Why You Should Not Factor Genetic Information into Your Hiring & Employment Decisions



Genetic screening of job applicants & employees can get you into serious legal trouble .

Before COVID-19, genetic testing from companies like 23andMe was probably the hottest thing in consumer diagnostics since home pregnancy tests. Even in—and maybe especially in—times of pandemic, genetic testing has potentially great value for employers as a screening tool and a way for employers to keep those whose genetic makeup makes them prone to costly injuries, illnesses and disorders off the payroll. There is just one little problem: This almost certainly illegal.

Genetic Discrimination, 101

The legal fly in the genetic screening ointment is genetic discrimination, which occurs when people are treated differently because they have a gene mutation that causes or increases the risk of a hereditary disorder. Genetic discrimination is especially problematic in the realm of employment.

Explanation

Companies may require job applicants or employees to undergo genetic testing (or disclose the results of previous testing) to avoid hiring, retaining, or promoting high-risk individuals to manage health insurance, disability and/or absenteeism-related costs.

In addition to being harsh and unfair, mandatory genetic screening has the effect of forcing people to choose between opportunity for employment and advancement and their personal privacy. It also chills genetic research essential to understand hereditary diseases. That is because many individuals will not participate in clinical trials if they fear that their genetic data will get out and be used against them.

The Law of Genetic Discrimination

Outside of Canada, many countries (including all the other G7 nations) have adopted laws banning genetic discrimination. But while several provinces, including Ontario and Manitoba, have tabled legislation, only one Canadian jurisdiction has adopted a

law banning genetic discrimination.

That happened in May 2017 when the federal government enacted the *Genetic Non-Discrimination Act* which, among other things, bans federally regulated employers from making employees and job applicants undergo or share the results of previous genetic testing. Violations of the Act carry a maximum fine of $1 million and/or prison term of 5 years.

Supreme Court Upholds the Act

Because it is a trailblazer, there has been some uncertainty about the law's validity. In a closely watched case, Québec challenged the Act as unconstitutional and the province's high court agreed, setting the stage for a showdown in the Canadian Supreme Court. On July 10, 2020, the Court came back with its ruling: The Act is constitutional. Being forced to undergo genetic testing "poses a clear threat to autonomy and to an individual's privacy interest," according to the Court. And adopting a law protecting Canadians from having their genetic information used against them is a valid exercise of Parliament's power over criminal law [*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 (CanLII), July 10, 2020].

Takeaway: Expect More Jurisdictions to Ban Genetic Discrimination

One reason genetic discrimination laws have been slow to catch on in this country is that relatively few Canadian employers practice genetic screening. However, the practice is likely to become much more widespread under the pandemic. As a result, the Canadian Supreme Court decision upholding the Act comes at a key strategic moment and is likely to open the door to a new wave of genetic discrimination laws across the country.

But even if it does not, genetic screening of job applicants and employees will still be highly problematic. That is because courts may interpret the practice as a form of disability discrimination banned by human rights laws. Thus, at least one court (from Québec, ironically enough) has ruled that a genetic susceptibility to Crohn's diseases constitutes a "handicap" under the province's discrimination laws. So, an employer who excluded a job applicant based on his genetic data crossed the line.

Finally, keep in mind that genetic dispositions to physical and mental illnesses or disorders might also be considered *perceived* disabilities, which are also protected from discrimination.

Bottom Line: Do Not Use Genetic Information to Make Employment Decisions

Genetic screening is highly problematic and employers who engage in it are incurring a major liability risk. This is especially true if you are federally regulated, but the risks are growing in all parts of the country. Finally, recognize that you're putting your organization at risk of liability even if you don't do the actual testing but merely rely on the results of previous genetic tests in making your hiring and employment decisions. (Go the HRI website for a Model Genetic Antidiscrimination Policy that you can adapt for your own use.)