESS

A. Lilly Ledbetter Fair Pay Act (S. 181; H.R. 11)

On January 29, 2009, President Obama signed into law the Lilly Ledbetter Fair Pay Act. The Ledbetter Act amends Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967 ("ADEA"), and modifies the operation of the Americans with Disabilities Act of 1990 ("ADA") and the Rehabilitation Act of 1973, to clarify that a discriminatory compensation decision or practice that is unlawful under such acts occurs each time compensation is paid pursuant to the discriminatory compensation decision

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Employers and the Genetic Information Nondiscrimination Act

By Adrianne Marshack

"Laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths disclosed, and manners and opinions change with the change in circumstances, institutions must advance also, and keep pace with the times." - Thomas Jefferson, July 12, 1810.

Your good friend Charlie has worked in the aerospace industry for the last twenty years and was laid off last year due to the economy. After looking for work for the past nine months, he finally found what he thought was the perfect position—the one he had been searching for his entire career. The new company loved him too, and Charlie all but moved into his new office when the company required him to undergo some medical testing prior to employment. The tests revealed that Charlie has a genetic susceptibility to a fatal lung disease caused by inhalation of beryllium, a naturally occurring metal to which he could potentially be exposed in the course of his employment. The company told Charlie that despite his stellar qualifications, they could not hire him because of this susceptibility, even though he may never actually be exposed to beryllium or develop the disease. Charlie was crushed, and came to you asking whether the company could require the genetic tests they subjected him to, or refuse to hire him based upon this hypothetical risk. Under the Genetic Information Nondiscrimination Act ("GINA"), which takes effect against employers in November of this year, your answer is a resounding "no."

Over the past decade, significant advancements in the quest to decode the human genome have revolutionized almost all areas of biomedical research. Genetic testing has improved early detection, diagnosis, and prevention of certain diseases. As with most things, the benefits resulting from our newly developed ability to identify medical predispositions and health conditions based on genes are not without potential risks. After becoming concerned that genetic information could be used against an individual to discriminate in both the health insurance and employment contexts, Congress

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needs and improve society.

I do not deny the ambitiousness of these goals; I embrace it. Nor do I deny the difficulty of the tasks, especially in the current economic climate. But we have a unique opportunity. No university of the caliber of the University of California, Irvine is likely to begin a law school in my lifetime. This really is the chance to create the ideal law school and we must not squander it.

♦ *Erwin Chemerinsky is the Dean and Distinguished Professor of Law, University of California, Irvine, School of Law.*

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nounce the formation of our Chapter's Leadership Development Committee. The Committee will be dedicated to serving ABTL member attorneys with ten or fewer years of experience, and will be hosting events tailored to our young lawyers. The Committee is hosting a "Kick-Off Event" on March 19, 2009. Attendees will gather for "March Madness," as well as an opportunity to network with fellow ABTL members. Michael Penn has graciously agreed to chair this committee. Future events will feature substantive programs relevant to the practice of less experienced attorneys, and will provide opportunities for interaction with members of our judiciary. All members with ten or fewer years of experience are strongly encouraged to participate.

As we move ahead with our Leadership Development Committee, Dean Erwin Chemerinsky will begin the task of educating the next generation of future lawyers. In this Edition of the Report, Dean Chemerinsky explains his vision for UCI's new law school, and how the school intends to educate the future members of our ABTL Chapter. Education will be a key for our nation's continued leadership in the world and a catalyst for emerging from these hard economic times. I believe the law school at UCI will serve an important role in training law students for practice in the 21st Century. Under Dean Chemerinsky's leadership, the law school is in great hands, and will play a significant role in educating our next generation of young lawyers.

With a new administration in Washington, D.C. comes new legal challenges and opportunities. This edition of the Report highlights some of the significant labor and employment initiatives of the Obama Administration and the 111th Congress. We hope you enjoy this timely and exciting piece. Under the leadership of our newest Editor of the Report, John A. Vogt, we look forward to continue to provide our members with timely and important articles affecting your clients and practices.

In closing, I would like to extend my thanks to all of our members. Without you, this fine organization would not exist. As Martha has remarked and I echo: This is your organization; it is you whose interests and needs we serve. I thank you for giving me the opportunity to be the President of the ABTL / Orange County, and I look forward to serving each and every one of you.

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or other practice. The Act overturns the Supreme Court's decision in *Ledbetter v. Goodyear Tire & Rubber Co., Inc.*, which held that an unlawful employment act occurs only when the discriminatory compensation decision is made and not each time a paycheck is issued. The Act further provides that, under Title VII, if an employer is found to have engaged in pay discrimination, an affected employee would be entitled to back pay dating to two years prior to the filing of the charge, in addition to other damages provided by the statute. The legislation applies to all claims of discrimination in compensation, including disparate impact cases.

The Ledbetter Act vastly broadens the scope of potential damages for pay-related discrimination claims, weakens standing requirements, and increases significantly both the settlement value of such lawsuits and the frequency with which they are filed. It may also cause pension funds to face unanticipated and potentially staggering liability.

B. Paycheck Fairness Act (S. 182; H.R. 11)

The Paycheck Fairness Act amends the Equal Pay Act within the Fair Labor Standards Act of 1938 ("FLSA") to revise remedies for and enforcement of prohibitions against sex discrimination in the payment of

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wages. Among other changes, the bill would permit unlimited punitive and compensatory damages; require employers to demonstrate that any pay inequities are not sex-based, are related to job performance, and are justified by business necessity; and facilitate the filing of class action lawsuits. In addition, the proposed legislation allows the Secretary of labor to make grants to eligible entities to carry out negotiation skills training programs for girls and women. Lastly, the proposed legislation prohibits employers from preventing their employees from disclosing salary information.

If enacted, this bill would significantly escalate potential liability for compensation discrimination due to its elimination of damages caps and its significant narrowing of legitimate employer defenses. The ambiguity of the standards set forth in the bill would likely create significant confusion and result in a further increase in litigation.

110th CONGRESS

A. Arbitration Fairness Act of 2007 (S. 1782; H.R. 3010)

The Arbitration Fairness Act of 2007 rendered predispute arbitration clauses invalid if they required arbitration of (1) an employment dispute or (2) a dispute arising under any statute intended to protect civil rights or to regulate contracts or transactions between parties of unequal bargaining power. The bill would have reversed the Supreme Court decision in *Circuit City v. Adams*, which held that employer policies could lawfully mandate that employees enter into binding predispute arbitration agreements as a condition of employment. The legislation also would have applied to consumer and franchise disputes but did not apply to arbitration provisions in collective bargaining agreements.

If enacted as previously proposed, this legislation will have a significant effect upon employers' employment dispute resolution procedures. Arbitration language in employment applications and employment agreements, covering at least 20 percent of all nonunion employees, will have to be deleted. Employers will be permitted to decide whether to seek arbitration only after a dispute arises, and those with mandatory arbitration programs would want to consider mediation as an alternative to resolving disputes through mandatory arbitration.

B. Bill to Repeal a Limitation in the Labor-Management Relations Act regarding Requirements for Labor Organization Membership as a Condition of Employment (H.R. 6477)

This legislation would have amended Section 14 (b) of the Labor-Management Relations Act that grants states the authority to enact "right to work" laws, which allow employees to continue working at a unionized employer while refusing to pay union dues. If enacted, this legislation would permit agreements between unions and employers making membership or payment of union dues a condition of employment, either before or after hiring.

C. Civil Rights Act of 2008 (S. 2554; H.R. 5129)

This omnibus bill was designed to "restore, reaffirm, and reconcile legal rights and remedies under civil rights statutes." Among other changes, the bill would have eliminated damages caps in Title VII and ADA cases, broadened other employee remedies, including remedies for undocumented workers, limited employer defenses, particularly in Equal Pay Act cases, restricted the use of mandatory predispute arbitration clauses in employment contracts, and overturned the Supreme Court case of *Alexander v. Sandoval* to give individuals a private right of action to sue federally funded programs for actions that have an alleged discriminatory impact under Title VI and Title IX of the Civil Rights Act, as amended, Section 504 of the Rehabilitation Act, and the ADEA. Further, the bill would have required that disparate impact claims under the ADEA be treated the same as those brought under Title VII. It also would have broadened the anti-retaliation provisions of the FLSA and added compensatory and punitive damages as remedies for unintentional and intentional equal pay violations. In addition, the bill would have expanded the definition of "prevailing party" eligible for attorneys' fees under federal civil rights fee-shifting statutes and permitted the recovery of expert fees by such prevailing parties.

As will be discussed elsewhere in this article, the elimination of damages caps and the overall broadening of employee remedies would likely vastly escalate the rate of litigation as well as settlement values, as would the restriction of arbitration as a means of resolving employment disputes.

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D. Employee Free Choice Act of 2007 (H.R. 800)

The Employee Free Choice Act ("EFCA"), as initially designed, would make four significant amendments to Section 9(c) of the National Labor Relations Act ("NLRA"). First, EFCA would dramatically alter the current law requiring a secret ballot election before union certification unless the parties agree otherwise, by requiring union certification as soon as a majority of employees in an appropriate collective bargaining unit have "signed valid authorizations." This would make it much more difficult for employers to oppose union organizing drives as they would no longer have they opportunity to express their views regarding unionism to their employees after authorization cards have been signed but before a secret ballot election takes place. Accordingly, employers who wish to remain union-free will have to spend significant time and resources proactively opposing organization at the earliest stages of union organizing campaigns.

Second, EFCA would provide for mediation and mandatory interest arbitration for first contract disputes. While the current system requires parties to negotiate in good faith without requiring either party to make a concession or reach an agreement, under EFCA, mandatory interest arbitration will give unions an incentive to make unreasonable demands for the purpose of having an arbitrator set favorable terms. This would significantly decrease employers' bargaining leverage during first contract negotiations.

Third, EFCA would impose significantly harsher penalties on employers who commit violations during union organizing drives and first contract negotiations. For example, EFCA would increase the amount of back pay that could be recovered if an employer discharged or discriminated against an employee during the course of an organizing campaign or initial contract negotiations. Moreover, EFCA would provide for civil fines of up to $20,000 each time an employer willfully or repeatedly violated employees' rights during an organizing campaign or first contract drive.

Fourth, EFCA would require the National Labor Relations Board to request an injunction against an employer if there were reasonable cause to believe that it had discharged, threatened, or otherwise discriminated against employees while they were "seeking representation by a labor organization or during the period after a labor organization was recognized . . . until the first collective bargaining agreement" is reached.

E. Employment Non-Discrimination Act of 2007 (H.R. 3685; H.R. 2015)

The Employment Non-Discrimination Act of 2007 would have prohibited employers from discriminating against employees or applicants on the basis of the individual's actual or perceived sexual orientation (defined as "homosexuality, heterosexuality, and bisexuality") and gender identity. If enacted as proposed, this legislation will require employers who do not already prohibit discrimination against employees on the basis of sexual orientation to revise their EEO policies accordingly.

F. Equal Remedies Act of 2007 (S. 1928; H.R. 5129)

The Equal Remedies Act of 2007 would have amended 42 U.S.C. § 1981(a) with potentially sweeping changes. As proposed, the legislation removed the caps in Title VII and the ADA, established by the 1991 Civil Rights Act, that limit compensatory and punitive damages based on an employer's size. (Currently, compensatory and punitive damages for intentional violations are capped based on the size of the employer at $50,000 to $300,000).

If caps upon compensatory and punitive damages are removed, potential liability will invariably increase, which will in turn likely encourage more employees to sue and plaintiff's counsel to accept borderline cases. Settlement values will likely also rise as employers face the possibility of adverse judgments without caps. In an effort to avoid claims of "willful" discrimination giving rise to punitive damages, employers would be well-advised to update company policies and ensure appropriate training of officers, managers, and supervisors.

G. Equality for Workers Under ERISA of 2007 (H.R. 2622)

This bill would have modified the standard of review for certain actions brought under ERISA. The proposed legislation required any civil action brought by a beneficiary or participant of an employee benefit plan to recover benefits be tried as a de novo proceeding without deference to any prior claim determination. Under current Supreme Court precedent, *Firestone Tire & Rubber Co. v. Bruch*, if an employee benefit plan allows an administrator or fiduciary discretion in determining benefits eligibility or to construe the terms of the plan, the beneficiary's or participant's lawsuit is tried under an abuse of discretion standard. If this bill

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is enacted as proposed, the determinations of plan administrators will face increased challenge and, likely, reversals under the stricter nondeferential standard of review. ERISA litigation will thus become more expensive as employers/benefit plan administrators are forced to defend their determinations before fact-finders in de novo proceedings, with accordingly higher settlement values.

H. Family Medical Leave Act Amendments and Regulations

On January 28, 2008, President Bush signed into law the National Defense Authorization Act for FY 2008 ("NDAA"). Section 585(a) of the NDAA amended the Family Medical Leave Act ("FMLA") to provide eligible employees working for covered employers two important new leave rights related to military service.

First, the NDAA creates a new qualifying reason for leave. Eligible employees are entitled to up to 12 weeks of leave because of "any qualifying exigency" arising out of the fact that the spouse, son, daughter, or parent of the employee is on active duty, or has been notified of an impending call to active duty status, in support of a contingency operation. By the terms of the statute, this provision requires the Secretary of Labor to issue regulations defining "any qualifying exigency." In the interim, employers are encouraged to provide this type of leave to qualifying employees.

Second, an eligible employee who is the spouse, son, daughter, parent, or next of kin of a covered service member who is recovering from a serious illness or injury sustained in the line of duty is entitled to up to 26 weeks of leave in a single 12-month period to care for the service member. This provision became effective immediately upon enactment.

Various bills dealing with the FMLA were also proposed in the prior Congress. One bill would have clarified that employees may independently settle FMLA claims without the approval of the Department of Labor ("DOL") or a court, overturning the Fourth Circuit decision in *Taylor v. Progress Energy, Inc.*, which held that DOL regulations preclude both the prospective and retrospective waiver of claims under the FMLA and bar all waivers of any rights under the FMLA without prior DOL or court approval. Another bill proposed to lower the coverage threshold for employers from 50 or more to 25 or more employees. This bill would also have provided up to 24 hours of unpaid leave during any 12-month period for parents and grandparents to attend parent-teacher conferences or to take a child, grandchild, or other family member to doctor or dental appointments. Other proposed legislation would have eliminated certain laws related to FMLA eligibility and notice.

DOL has also proposed revisions to the FMLA regulations that would, among other changes, amend the medical certification process. The current regulations require the employer to communicate with a health care provider through its own health care provider regarding authentication and clarification of the medical certification. The proposed regulations allow direct contact between the employer and the employee's health care provider. Further, proposed regulations also require that an employer's request for clarification of vague medical certification must be provided within seven calendar days or the employee is not protected under the FMLA, and may require employers to notify employees if medical certification forms have not been returned by the health care provider.

Additionally, proposed regulations amend the 12-month employment requirement for FMLA eligibility. The requirement may be satisfied based on the preceding five years, regardless of breaks in service, allowing for the aggregation of past service with present service to meet the requirement. Proposed regulations also extend the deadline for employers to send eligibility and designation notices to employees to five business days.

If enacted as previously proposed, many of the bills will assist employers in navigating what currently is a poorly written, and consequently confusing, set of legal requirements. Amendments to the certification process, particularly the allowance of direct communication between the employer and the health care provider, should facilitate the making of more accurate eligibility determinations. Revised "designation notice" and "medical certification" forms may also provide employers with improved guidance in carrying out related FMLA obligations.

I. Forewarn Act of 2007 (S. 1792; H.R. 3662)

The Forewarn Act of 2007 would have amended the Worker Adjustment and Retraining Notification ("WARN") Act to redefine the terms "employer," "plant closing," and "mass layoff" for purposes of the Act. Among other changes, the Forewarn Act would have reduced the coverage threshold, applying its re-

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quirements to employers of 50 or more employees as opposed to the current threshold of 100 or more employees. The threshold numbers to qualify for plant closing and mass layoffs would also have been lowered from 50 employees to 25 employees for a plant closing, and from 500 employees to 100 employees for a mass lay off. Another change would have increased the aggregation period for plant closings or mass layoffs from a 90-day period to 180 days.

The Forewarn Act also would have modified the written notice requirement with regard to plant closings and mass layoffs. The proposed amendment would have required 90 days' written notice, as opposed to the current 60-day requirement, to employees and government officials before ordering a plant closing or mass layoff, with notification to be sent to the Secretary of Labor within 60 days, as well as notice to the United States, the state senators and representatives who represent the area in which the plant is located, the governor, and the chief elected local official of the area.

Employer liability was also modified under the proposed Forewarn Act. WARN currently imposes back-pay liability for 60 days and varies by jurisdiction with regard to whether back pay is based on calendar or work days within the violation period. The Forewarn Act would have made employers who violate the notice requirements liable for double back pay for each calendar day of the violation period for up to 90 days. The proposed legislation also would have granted the Secretary of Labor or the state attorney general the authority to bring a civil action on behalf of employees for relief.

If enacted as proposed, more reductions-in-force will qualify for WARN analysis and require notice and/or pay in lieu of notice. Given the increased penalties for failure to provide the requisite notice, employers would be well-advised to initiate a WARN analysis at the outset of any major transaction or personnel action.

J. Healthy Families Act (S. 910; H.R. 1542)

The Healthy Families Act would have required employers to provide seven days of paid sick leave annually for those who work at least 30 hours per week to their own medical care or that of their family, as well as a prorated annual amount of paid sick leave for those who work less than 30 hours but at least 20 hours a week, or less than 1,500 but at least 1,000 hours per year. The Healthy Families Act would have applied to employers who employ 15 or more employees for each working day during 20 or more workweeks a year. If enacted as proposed, the bill would require the majority of employers in the United States to assume the increased expense of providing such additional paid leave.

K. Private Sector Whistleblower Protection Streamlining Act of 2007 (H.R. 4047)

The Private Sector Whistleblower Protection Streamlining Act of 2007 would have expanded whistleblower protections for private-sector employees who report violations of federal laws, rules, or regulations, or the state or local implementation of a federal law governing working conditions and benefits. In addition, the legislation would have reinstated employees who were fired for reporting violations on a preliminary basis. The bill did not set a limit on compensatory and punitive damages. It also made conforming whistleblower amendments to the OSH Act.

If enacted, given that the bill prohibits restrictions on whistleblowing and provides virtually unlimited relief, it will likely encourage such complaints and suits against private sector employers. The establishment of the Whistleblower Protection Office within the Employment Standards Administration of DOL suggests that investigations and enforcement will escalate as well.

L. RESPECT Act (S. 969; H.R. 1644)

The Re-empowerment of Skilled and Professional Employees and Construction Tradesworkers ("RESPECT") Act would have amended the NLRA to narrow how the Act defined the term "supervisor." As proposed, individuals would only have been considered "supervisors" if they (1) had authority over their employees for a majority of the workday and (2) had the authority to responsibly direct employees.

If enacted as proposed, this legislation would limit significantly which workers the NLRA classifies as supervisors. In its current form, the RESPECT Act would make most employees nonsupervisors for NLRA purposes and thus eligible for union organizing. This would allow unions to collect compulsory dues from workers with supervisory authority and could potentially affect employer efficiency and productivity, as supervisors who are expected to assist in running the business are faced with divided loyalties due to their union membership.

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M. Safe Nursing and Patient Care Act of 2007 (S. 1842; H.R. 2122)

The Safe Nursing and Patient Care Act of 2007 would have prevented health care facilities that receive payments under the Medicare programs from requiring nurses to work overtime except during declared emergencies. In addition, the proposed legislation would have allowed the Department of Health and Human Services to investigate complaints and impose penalties of up to $10,000 per violation with higher penalties for patterns of violations. If enacted, health care facilities will likely be faced with the decision whether to increase hiring of nursing staff or to decrease capacity and/or the provision of services.

N. Save America Comprehensive Immigration Act of 2007 (H.R. 750)

The Save America Comprehensive Immigration Act ("SACIA") would have prohibited employment discrimination and retaliation against immigrants. Under SACIA, employers could not threaten an individual with removal from the United States or with any immigration-related or employment benefit-related adverse consequence so as to intimidate, pressure, or coerce the individual into not exercising a state or federal labor/employment right. Further, employers could not retaliate against an individual for having actually exercised or stating an intention to exercise any such right. The legislation also prohibited employment discrimination on the basis of "immigration status." Lastly, the proposed legislation required employer-petitioners for nonimmigrant labor to describe their efforts to recruit aliens lawfully admitted for permanent residence or U.S. citizens, which must include substantial recruitment in "minority communities."

President Obama has voiced support for this bill and has indicated that immigration reform is high on his agenda. If enacted as proposed, this legislation would dramatically expand family-based immigration to the United States, with little in the way of annual caps or limits. It also contains significant amnesty provisions for illegal aliens and decreases incentives for worksite enforcement, as it neither mandates use of the E-Verify program nor increases employer sanctions for illegal employment practices.

O. Workplace Religious Freedom Act of 2007 (H.R. 1431; S.3628)

The Workplace Religious Freedom Act of 2007 would have amended Title VII to clarify the definition of "undue hardship," which currently is not defined in the statute. Under the Supreme Court decision in *TWA v. Hardison*, however, an employer does not have to accommodate a person's religious practice if doing so would bring a de minimis expense upon the employer. The proposed legislation would have redefined the concept of "undue hardship" to require significant difficulty or expense, and set forth factors to determine whether an accommodation causes such hardship.

If enacted, this bill would potentially increase employers' exposure to liability, as the new law provides no clear definition of "undue hardship" and employers will no longer be excused from providing accommodations by proving only a de minimis expense. Employers would be required to modify their policies and training relating to accommodation of employees' religious observations.

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passed GINA (H.R. 493) last year.* Senator Ted Kennedy called GINA the "first major new civil rights bill of the new century," and on May 21, 2008, President Bush signed the Act into law. It will take effect with respect to insurance companies on May 21 of this year, and on November 21, 2009 for employers.

What Does GINA do?

GINA prohibits discrimination based upon genes. It touches on or amends many existing laws, including the Employee Retirement Income Security Act of 1974 (ERISA), the Public Health Service Act, the Internal Revenue Code of 1986, Title XVIII (Medicare) of the Social Security Act, the Health Insurance Portability and Accountability Act of 1996 (HIPAA), and Title VII. (See Sections 101-104 of GINA.)

For example, GINA mandates that all genetic information is to be treated as health information under HIPAA, making it subject to HIPAA's privacy regulations, and forbids a health insurer from establishing eligibility rules based on genetic information. (Section 105 subdivision 1180.) It also prohibits health insurers from discriminating against individuals on the basis of genetic information. Further, the Act makes it illegal for an insurer to require genetic testing, consider family history of genetic disorders when making underwriting or premium determinations, or tie premiums to genetic infor-

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