Dear Representative:

We write on behalf of the Genetic Information Nondiscrimination in Employment (GINE) Coalition to express our strong concerns with the Genetic Information Nondiscrimination Act of 2007 (H.R. 493). The Senate Health, Education, Labor, and Pensions Committee is scheduled to mark up the Senate version of the bill on Wednesday, January 31, and the House Education and Labor subcommittee on Health, Employment, Labor, and Pensions will consider the issue of genetic discrimination at a hearing on Tuesday, January 30. **We urge you not to cosponsor H.R. 493, and if the Genetic Information Nondiscrimination Act is considered in the House, not to support the bill or similar legislation unless the following concerns are addressed.**

The GINE Coalition is a group of employers, national trade associations, and professional organizations formed to address concerns about workplace discrimination based on employees’ genetic information as well as the confidentiality of that information. The Coalition strongly supports genetic nondiscrimination and confidentiality, and believes that employment decisions should be based on an individual’s qualifications and ability to perform a job, not on characteristics that have no bearing on job performance.

We also believe, however, that any legislation on this issue must be carefully designed to minimize uncertainties, unintended consequences, and unwarranted litigation. To this end, the Coalition, while at times questioning the need for legislation, has worked diligently for several years with Congress and proponents of the Genetic Information Nondiscrimination Act, consistently advocating that any legislation be fair, reasonable, and narrowly drafted.

Foremost among the Coalition’s concerns with the legislation are:

- **Benefits mandate**—The bill would permit plaintiffs to sue an employer for offering health benefits that do not cover treatment for a specific genetic condition (President Clinton signed an Executive Order specifically exempting the federal government from similar suits). Thus, the bill could act as a de facto federal mandate requiring employers to offer health plans covering *all* treatments for genetic related conditions.

- **Punitive damages for technical and paperwork errors**—Under the bill, employers could face substantial damages, including compensatory and punitive damages, for paperwork violations or for failing to properly distinguish genetic information from other health care information.

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1 Title I of the Genetic Information Nondiscrimination Act addresses issues related to genetics and insurance coverage. Although certain individual Coalition members may have views on Title I, the Coalition’s comments are limited to Title II of the bill.

For More Information Contact:
Mike Eastman (meastman@uschamber.com), Michael Layman (mlayman@shrm.org), Jason Straczewski (jstraczewski@nam.org), Josh Ulman (julman@cupahr.org) or Neil Trautwein (trautweinn@nrf.com)
• **Confusing and inconsistent recordkeeping and technical requirements**—The bill would require employers to follow one set of rules for handling genetic information and a different set for handling health care information. As a result, employers would have to distinguish between genetic information and other health care information they collect in the course of providing benefits, accommodations for the disabled and a safe workplace. Indeed, in many cases, employers might be required to keep two sets of confidential health care files for employees – one for records with genetic information, one for records with other health care information.

• **Inconsistent state laws**—The legislation does not create a single federal standard, but allows a patchwork of state standards to impose inconsistent requirements.

• **Broad definition of family member**—The bill’s definition of “family member” is too expansive and will increase the amount of frivolous litigation. The bill defines family members as any individual related by blood or any individual related by blood to a child placed for adoption with the employee no matter how remote the relation. The bill should only cover instances in which information is scientifically proven to reveal patterns of inheritance of genetic conditions and is useful for medical diagnosis of the employee and his or her immediate family.

The attached document expands on each of these points and our other major concerns.

Proponents of the Genetic Information Nondiscrimination Act have argued that legislation is necessary in order to promote genetic testing by giving people more confidence that the results of their genetic tests will not be misused. If Congress is to pass legislation to address this problem, then it should be narrowly tailored to ensure that it does not open the door for excessive and needless litigation and administrative burdens. Unfortunately, even under our existing anti-discrimination laws, most charges filed are without merit (as evidenced by the Equal Employment Opportunity Commission’s statistics, which found absolutely no cause for discrimination in more than 62 percent of charges filed in 2006). Congress should not increase the number of frivolous lawsuits by passing overly broad legislation.

Thank you for your consideration. Please do not hesitate to contact us if you would like to discuss these concerns in greater detail.

Sincerely yours,

The GINE Coalition Steering Committee:

College and University Professional Association for Human Resources
HR Policy Association
National Association of Manufacturers

National Retail Federation
Society for Human Resource Management
U.S. Chamber of Commerce

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Limit the Scope to Genetic Tests

The driving force for this legislation is not an ongoing practice of discrimination or mishandling of genetic information, but, rather that the fear of possible discrimination may deter employees from availing themselves of genetic tests. Accordingly, H.R. 493 only should prohibit employers from discriminating based on genetic tests, not family history that could be – and most times is – completely unrelated to tests. This would greatly minimize the opportunity for unintended consequences and unnecessary litigation under the bill, while also thoroughly addressing the issue which fueled the bill’s creation. It would also greatly reduce the probability that the bill will conflict or complicate compliance with other laws, such as the Americans with Disabilities Act (ADA). If the bill is to include provisions regulating genetic information, then it is imperative that such provisions be consistent with the ADA and HIPAA. Unfortunately, rather than address any possible gaps between the ADA and HIPAA, H.R. 493 creates an entirely new regime to regulate medical information and then seeks to eliminate absurd consequences through inadequate exceptions (genetic information obtained through FMLA certification is excepted, but not through sick leave certification, for example).

Damages

Given the lack of genetic discrimination and availability of significant protections under other laws, administrative enforcement and equitably based remedies (including loss of wages and benefits) should be sufficient to allay fear of possible discrimination while mitigating the risk of a dramatic increase in baseless and inherently expensive litigation. Unfortunately, H.R. 493 resorts to jury trials with punitive and compensatory damages, which will necessarily invite additional litigation, as was the case when such damages were made available under other discrimination laws. The courts already are inundated with employment litigation and certainly do not need the additional workload.

One Federal Standard

Any legislation should recognize the problems faced by employers as they try to comply with the numerous genetic discrimination laws already in existence. More than 30 states have enacted laws prohibiting discrimination based on genetic information. However, these laws vary widely from state to state. If Congress enacts legislation barring employment discrimination based on genetic information then it should include a safe harbor providing that employers in compliance with the federal standards cannot be liable under state or local laws banning such discrimination.

Narrow the Definition of Family Member

If there must be a cause of action based on family history, then it should be of reasonable scope. H.R. 493 defines family members as any individual related by blood or any individual related by blood to a child placed for adoption with the employee no matter how remote the relation. This is merely an opportunity for plaintiffs’ attorneys to exploit, and an invitation for frivolous litigation. The bill only should cover situations where the information is scientifically proven to reveal patterns of inheritance of genetic conditions and is useful for medical diagnosis in the employee and his or her immediate family.

An Independent Commission

H.R. 493 would require the creation of a commission six years after the bill’s enactment to “review the developing science of genetics and to make recommendations to Congress regarding whether to provide a disparate impact cause of action under this act.” The Commission, to be known as the Genetic Nondiscrimination Study Commission, is to be housed and funded by the Equal Employment Opportunity Commission (EEOC).

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While the Coalition has no objection to the idea of a commission, we do object to tying both its housing and funding to the EEOC. No one would ever suggest that the business trade association or law firm that regularly defended claims made under H.R. 493 would be an appropriate source of funding or housing for the Commission. So too, it should be with the EEOC – the agency tasked with prosecuting violations of the bill. Clearly, the EEOC will have its own views on what changes should be made to genetics legislation, and it is unlikely those views would be objective. By tying the Commission’s housing and funding to the EEOC, it is inevitable that the Commission will be largely staffed with former or current EEOC employees – some of whom will have been responsible for prosecuting claims under H.R. 493. To prevent this undue influence, the Commission should be funded and housed independent of the EEOC.

**Expanded Commission & Sunset**

Any genetic nondiscrimination legislative proposal should contain a mechanism to ensure that public policy keeps pace with future scientific advances. Given the rapid evolution in the field, legislation drafted now is unlikely to anticipate developments in genetic science that could occur even in the near future. As demonstrated by state experience – where several states were compelled to revisit their original legislation - unintended consequences can sometimes force the legislature to rewrite legislation within just a few years. Thus, the Genetic Nondiscrimination Study Commission should study and report on all aspects of the bill – as it name implies – not just disparate impact. The bill should also provide for a sunset date, at which time Congress may consider new issues related to genetic discrimination raised by the Commission and adjust the legislation accordingly. Such a model creates a powerful incentive for Congress to revisit the law and make appropriate modifications.

**Direct Threat - Protecting Employees and the Public**

The ADA, Title VII of the Civil Rights of 1964, and other discrimination laws recognize that there can be rare cases where an employer has a legitimate reason to make employment decisions based on information that would otherwise be protected. Courts have interpreted these exceptions extremely narrowly but have recognized that employers can have valid reasons for such policies. For example, under the ADA, a health condition likely to cause uncontrollable seizures could properly be considered a “direct threat” to safety if the employee were a bus driver, thus justifying an employment decision that would otherwise be unlawful. A similar narrow exception should exist for genetic discrimination. For example, if an employee has a genetic predisposition for a high chance of developing a severe disease by working in proximity to a chemical that might only pose a minor risk to others, then employers should be able to make employment decisions based on this information. Thus, we propose adding the following language, which mirrors that of the ADA: “Nothing in this bill shall be construed to prohibit an employer from requiring that an individual not pose a direct threat to the health and safety of other individuals in the workplace.”

**Choice of Remedies**

In the only recorded case where an employer was accused of engaging in genetic testing and genetic discrimination, the individual plaintiffs filed claims against their employer with the EEOC, which, in turn, sued the employer under the ADA. The agency successfully settled the case for $2.2 million. Thus, if H.R. 493 is enacted, individuals and the EEOC will be empowered to bring suit against an employer on the same facts under both H.R. 493 and the ADA.

In the 107th Congress, the original sponsors of H.R. 493 introduced similar legislation (S. 1995) that included an “election of remedies,” under which a plaintiff could sue under the genetics bill or the ADA, but not both. That provision is not in H.R. 493. It should be re-inserted in the bill in order to prevent multiple lawsuits, double recovery and unnecessarily complex litigation.