How to Avoid Liability for Genetic Discrimination



Federal laws ban requiring job applicants and employees to undergo genetic testing—or do they?

A new form of employment discrimination is on the rise. It occurs when employers demand that job applicants or employees undergo genetic testing or seek to access the results of previous tests so they can use the information to decide whether to hire or make other employment decisions about the individual. While morally suspect, such conduct isn't technically illegal. At least not yet. But many countries have adopted laws banning genetic discrimination and it's only a matter of time before Canada does likewise. In fact, one jurisdiction already has—the federal jurisdiction. Here's a look at the current state of genetic discrimination law and how to implement a policy to prevent it from happening at your company.

What Is Genetic Discrimination?

The DNA inside our cells contain comprehensive information about our unique health characteristics, vulnerabilities and likelihood to develop certain medical diseases and disorders. Widespread genetic testing has made it possible to access this information and use it to tailor individualized health, wellness and treatment plans based on our own DNA. The bad news is that genetic information can also be used to discriminate.

In the employment context, companies may use genetic test results to weed out individuals at high medical risk. **Example:** A company may deliberately reject an otherwise qualified applicant whose genetic makeup or family medical history put them at high risk of infectious diseases to guard against workplace infection or avoid costly health care benefit claims. Individuals may also be subject to harassment because of their or a relative's genetic characteristics.

The Law of Genetic Discrimination

Canada lags behind the US and other industrialized countries in terms of legal protections against genetic discrimination. What might have looked like a breakthrough occurred in 2017 when the federal government adopted a law called the *Genetic Non-Discrimination Act* (GNDA) making it a criminal offence to require individuals to submit to genetic testing. More precisely, the GNDA bans a "person"

from requiring another party with whom it wants to enter into a contract make the contract conditional on the other party's agreement to undergo genetic or disclose the results of previous genetic tests. Potential penalties:

- Up to $1 million in fines and/or 5 years in prison for a conventional conviction (on indictment); and
- Up to $300,000 in fines and/or 12 months in prison for a summary conviction.

Since it's a criminal law, the GNDA applies in all parts of the country. But it's less than it might appear. For one thing, it's unclear whether the ban on making genetic testing a condition to contract actually applies to employment. And even if it does, the law just says you can't make an individual get tested or disclose test results. It doesn't restrict what an employer can do if it gets its hands on test results from a third party. That's a big loophole given how easy it is to purchase or access genetic test results from public and even paid sources nowadays.

In fact, the lawmakers that created the GNDA recognized its limitations and added a pair of key provisions to give it real bite by adding provisions banning genetic discrimination to the:

- *Canada Labour Code*, which sets minimum employment standards for federally regulated employers; and
- The *Canadian Human Rights* code to ensure the ban on employment discrimination covers discrimination on the basis of genetic information.

However, not a single province or territory has added bans on genetic discrimination to its own employment standards or human rights laws. Outside the GNDA and a few scattered provisions in insurance laws, the only real protections for genetic information are in the 5 jurisdictions with privacy laws that restrict its collection, use and disclosure. But in 3 of these jurisdictions—AB, MB, NB—the restrictions apply only to government collection, use and disclosure; in PEI and YK, the limits apply to both the government and private sectors.

Adopting a Genetic Discrimination Policy Is Best Practice

Implementing a genetic discrimination policy is a must if you're federally regulated. It's also wise for companies subject to provincial or territorial laws, to limit risk of criminal penalties under the GNDA and civil lawsuits for money damages for privacy violations under the common-law, that is, law made by court rulings rather than statutes and regulations. Meanwhile, legislatures of several jurisdictions are considering bills that would add genetic discrimination to their human rights laws. Above all, genetic discrimination is a significant issue that every company should address—either by banning or clarifying how they collect, use and disclose genetic information.

The template on the HR Insider website takes the former approach and contains the kinds of provisions that any genetic discrimination policy should, including:

- A clear statement of the company's principles on genetic information and discrimination;
- Specific definitions of "genetic discrimination" and "genetic information";
- A statement that the company won't require individuals to submit to genetic testing or disclose the results of previous tests;
- Specific limits on the use and disclosure of genetic information that may inadvertently come into the company's possession;

- Assurances against retaliation for refusing to undergo genetic testing or disclose genetic test results;
- A promise to keep genetic information confidential;
- Provisions for filing and investigating genetic discrimination and harassment complaints; and
- A promise to discipline those who engage in genetic discrimination or harassment.