Confidentiality of Genetic Information in the Workplace (with A. Jaeger)

Lori B. Andrews, Chicago-Kent College of Law
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Lori B. Andrews, J.D.*
Ami S. Jaeger, J.D.**

This Article analyzes existing legal protections for the confidentiality of information collected through genetic screening or genetic monitoring in the workplace. It notes that there are a variety of protections, such as ethical codes for occupational physicians, statutes protecting health care information in the hands of the employers, and tort, contract and constitutional principles. It describes defenses to suits based on improper disclosure of medical information. The Article then analyzes legal bases for employee and third party access to the employee's genetic information. In response to gaps in existing legal protections, it suggests parameters for a model law protecting the confidentiality of genetic information collected in the workplace.

I. INTRODUCTION

Medical screening and monitoring1 have long been used by employers for a variety of reasons — to exclude people from jobs,2 to determine whether there is any reason an employee cannot perform the

* B.A., Yale University; J.D., Yale Law School. Research Fellow, American Bar Foundation; Senior Scholar, Center for Clinical Medical Ethics, University of Chicago.

** B.B.A., University of Iowa; J.D., University of Wisconsin; Associate Counsel, Rural Insurance Companies. An earlier version of this Article was prepared as a background paper for Office of Tech. Assessment, U.S. Cong., Genetic Monitoring and Screening in the Workplace (1990).

1 See Office of Tech. Assessment, U.S. Cong., Genetic Monitoring and Screening in the Workplace 3 (1990) [hereinafter OTA 1990 Report] ("[G]enetic testing of employee populations involves both examining persons for evidence of induced change in their genetic material (monitoring) and identifying individuals with particular inherited traits or disorders (screening).")

essential functions of a job,\textsuperscript{5} to study the workplace’s effect on individuals\textsuperscript{4} and to target work areas for increased safety and health precautions.\textsuperscript{5} Employers have been found to have a right to require employees to undertake medical examinations that will help the employer meet its obligation to maintain a safe and healthy workplace.\textsuperscript{6}

The development of genetic testing provides employers with an additional method of medically evaluating employees and potential employees.\textsuperscript{7} An employee’s genetic status might be determined through a one-time genetic screening procedure — for example, to determine whether an employee or potential employee could safely work in a particular job. Alternatively, genetic information could be collected through monitoring, which is the periodic assessment of the employee’s genetic status to determine if there has been chromosomal or genetic damage due to exposure to hazardous agents. In 1989, the Office of Technology Assessment (OTA) conducted a survey of 1,500 United States companies, the fifty largest utilities and the thirty-three largest unions. OTA found that one in twenty companies surveyed currently conducts genetic monitoring or screening.\textsuperscript{8}

Workers can realize certain benefits from genetic testing. Genetic screening may warn individuals with certain genetic predispositions to avoid particular types of jobs that could trigger an illness. For example, workers who have the genes for alpha-1-antitrypsin deficiency can develop emphysema if they work in a dust-producing job,\textsuperscript{9} such as smelting. Accordingly, such workers may want to avoid such a job. Furthermore, genetic monitoring can provide information to workers regarding chromosomal damage caused by workplace exposure to asbestos, chromium, nickel and vinyl chloride.\textsuperscript{10} Both types of genetic testing can help employers make decisions about how to make a workplace safer.

The practice of genetic testing in the workplace raises issues about who should have access to the results. The results might be sought from occupational health care providers or the employer by the employee, managers, other employees, unions, governmental agencies, the employee’s spouse, insurance carriers and subsequent employers. The legal permissibility of such disclosures must be assessed against

\textsuperscript{5} Atherley, supra note 2, at 270.
\textsuperscript{4} Id. at 266, 273; OTA 1990 Report, supra note 1, at 4.
\textsuperscript{5} OTA 1990 Report, supra note 1, at 4.
\textsuperscript{6} Id. at 130.
\textsuperscript{7} See id. at 55-190 (providing general information about the medical procedures available to employers and the policy issues the procedures raise).
\textsuperscript{8} Id. at 22.
\textsuperscript{9} See id. at 41, 86 (citing Stokinger & Scheel, Hypersusceptibility and Genetic Problems in Occupational Medicine — A Consensus Report, 15 J. Occupational Med. 564 (1973)).
\textsuperscript{10} OTA 1990 Report, supra note 1, at 14.
the importance of the protection of confidentiality. As Professor Richard Turkington notes, in discussing confidentiality of health care information, "the need for the condition of privacy is a reflection of the patient’s or client’s most basic sense of security and morality."  

As a species of health care information, genetic information is particularly sensitive because genetic screening and monitoring reveal much more personal information about the individual than other types of medical surveillance used by employers. Genetic testing, for example, might reveal that an asymptomatic worker will later suffer from a serious illness (such as Huntington disease) or has a greater likelihood than others of developing certain diseases (such as early coronary disease). Unlike a transient condition, a genetic disorder generally affects the person throughout his or her life. Thus, once such information is unwarrantedly disclosed, it can continue to stigmatize the individual and lead to adverse decisions throughout a lifetime in many different contexts, causing serious financial, emotional and perhaps even physical harm. For instance, an insurance company might deny coverage based on information that the applicant will suffer from a late onset disorder. Thus, the handling of genetic information is particularly sensitive.

This Article analyzes in detail the existing statutes, common law precedents and constitutional theories that could protect confidentiality of genetic information in the workplace, as well as the various exceptions to those protections. It then discusses the legal precedents applicable to various individuals, groups and entities that might seek disclosure of genetic information in the workplace setting. Finally, the Article concludes with suggestions for a model law governing treatment of genetic information in the workplace.

As this Article demonstrates, there is a patchwork of legal precedents that give varying degrees of protection to genetic information in the workplace. Occupational physicians, whether employed directly by the company or contracting independently with the company, have a

12 Recognition of the sensitivity of genetic information led to the introduction of a bill in the U.S. Congress "to safeguard individual privacy of genetic information from the misuse of records maintained by agencies . . . for the purpose of research, diagnosis, treatment, or identification of genetic disorders." The bill also provided "individuals access to records concerning their genome which are maintained by agencies for any purpose." Human Genome Privacy Act, H.R. 5612, 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H7623, H7624 (daily ed. Sept. 13, 1991). The bill died in committee.
14 See infra notes 17-37 and accompanying text.
more attenuated relationship with the employee or potential employee upon whom they perform genetic screening or monitoring than physicians hired by the individual. However, occupational physicians have an ethical duty to maintain confidentiality based on the code of occupational physicians, and a legal duty based on common law and constitutional privacy principles. Moreover, employers have a legal duty to maintain confidentiality based on similar common law and constitutional principles. Notably, certain statutes delineate measures required for protecting employee medical records, but these statutes are neither uniform nor comprehensive.

II. PHYSICIANS’ DUTY OF CONFIDENTIALITY

The ethical principles of the medical profession have mandated confidentiality since at least the time of the ancient Greeks. Physicians since the time of Hippocrates have recognized that, as a matter of necessity, they must be entrusted with communications of the most personal and private nature in order to effectuate proper diagnoses and cures. As a result, the confidentiality obligation is an integral part of various ethical codes for physicians.

However, the ethical standards of the medical profession did not have legal counterparts at common law. At common law, the physician could disclose, in court and elsewhere, a patient communication. In jurisdictions still following the traditional common law approach, the result is a harsh one for patients. For example, a federal court ap-

15 See infra text accompanying notes 38-41.
16 See infra text accompanying notes 45-55.
17 The Hippocratic Oath is taken by each physician entering the medical profession. Since the fourth century B.C., physicians have pledged to respect the confidence of their patients: “And whatsoever I shall see or hear in the course of my profession, as well as outside my profession in my intercourse with men, if it be what should not be published abroad, I will never divulge, holding such things to be holy secrets.” 1 HIPPOCRATES 164-65 (W. Jones trans. 1923), reprinted in ETHICS IN MEDICINE: HISTORICAL PERSPECTIVES AND CONTEMPORARY CONCERNS 5 (S. Reiser, A. Dyck & W. Curtan eds. 1977).
18 See, e.g., AMERICAN MED. ASS’N, CURRENT OPINIONS OF THE JUDICIAL COUNCIL OF THE AMERICAN MEDICAL ASSOCIATION 19 (1984) (The physician should not reveal confidential communications without the consent of the patient, unless legally compelled to do so.); see also Gellman, PRESCRIBING PRIVACY: THE UNCERTAIN ROLE OF THE PHYSICIAN IN THE PROTECTION OF PRIVACY, 62 N.C.L. REV. 255 (1984); J. GUTMAN, ACCESS, IN CONFIDENTIALITY OF HEALTH RECORDS, supra note 2, at 31, 36; Kobrin, CONFIDENTIALITY OF GENETIC INFORMATION, 30 UCLA L. REV. 1283 (1983); Winslade, CONFIDENTIALITY OF MEDICAL RECORDS, 3 J. LEGAL MED. 497 (1982). All of these articles discuss the physician’s dilemma of whether or not to disclose confidential information to third parties.
19 8 J. WIGMORE, EVIDENCE § 2380, at 818-19 (J. McNaughton rev. ed. 1961). Early English law indicated that neither a voluntary vow of secrecy nor the privacy of the relation alone were sufficient to establish a privileged communication.
20 8 J. WIGMORE, supra note 19, § 2380, at 818. See Quarles v. Sutherland, 215 Tenn. 651, 389 S.W.2d 249 (1965) (physicians’ ethical requirement of confidentiality not enforceable by law).
plying Georgia law did not recognize a confidential relationship between doctor and patient or hospital and patient in the absence of a statute creating the relationship, because no such relationship existed at common law. In that case, the plaintiff sued the physician, hospital and laboratory for disclosure to the plaintiff’s employer of the results of a test for blood alcohol content that led to the plaintiff’s termination. The court held that the plaintiff had failed to state a cause of action because no confidential relationship existed between plaintiff and defendants.

Fortunately, evolving case law in most states recognizes a patient’s right to sue when a physician discloses medical information without the patient’s consent. The route taken toward recognition of the physician’s duty to maintain confidentiality varies. In some states, courts point to the Hippocratic Oath and the American Medical Association’s Code of Ethics to demonstrate a public policy of protecting confidentiality. Some courts use medical ethics concepts to find a confidential relationship between a physician and a patient that gives rise to a general duty not to disclose information obtained through that relationship. Other courts achieve this policy by referring to statutory enactments such as the testimonial privilege statutes or the confiden-

22 Id. at 324.
25 See, e.g., Simonsen, 104 Neb. at 224, 177 N.W. at 831. Under testimonial privilege statutes, physicians are not permitted to testify in court about a patient’s condition unless the patient has either consented to the testimony or waived his or her right to consent. E.g., N.J. STAT. ANN. § 2A:84A-22.2 (West 1986) (a patient may invoke the privilege if the judge finds the communication was confidential, and “the patient or the physician reasonably believed the communication to be necessary or helpful to enable the physician to make a diagnosis . . . or to prescribe or render treatment”); see Turkington, supra note 11, at 312. Numerous cases have basing a duty not to disclose on the existence of a state testimonial privilege statute.

The only states that do not have testimonial privilege statutes regarding physicians and
tiality provisions of the physician licensure and discipline statutes.\textsuperscript{26}

Another means of legal relief for disclosure of genetic information is a suit for tortious public disclosure of private facts,\textsuperscript{27} a cause of action which is part of the common law protection of privacy.\textsuperscript{28} The patient can also maintain a breach of contract action against the physician. In the latter scenario, the physician-patient relationship is deemed a contractual one, and as an implied condition of the contract, "the doctor warrants that any confidential information gained through the rela-

\textsuperscript{26}Twenty-one states protect the relationship between a patient and his or her physician by providing that the disclosure of confidential information by the physician is a ground for revocation of the medical license or a basis for other disciplinary action. ARIZ. REV. STAT. ANN. §§ 32-1401(20)(b), 1451 (Supp. 1990); ARK. STAT. ANN. § 17-93-409(15) (1987); CAL. BUS. \& PROF. CODE §§ 2227, 2228 (West Supp. 1991) \& 2263 (West Supp. 1990); DEL. CODE ANN. tit. 24, § 1751(a), (b)(12) (1987); IDAHO CODE § 54-1814(13) (1988); ILL. ANN. STAT. ch. 111, para. 4400-22(A)(30) (Smith-Hurd Supp. 1990); KAN. STAT. ANN. § 65.2836(c) (Supp. 1989); KY. REV. STAT. ANN. § 311-595 (Baldwin Supp. 1990); ME. REV. STAT. ANN. tit. 32, § 3282-A(2) (Supp. 1990); MICH. COMP. LAWS ANN. § 333.16221(e)(ii) (West Supp. 1990); MINN. STAT. ANN. § 147-091(1)(m) (West 1989); Neb. Rev. Stat. §§ 71-147(10), 71-148(9) (1990); NEV. REV. STAT. ANN. § 630-3065(1) (1989); N.M. STAT. ANN. § 61-6-15(D)(5) (1989); N.D. CENT. CODE § 43-17-3113(Supp. 1990); OHIO REV. CODE ANN. § 4731.22(B)(4) (Bal-


tionship will not be released without the patient's permission . . . . The promise of secrecy is as much an express warranty as the advertisement of a commercial entrepreneur.”

On contractual grounds, "a physician, who enters into an agreement with a patient to provide medical attention, impliedly covenants to keep in confidence all disclosures made by the patient concerning the patient's physical and mental condition as well as all matters discovered by the physician in the course of examination or treatment." Although this cause of action is not as widely used as some others, one court noted, "[w]e have not been cited to, nor have we found in our research, any case in which a cause of action for the breach of an implied contract of confidentiality on the part of the doctor has been rejected."  

There is also the possibility for a claim based on the federal constitutional right to privacy. One court stated "the right to privacy . . . [r] a fundamental right, older than the Bill of Rights, is protected by both our federal and state constitutions." The court extended the protection "not only to the home . . . but also to the doctor's office, [and] the hospital," and thus to medical records. Some courts have also found a state constitutional basis for privacy in medical records. Moreover, where state constitutions have enumerated a right to privacy, courts have extended the state protection of privacy to include medical

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29 Hammonds, 243 F. Supp. at 801.

30 MacDonald v. Clinger, 84 A.D.2d 482, 485, 444 N.Y.S.2d 801, 804 (1982) (quoting Doe v. Roe, 93 Misc. 2d 201, 210, 400 N.Y.S.2d 668, 674 (1977)). Contract remedies, such as compensation for damages or an injunction, may be used to enforce the condition of confidentiality.

31 Home, 291 Ala. at 711, 287 So. 2d at 832.

32 But see Whalen v. Roe, 429 U.S. 589 (1976). In Whalen, the plaintiffs challenged a New York law requiring physicians prescribing certain drugs to report the drug name, dosage and pharmacy, and the patient's name, address and age to the State Department of Health. While the Court recognized the need to protect the privacy of the physician-patient relationship, it held that the particular disclosure requirement did not violate a patient's constitutionally protected privacy right because the information was securely stored, id. at 593-95, the information was not publicly disclosed and an individual was not deprived of the right to acquire and use the medication. Id. at 603. The Court recognized "the individual interests in avoiding disclosure of personal matters." Id. at 599. However, the Court distinguished between an individual's interest in autonomy and an individual's interest in nondisclosure; the former clearly being protected by the federal Constitution, and the latter only "arguably" rooted in the Constitution. Id. at 605.

33 Sanderson v. Bryan, 361 Pa. Super. 491, 499, 522 A.2d 1138, 1142 (1987) (State Peer Review Protection Act violated by an order giving a plaintiff access to peer review information not directly related to his or her case).

34 Id. (citations omitted).

35 See id. at 499, 522 A.2d at 1142; see also In re The June 1979 Allegheny County Investigating Grand Jury, 490 Pa. 143, 148, 415 A.2d 73, 76-77 (1980); Peninsula Counseling Center v. Rahm, 105 Wash. 2d 929, 942-43, 719 P.2d 926, 932-33 (1986) (Pearson, J., dissenting) (the Washington Constitution privacy protections were broad enough to protect individual medical records from disclosure).
records. However, the claim that disclosure of confidential information violated an individual's constitutionally protected privacy right can be asserted only when there is governmental involvement, such as when the employer is a federal or state entity, or where the government requests medical records.

Finally, at least five states maintain a more direct means of protecting the patient from unauthorized disclosures of genetic information, with statutes that specifically protect medical information.37

III. PROTECTIONS FOR GENETIC INFORMATION IN THE WORKPLACE

When a physician undertakes genetic screening or monitoring of an employee or potential employee, there is some question about whether the legal precedents protecting confidentiality in the physician-patient relationship apply.38 However, other legal precedents based on specific ethics codes or statutes, as well as more general precedents regarding tortious public disclosure of private facts or violation of a constitutional right to privacy,39 provide a basis for holding occupational physicians or employers liable for the unauthorized disclosure of medical information about a job applicant or an employee. The occupational physician's or employer's duty to an employee who is a member of a union may also be created by the terms of the collective bargaining agreement.40 Thus, an employee may bring a claim for violation of his or her privacy under the bargained labor agreement.41

The American Occupational Medical Association Code of Ethical Conduct (the Code) specifies that occupational physicians should maintain confidentiality.42 Even with respect to disclosures to the employer, the Code cautions that occupational physicians should provide bottom line information, not specific details:

Physicians should treat as confidential whatever is learned

36 E.g., Ex parte Mack v. Beacon Light Clinic, 461 So. 2d 799, 801 (Ala. 1984); Sanderson, 361 Pa. Super. at 499, 522 A.2d at 1142.
38 See infra notes 81-82 and accompanying text (discussing cases finding that occupational physicians were not in a physician-patient relationship with the employee).
39 See supra notes 27-36 and accompanying text (discussing the success of these claims against physicians).
41 See Comment, The Union's Right to Information at the Expense of Employees' Privacy Rights, 15 U. Tol. L. Rev. 755, 762 (1984) (describing how an employee might bring an after-the-fact privacy suit against an employer; questioning the desirability of such a suit).
about individuals served, releasing information only when required by law or by overriding public health considerations, or to other physicians at the request of the individual according to traditional medical ethical practice, and should recognize that employers are entitled to counsel about the medical fitness of individuals in relation to work, but are not entitled to diagnoses or details of a specific nature.\footnote{Id. at Principle 7.}

This Code might provide the policy basis for recognizing a legal duty of occupational physicians to maintain confidentiality, in the same way the Hippocratic Oath and the American Medical Association’s Code of Ethics have provided a basis in some states for judicially recognizing a duty of private physicians not to disclose,\footnote{See supra notes 17-18 and accompanying text.} by using ethical codes as a basis to infer standard practice.

Various statutes protecting the confidentiality of health care records in the workplace could also be used as the basis for a private suit against the occupational physician or the employer for breach of confidentiality. Although no state has a statute specifically protecting genetic information, some states have adopted statutes protecting health care records in the hands of employers. Statutes in California and Connecticut specifically protect the confidentiality of medical records obtained in the course of employment.\footnote{Cal. Civ. Code \S 56.20(a)(c) (West 1982); Conn. Gen. Stat. Ann. \S 31-128f (West 1987).} Under a Wisconsin statute, public employers have an obligation to maintain records of work-related injuries and illnesses,\footnote{Wis. Stat. Ann. \S 101.055(7)(a) (West 1988).} and these records must be kept confidential.\footnote{Id. at \S\S 146.82, 146.83.} Moreover, some statutes which protect the confidentiality of medical information in general could be read to include occupational physicians. A Montana statute, for example, covers even those health care professionals who merely diagnose.\footnote{Mont. Code Ann. \S 50-16-101 (1987).} The preamble to the Montana health care confidentiality statute states that “persons other than health care providers obtain, use, and disclose health record information in many different contexts and for many different purposes. It is the public policy of this state that a patient’s interest in the proper use and disclosure of his health care information survives even when the information is held by persons other than health care providers.”\footnote{Id. at \$ 50-16-502(4).}

In contrast, the Rhode Island law probably would not apply. It protects the confidentiality of health care information about a “patient,” even when that information is in the hands of third parties such
as employers.\textsuperscript{50} However, information obtained outside of a physician-patient relationship through genetic screening or monitoring arguably would not be considered "patient" information. So the Rhode Island protections would cover only more traditional health care information (such as information from the employee’s personal physician about the employee’s genetic status) that makes its way to the employer’s files.

Both the California and Rhode Island confidentiality statutes pay particular attention to the handling of information provided by health care professionals to third parties (such as employers).\textsuperscript{51} The California law requires that employers establish procedures to maintain confidentiality, suggesting that these include "instruction regarding confidentiality of employees and agents handling files containing medical information, and security systems restricting access to files containing medical information."\textsuperscript{52} The Rhode Island statute requires third parties to establish certain security procedures to protect the confidentiality of patient health care information, including limiting access to people with a "need to know," identifying someone who has responsibility for assuring confidentiality and requiring employees to sign a written statement regarding the importance of maintaining confidentiality.\textsuperscript{53}

IV. DEFENSES TO SUITS FOR DISCLOSURE OF CONFIDENTIAL MEDICAL INFORMATION

There are a number of defenses to a suit based on the improper disclosure of medical information. The health care provider or employer can justify disclosure if he or she can prove that the individual consented, the individual waived his or her right to object, the disclosure was required by law or the disclosure was made to avoid physical harm to third parties.\textsuperscript{54}

Where the health care provider or employer relies on the consent justification, the underlying rationale is that a person who undergoes testing as a job applicant or employee implicitly authorizes the health care provider to share the results with the employer. Often, employees are required to authorize their employers to use their medical and personnel records as the employers see fit.\textsuperscript{55} Nevertheless, a health care provider must not exceed the scope of any valid consent which has

\begin{footnotes}
\item[53] R.I. Gen. Laws § 5-37.3-4(c).
\item[54] See infra notes 55-74.
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been obtained. In the genetics context, for example, the patient's consent to the health professional's disclosure of information to the employer would not justify disclosure to other third parties, such as an insurer. Nor would it justify the employer's use for purposes beyond the consent (such as for use in health care coverage determinations under a self-insured benefit plan).

If an individual puts his or her health at issue in a legal case, that individual might be waiving the right to object to the release of related medical data. This would apply when, for example, the patient brings a workers' compensation claim based on an illness caused by genetic or chromosomal damage from workplace exposure.

In addition, breaches of confidentiality may be required by statute. All states have statutes which require health care professionals to inform designated public officials whenever a patient suffers from some statutorily defined condition. These include a host of communicable diseases, gunshot wounds, drug abuse, child abuse and, in some cases, disabilities. Such statutes exonerate reporting health care professionals from liability, so long as they report in good faith. In the future, states might specifically mandate reporting of employees' and job applicants' pre-existing genetic disorders or genetic or chromosomal anomalies that might be caused by job exposure. In other areas,

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56 See, e.g., Feeney v. Young, 191 A.D. 501, 181 N.Y.S. 481 (1920). In this case, the plaintiff had given her physician permission to film a Caesarean section operation which she was to undergo, with the understanding that such film would be exhibited to medical societies and in the interest of medical science. The pictures were exhibited publicly in leading theaters as part of a motion picture Birth. The woman was allowed to bring an action for breach of a statute prohibiting advertising the name or likeness of a person without her consent.

57 See infra text accompanying note 294 for an example of this practice.

58 See, e.g., Urseth v. City of Dayton, 653 F. Supp. 1057 (1986). Beyond the general common law rule to that effect, a statute in Minnesota specifically provides that medical data directly related to a claim for workers' compensation may be released without prior approval to the employee, employer or insurer who are parties to the claim. Minn. Stat. Ann. § 176.138 (West Supp. 1991). Private medical data that is not directly related to a current disability or injury may not be released, and the party that does not treat properly-released data as private is guilty of a misdemeanor. Id. A Louisiana statute similarly mandates the release of health care information relevant to the employee's injury to the employee, employer or workers' compensation insurer in a workers' compensation claim. La. Rev. Stat. Ann. § 23:1127(A) (West 1988). Rhode Island's Confidentiality of Health Care Information Act also has an exception for information directly related to a current claim for workers' compensation. R.I. Gen. Laws § 5-37.5-4(b)(11) (1987).

59 See Gellman, supra note 18, at 274.

60 To give an example of the disabilities covered, in Wisconsin, a physician who believes that his or her patient's physical or mental condition affects the patient's ability to exercise reasonable and ordinary control over a motor vehicle may report the patient's name and other information relevant to the condition to the department of transportation without the informed consent of the patient. Wis. Stat. Ann. § 146.82(3) (West 1989). In Rhode Island there is an exception to the confidentiality statute allowing reporting of health care information on an individual to the central cancer registry. R.I. Gen. Laws § 5-37.5-4(b)(18) (1987).

61 States are increasingly interested in employees' medical status, especially if the individ-
there is evidence of state interest in the genetic health status of individuals. For example, in at least twelve states, there are birth defects registries.\textsuperscript{62} Some public health laws and regulations additionally require physicians to report to the state any individual of any age with specified congenital disorders.\textsuperscript{63} Where government benefits (such as the provision of treatment or income tax exemption) are given to individuals with certain disorders, the affected person must file information with the state.\textsuperscript{64}

Some cases have held that the health care provider may disclose otherwise confidential information in order to avoid physical harm to third parties. A case of first impression regarding a physician’s disclosure of information about communicable diseases in the face of an overriding public health interest was \textit{Simonsen v. Swenson}.\textsuperscript{65} The court held that a physician who discloses patient information in order to prevent the spread of disease will not be held liable as long as the physician acts in good faith, without malice and has reasonable grounds for the diagnosis.\textsuperscript{66} The \textit{Simonsen} court recognized that information given to a physician by his patient is confidential. This confidentiality is subject to the understanding that if the patient’s disease is found to be dangerous and of such a contagious nature that it may be transmitted to others unless the danger of transmission is disclosed, the physician is permitted to make a reasonable disclosure.\textsuperscript{67} The court recognized that “a duty may be owing to the public and, in some cases, to particular individuals.”\textsuperscript{68}


\textsuperscript{64} See Riskin & Reilly, \textit{Remedies for Improper Disclosure of Genetic Data}, 8 \textsc{Rut.-Cam. L.J.} 480, 483 (1977).

\textsuperscript{65} \textit{Simonsen v. Swenson}, 104 Neb. 224, 177 N.W. 831 (1920). The court noted that “no patient can expect that if his malady is found to be of a dangerously contagious nature he can still require it to be kept secret from those to whom, if there was no disclosure, such disease would be transmitted.” \textit{Id.} at 228, 177 N.W. at 832.

\textsuperscript{66} \textit{Id.} at 228, 177 N.W. at 832.

\textsuperscript{67} \textit{Id.}

\textsuperscript{68} \textit{Id.}
The line of communicable disease cases emanating from *Simonsen* was cited in another case of first impression, *Tarasoff v. Regents of University of California*. In *Tarasoff*, a psychiatrist employed by the University of California failed to warn a woman that his patient threatened to kill her. Subsequently, the woman was murdered by the patient. The court enunciated a general rule that where a psychiatrist, in the exercise of his professional skill and knowledge, determines, or should determine, that a warning is essential to avert danger arising from the medical or psychological condition of his patient, he incurs a legal obligation to give that warning. The basis for this far-reaching decision was the court’s belief that we live in an “interdependent” and “risk-infected” society, and members of such a society cannot tolerate being exposed to additional risks that psychiatrists could eliminate by a simple act of communication.

This public protection rationale was also recognized in dictum in *Collins v. Howard*. In that case, a blood sample was drawn from the plaintiff, tested for alcoholic content, and the results given to his employer without his consent. Although the court denied recovery to the plaintiff on the ground that Georgia followed the common law rule of not recognizing physician-patient confidentiality, the court also noted that public policy would favor disclosure in this instance because the plaintiff was an engineer who controlled a railroad passenger train. However, there can be liability if a disclosure made to a subsequent employer is not in the public interest, such as where the information has no bearing on the person’s ability to perform the subsequent job.

V. WEIGHING THE INTERESTS INVOLVED WHEN EMPLOYEES, EMPLOYERS OR THIRD PARTIES SEEK DISCLOSURE

Workers, employers and third parties might seek to obtain genetic information collected by health care providers through screening or monitoring in the workplace. Workers want the information in order to make employment or health care decisions. Employers want the information in order to assess the worker’s ability to perform a given job.

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70 *Id.* at 441, 551 P.2d at 347, 131 Cal. Rptr. at 27. The court reasoned that “[t]he protective privilege ends where the public peril begins.” *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.
71 *Id.* at 442, 551 P.2d at 347, 131 Cal. Rptr. at 27.
73 *Id.* at 325.
74 *Carr v. Watkins*, 227 Md. 578, 177 A.2d 841 (1962) (where no privilege exists, an action for invasion of privacy based on oral communications may be maintained).
Other parties, such as unions, want information in order to insure overall workplace safety. Third parties unaffiliated with a company, such as the government, the employee’s spouse, subsequent employers or insurers, might also want access to genetic information.

A. Disclosure to the Employee or the Prospective Employee

Physicians, as a part of their fiduciary relationship with patients, have a duty to disclose the information patients request. A physician’s failure to disclose has been found to constitute fraudulent concealment. In at least sixteen states, a patient must be given access to medical records retained by a physician. In 1959, a common law right of access to medical records was first recognized by a state appellate court, beginning a clear trend toward finding such a right of access. Generally, the custodian of the record has a property interest in the record itself, and the patient has a property interest in the information in the record.

Historically, however, occupational physicians engaged by the employer or the employer’s compensation insurer were not in a physician-patient relationship with the employees or prospective employees that they tested. Their clients were seen to be the employers.


76 See Sheets v. Burman, 322 F.2d 277, 279 (5th Cir. 1963) (where there is a fiduciary relationship, a physician’s failure to disclose acts of malpractice constitutes a fraudulent concealment); Turkington, supra note 11, at 278 n.35 (arguing for a more comprehensive definition of rights and duties involved in patient-client access to health care information).


81 See, e.g., Rogers v. Horvath, 65 Mich. App. 644, 237 N.W.2d 595 (1975); Johnston v. Sibley, 558 S.W.2d 135 (Tex. 1977); Lotspeich v. Chance Vought Aircraft, 369 S.W.2d 705 (Tex. 1963) (pre-employment physical indicated pulmonary disease, which was not disclosed to the job applicant).

In rare instances, the refusal to characterize the relationship as a physician-patient rela-
not the workers. Since no duties ran to the employee, physicians could not be held liable for medical malpractice when they caused harm to employees by failing to disclose information about the patient’s condition to the patient. Moreover, if the physician did disclose, but made an inaccurate diagnosis, he or she might not be held liable.\textsuperscript{82}

In recent years, the rigid rule that an occupational physician is not in a physician-patient relationship with an employee has been relaxed to yield a more flexible standard. In particular, courts distinguish between cases in which the physician merely tests the employee and those in which the physician provides care and treatment.\textsuperscript{83} In the latter instance, courts tend to find that a physician-patient relationship exists between the employee and the occupational physician.

In Betesh v. United States,\textsuperscript{84} for example, Selective Service physicians undertook a pre-induction physical examination of a military applicant. His chest X-ray revealed an abnormal (but treatable) condition. Although the Selective Service denied admission to the individual, it did not inform him of his medical condition. Six months later the individual learned of his condition and died because of the lack of treatment. Because the physician at the induction center notified him that he should be re-examined in three months by the Service, the court held that the physicians assumed the role of treating physicians, and that a physician-patient relationship existed.\textsuperscript{85}

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\textsuperscript{82} Courts holding occupational physicians or workers’ compensation physicians not liable for erroneous diagnoses reason in part that the physician “has no reason to believe that the person being examined will rely on his report.” Keene v. Wiggins, 69 Cal. App. 3d 308, 314, 138 Cal. Rptr. 3, 7 (1977). However, that assertion may not be true in the case of genetic screening or monitoring in the workplace. The health care professionals who undertake such testing and analysis may have special skills that the employees cannot readily find in physicians elsewhere. Thus, the employee may have an understandable tendency to rely on the occupational physician for an accurate evaluation of his or her genetic status. See Atchison, T. & S.F. Ry. Co. v. Perryman, 200 Okla. 266, 192 P.2d 670 (1948). In this case, the court held the company liable for failure to disclose evidence that the worker had a rare disease, Buerger’s disease, which was not commonly known or recognized. The employee was uneducated and did not receive health care other than from company doctors or doctors reporting to the company.


\textsuperscript{85} Id. at 245.
Similarly, the legal maxim that one who assumes to act, even though gratuitously, must act carefully, is grounds for finding the physician liable if he or she does more than merely test the employee and report to the employer.\textsuperscript{86} This rationale led the court to find a potential tort cause of action in \textit{Hoover v. Williamson},\textsuperscript{87} despite the absence of a physician-patient relationship between an employee and an occupational physician. In that case, the physician administered an annual X-ray, but misrepresented the seriousness of the employee’s condition and concealed the consultant’s advice that the employee discontinue working in the injurious environment.\textsuperscript{88}

This logic is also applied to find employers liable for failing to disclose medical information obtained in the course of a pre-employment exam. According to the Supreme Court of California in \textit{Coffee v. McDonnell-Douglas Corp.}, “[a]n employer generally owes no duty to his prospective employees to ascertain whether they are physically fit for the job they seek, but where he assumes such duty, he is liable if he performs it negligently.”\textsuperscript{89} In that case, Coffee underwent a pre-employment physical which included a blood test. The results, indicating a problem, were sent to the company, where they were filed without review or evaluation. Coffee took a job with the company and some months later collapsed due to bone marrow cancer. The court held the company violated a duty to establish a proper procedure for the evaluation of blood test reports.\textsuperscript{90} Several other cases similarly held employers liable for failing to disclose the results of a medical examination to the worker when the examination revealed a condition of which the employee was unaware.\textsuperscript{91} Some courts hold that the exclusive remedy for

\textsuperscript{86} See Prosser & Keeton \textit{supra} note 27, at \S\ 32. This maxim, in the context of an occupational physician, would seem to include requiring the physician to make an understandable presentation of the information to the employee, so that the employee can act in an informed manner.

\textsuperscript{87} Hoover v. Williamson, 236 Md. 250, 253-55, 203 A.2d 861, 863-64 (1964).

\textsuperscript{88} Id. at 252-53, 203 A.2d at 862. \textit{But see} Thomas v. Kenton, 425 So. 2d 396, 399-400 (La. Ct. App. 1982) (employee’s complaint failed to establish physician-patient relationship; hence, doctor could not breach duty).


\textsuperscript{90} Coffee, 8 Cal. 3d at 559-62, 503 P.2d at 1372-73, 105 Cal. Rptr. at 364-65. \textit{See also} James v. United States, 483 F. Supp. 581, 585 (N.D. Cal. 1980) (having made a chest X-ray an essential part of the pre-employment examination, employer failed to exercise due care when, through clerical error, the report on the X-ray was not brought to the attention of the examining physician); Betesh v. United States, 400 F. Supp. 238 (D.D.C. 1974).

\textsuperscript{91} E.g., E.I. du Pont de Nemours & Co. v. Brown, 102 F.2d 786 (3d Cir. 1939); Blue Bell Globe Mfg. Co. v. Lewis, 200 Miss. 685, 27 So. 2d 900 (1946) (employer liable where injury to employee was due in part to employer’s failure to inform); Wojcik v. Aluminum Co. of Am., 18 Misc. 2d 240, 183 N.Y.S.2d 351 (1959) (employer liable for negligent, careless, reckless and willful failure to inform employee of his tubercular condition after gratuitous physical examinations revealed the condition); Atchison, T. & S.F. Ry. Co. v. Perryman, 200 Okla. 266, 192 P.2d 670 (1948).
a company’s failure to disclose is the workers’ compensation laws. Conversely, where an employee’s condition is not contracted or aggravated during employment, some courts hold that workers’ compensation laws are not the exclusive remedy.

Tort actions by an employee against an employer are generally obviated by workers’ compensation statutes, except when concealment results in aggravation of the injury. For example, if an employer undertakes genetic screening or monitoring and discovers that a worker has increased susceptibility but does not inform the worker, the worker can sue if he or she consequently contracts an illness because of continued workplace exposure.

Various federal statutes give employees certain rights of access to health care information possessed by their employers. Certain types of employees, such as those who have been or will be exposed to toxic substances or harmful physical agents, have a right of access to their medical records maintained by their employer under Occupational Safety and Health Act (OSHA) regulations. The regulations also require that the employer maintain such records for the duration of the employment, plus thirty years. This right of access does not apply to job applicants.

State statutes granting employees access to medical information take one or more of four approaches. They allow general access to such information; allow access when an employment decision requires the information; allow access when the worker is exposed to a potentially hazardous substance; or allow access when the worker suffers an injury.

Connecticut, Louisiana, Massachusetts, Michigan, Ohio, Rhode Island and Wisconsin provide the best examples of “general right to access” statutes, giving the employee certain rights of access to medical records in his or her employer’s possession. In addition, some states

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92 E.g., Tourville v. United Aircraft Corp., 262 F.2d 570 (2d Cir. 1959).
93 E.g., Wojak, 18 Misc. 2d at 740, 183 N.Y.S.2d at 351 (common law action may lie when tortious act was outside the scope of the worker’s compensation law).
96 Id. at § 1910.20(d)(1)(ii)(A), (B). This regulation does not apply to health insurance claims records maintained separately, nor to first-aid records. In addition, the medical records of employees who have worked less than a year for the employer need not be retained if they are given to the employee upon termination of the employment. Id. at § 1910.20(d)(1)(ii)(C).
97 Id. at § 1910.20(c)(4).
allow employees to inspect their personnel files, specifically defining such files to include medical records.\textsuperscript{99}

If an employer in Rhode Island refuses to hire an applicant or fires an applicant based on his or her genetic status, the individual has a right to that information. In Rhode Island the applicant or employee in this situation can require the employer to send a copy of all confidential health care information in its possession to the individual's physician.\textsuperscript{100} The law includes a procedure allowing the individual to correct erroneous information in those records.\textsuperscript{101} Similarly, a Nevada law allows employees to inspect any records an employer uses to determine the employee's qualification for employment.\textsuperscript{102} If an employer places a person in a particular job based on his or her genetic status, the employee can have access to that information.

At least thirteen states have laws similar to the OSHA regulations, which grant employees access to records about their exposure to potential toxins or harmful physical agents.\textsuperscript{103} Twelve of these states provide that the employer must specifically notify the employee if he or she has been or is being exposed to toxic materials or harmful physical agents at levels exceeding a prescribed threshold.\textsuperscript{104} Indiana requires notifi-
cation to the employee if he or she is "consistently" being exposed to excessive levels.\footnote{105}

If genetic monitoring reveals evidence of genetic damage, the employee may have a right to obtain information under statutes that require disclosure of injuries. In Virginia, for example, any physician who attends an injured employee shall, at the employee's request, furnish him or her with the medical report.\footnote{106} Under a Wisconsin statute, a public employer has an obligation to maintain records of work-related injuries and illnesses, and these records must be made available to the employees and the employees' representatives.\footnote{107}

The employee might also obtain information indirectly by requesting medical information that the employer is required to report to a state agency. Under a Nevada statute, for example, employees and former employees are entitled to access any records concerning them possessed by the state Division of Occupational Safety and Health of the Department of Industrial Relations.\footnote{108}

Although employees can likely gain access to employers' records about their genetic status, genetic information is difficult for lay people to interpret. Indeed, many physicians do not correctly interpret the results of genetic tests.\footnote{109} Consequently, employers (and occupational physicians) are likely to be held to have a duty to refer the worker to a genetici\textsuperscript{c}st or other health care professional who can adequately advise the worker regarding the test's significance. In a comparable circumstance OSHA, in its benzene standard, requires referral to a hematologist or internist for further evaluation if the employee's test reveals certain abnormalities.\footnote{110}

Another confidentiality problem exists regarding how employers disclose genetic information obtained through screening or monitoring. For example, if an entire group of employees is tested, but only those who test positive are given notices to report to the company physician, fellow employees will easily discover the results of other workers' tests. A better method of notifying selected employees is sending sealed notices to all employees tested, each containing an individual

\footnotesize{\begin{itemize}
\item \footnote{105}{\textit{Ind. Code Ann.} \textsection 22-8-1.1-17.1 (Burns 1987).}
\item \footnote{106}{\textit{Va. Code Ann.} \textsection 65.1-88.1 (1987).}
\item \footnote{107}{\textit{Wis. Stat. Ann.} \textsection 101.055(7)(a) (West 1988).}
\item \footnote{108}{\textit{Nev. Rev. Stat.} \textsection 618.370(1) (1987).}
\item \footnote{110}{29 C.F.R. \textsection 1910.1028(i)(5)(ii) & Appendix C (1990). \textit{See also} Testimony of the Amalgamated Clothing and Textile Workers Union, AFL-CIO on The Proposed Standard for Ethylene Oxide Before the Occupational Safety and Health Administration, U.S. Department of Labor, Docket No. H-200, July 1, 1983, at 10.}
\end{itemize}}
message regarding whether the employee tested positive or negative. With this method, everyone is treated equally because each employee receives a sealed memo.

Indeed, federal regulations recognize the importance of the manner in which sensitive information is obtained from employees. For example, when National Institute of Occupational Safety and Health (NIOSH) officials conduct hazard investigations, the employer is required to provide a suitable place to conduct private interviews and medical examinations. While the regulations do not create a legal duty for all employers, they point out the importance of the mode of collecting and disclosing information.

As part of their medical surveillance programs, companies may also store or maintain actual tissue samples (such as blood samples) for future or follow-up testing. They may use the samples to make comparisons between groups of such samples. Alternatively, the employer may use new tests on existing samples either to more accurately confirm an earlier diagnosis (for example, if a previous testing procedure was refined and made more sensitive or more accurate), or to make a different diagnosis. This storage of individuals' genetic materials raises further privacy concerns regarding notification that samples will be stored and that tests may be conducted at a later time, and proper coding of the samples so that one individual's materials are not confused with another's.

B. Disclosure to Employers

Courts have recognized the importance of employers' needs for medical information about employees. One judge even stated that "[employers] obviously have a legitimate need and even a duty to determine whether or not their employees are professionally, physically, and psychologically capable of performing their duties." When a physician is employed by a company to examine its employees, the physician's duties run primarily to the company. This might be interpreted to mean that when an employee undergoes genetic testing in the

111 42 C.F.R. § 85a.6 (1990). See also 29 C.F.R. § 1910.20(e)(1)(i) (1990) ("Employer shall assure that access is provided in a reasonable time, place, and manner.").

112 For example, it may be inappropriate to label samples with the individual's name because the laboratory technician (or company nurse) will immediately be aware of test results. A preferable method would be to label the samples with a numerical code.


114 Leonard v. Wilson, 150 Fla. 503, 509, 8 So. 2d 12, 14 (1942) (company physician who was employed and directed by employer to report result of an employee's physical exam, fell within scope of "qualifiedly privileged communication").
workplace, he or she is implicitly consenting to the release of that information to the employer.

Moreover, there are instances where physicians who are not in the employ of the company may also be allowed to disclose patient information to the employer.\(^{115}\) In Virginia, for example, a statute provides that any physician attending any injured employee shall, upon the employer’s request, furnish the employer with a copy of the medical report.\(^{116}\) If genetic damage is considered an injury, then that information could be disclosed.

On the other hand, the American Occupational Medical Association Code of Ethical Conduct (the Code) states that physicians should “recognize that employers are entitled to counsel about the medical fitness of individuals in relation to work, but are not entitled to diagnoses or details of a specific nature.”\(^ {117}\) Thus, the Code limits the kind of information a physician may disclose to a company or manager, despite the fact that the physician is paid by the company.

This approach is also codified in California. The statute provides that when an employer pays for a worker’s employment-related health service, the health care provider may disclose only certain limited information. That is, the physician may describe the worker’s functional limitations that may entitle the worker to take a leave for medical reasons or that limit the worker’s fitness to perform the present job, but the health care provider may not provide a statement of medical cause.\(^ {118}\)

C. Disclosure to Other Employees or Unions

Medical information, including records about exposure to hazardous materials or susceptibility to illness, while clearly of interest to the individual, might also be of major concern to third parties in the workplace, such as co-workers and unions. One can argue that confidential information, such as chromosomal damage to an employee, should be revealed by the physician when it places identifiable third parties, such as other workers, at risk of serious injury.\(^ {119}\) For example, a co-worker

\(^{115}\) In addition, other entities may be permitted to divulge health care information to an employer. A Connecticut statute specifically allows disclosure of information collected about an employee to the employer by, for example, NIOSH, regarding occupational illness and susceptibility to illness. Conn. Gen. Stat. § 31-383 (1987).


could avoid potentially harmful exposure, based on a worker’s experience and diagnosis. A co-worker might also be interested in medical information about a team worker in instances where the worker’s illness might put co-workers at a safety risk (such as if the worker is likely to go into a coma or faint). Construction workers who work with a partner on scaffolds have an interest in knowing if their partner is an epileptic prone to seizures. Even if the specific illness is not disclosed, the co-worker has an interest in knowing if his or her partner is taking proper medication and watching his or her diet to control the illness.

Employee genetic information might be disclosed to third parties if the underlying medical condition jeopardizes their safety. In Mantolete v. Bolger, a case dealing with the application of the federal Rehabilitation Act, the Ninth Circuit considered whether an employer could refuse to hire a woman with epilepsy because of the risk she might create to herself or others. The court said that such refusal is permissible only if the applicant could not perform the essential requirements of the job without a reasonable probability of substantial injury to herself or others, and if the employer could not reasonably avoid the risk without undue hardship. Unions also have an interest in obtaining their members’ medical records. One reason is that mandatory subjects for good faith bargaining include workplace safety and health issues. In order to fully represent membership demands, therefore, unions often want access to employee medical records. In addition, unions providing health and life insurance to their members might want medical records for underwriting decisions. They might also want to use such information in managed care and other cost containment programs.

An OSHA rule grants unions’ certified bargaining agents access to aggregated employee exposure and analysis records without individual employee authorization. The purpose of the rule is to ensure that unions have sufficient information to adequately represent their members’ interests when negotiating labor agreements. The rule does not grant comparable access to employee medical records, on the grounds that significantly greater privacy interests are involved.

Some state statutes specifically allow for disclosure of non-identifying information collected about an employee by, for example, NIOSH, regarding occupational illness and susceptibility to illness to em-

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120 Mantolete v. Bolger, 767 F.2d 1416 (9th Cir. 1985).
121 Id. at 1424.
122 Id.
123 See Rothstein, supra note 55, at 1467; Comment, supra note 41, at 773.
125 Id.
126 E.g., CONN. GEN. STAT. ANN. § 31-383 (West 1987).
ployee organizations, such as unions. In eleven\textsuperscript{127} of the states allowing employees access to information about exposure to harmful physical agents or toxins, the employee's representative (for example a union) is granted access as well.\textsuperscript{128} In Connecticut, an additional law protecting the confidentiality of employee medical records has an exception allowing the dissemination of information pursuant to the terms of a collective bargaining agreement.\textsuperscript{129}

In addition to statutes allowing disclosure of information to unions, the employer's duty to bargain collectively\textsuperscript{130} creates a responsibility to supply a union with information relevant either to the negotiation of a new contract or the enforcement of a present contract.\textsuperscript{131} If the employer refuses to release the information, the union may file an unfair labor practice charge with the National Labor Relations Board (NLRB).

The NLRB addressed the issue of union access to confidential medical records in \textit{Minnesota Mining and Manufacturing Co.}\textsuperscript{132} The union was willing to accept statistical information without identification of individual workers. The NLRB found that the employer had violated the National Labor Relations Act by not disclosing the "sanitized" medical information to the union.\textsuperscript{133}

The NLRB further held that the employer had a legitimate confidentiality claim, but balanced that interest with the union's claim that the medical information was relevant and useful to the union's performance of its statutory duties and responsibilities.\textsuperscript{134} On appeal, the court stated that the NLRB recognized that the employer has a legitimate and substantial concern in protecting the privacy of the employees' medical records.\textsuperscript{135} The appeals court found the medical information relevant to the union's duty to assure the health and safety of its members, but failed to expressly state that, as a general notion,
medical records are presumptively relevant to a union’s function.136

Unions generally do not have a professional or ethical duty to maintain the confidentiality of member records.137 Although one commentator suggests that it is unlikely the union would be subject to liability or court sanction for inadvertent leaks of confidential information,138 tort actions for invasion of privacy are possible.139 Notably, however, union attention to health and safety issues might not affect the majority of employees because only a minority of U.S. workers are organized.140 In addition, the relative attention paid to health issues as opposed to wages, job security and promotion, or vacation varies from group to group.141

D. Disclosure to the Government

The government has a strong interest in obtaining medical information about individuals. Not only does the government have regulatory authority to ensure safe workplaces, but it also provides health and disability benefits. Thus, the government plays a role in creating information networks, and it has an interest in maintaining them. Although these networks are useful to the government, they are comprised of confidential information. Accordingly, the creation of information networks must be closely linked to disclosure concerns, and confidentiality should be protected.

A governmental agency may seek genetic information about a worker under certain federal regulations that grant governmental agencies the right to obtain medical records.142 OSHA, for example, requires that employers disclose to the federal government, on demand, certain medical records about their employees.143 Courts have compelled the surrender of employee health records pursuant to OSHA demands.144 In addition, federal regulations authorize NIOSH officers conducting a health hazard investigation to “review, abstract, and duplicate records required by OSH[A] acts and regulations and any other

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136 Id. at 360-61.
137 See Comment, supra note 41, at 768.
138 Id. at 768, 769.
139 See id. 760, 769-70 & n.33; see also supra notes 27-28 and accompanying text.
141 Rothstein, supra note 55, at 1469.
related records.” Furthermore, they are authorized to conduct medical examinations of employees. OSHA grants a similar right of access to its officials. Employers must disclose employee medical records to the Occupational Safety and Health Agency. Because of statutory grants of authority, federal agencies can obtain medical records without being concerned with a privacy violation claim.

Some states allow certain agencies to collect information about workers' health. In Connecticut, for example, the Commissioner of Public Health may prescribe regulations requiring employers to measure, record and make reports on exposures of employees to toxic substances that he believes could endanger the health or safety of employees. The Commissioner may also cooperate with NIOSH in establishing programs to measure the incidence of occupational illness or susceptibility to such illness. The statute requires that the results of such testing be made available to the public without revealing the identity of the workers. In addition, it provides that the results "shall be made available to employers, employees, and their respective organizations." Similarly, in California, Cal-OSHA has a right of access to employee medical records and to exposure records.

All states require health care providers to report certain patient information to state agencies. Examples of reportable information include occupational diseases or injuries, knife, gunshot wounds and other violent injuries, communicable diseases, congenital defects, injuries from child abuse or neglect, and information relating to abortions, cancer and sometimes even prescription drugs. In some states, occupational diseases must be reported to the department of health. According to an Ohio law, for example, every physician must report the name, address and occupation of any patient believed to be suffering from an occupational disease. A similar law in Massachusetts authorizes the Department of Labor and Industries to require such reports. These statutes reflect the notion that, in certain instances, the confidentiality of an individual's medical record is subordinate to a

146 42 C.F.R. §§ 85.4(b), 85.7(c) (1990).
150 Id.
greater societal interest.\textsuperscript{155}

In addition to its access to medical information through reporting requirements, the government can collect medical information through its subpoena power. The Secretary of Labor has the authority to subpoena workplace and employment records, including employee medical records.\textsuperscript{156} The Secretary of Health and Human Services has the authority to gain access to employee medical records for public health research.\textsuperscript{157}

A body of case law exists regarding governmental attempts to gain access to employee medical records.\textsuperscript{158} Typically in these cases, NIOSH requests employee medical information in connection with a health hazard investigation, and the employer refuses to release the records (or portions of the records) on the grounds that the information is confidential. Thus, NIOSH seeks judicial enforcement of the subpoena. The employer, and not the employee whose medical information is sought, asserts the privacy rights of the employee because it is the employer, and not the employee, who is asked to supply the information.\textsuperscript{159} In addition to the privacy of its employees, an employer can assert other defenses to a subpoena, such as business usage,\textsuperscript{160} trade secret,\textsuperscript{161} and relevancy.\textsuperscript{162}

NIOSH is required to disclose results of the investigation to the employer and employees.\textsuperscript{163} Specific findings resulting from individual

\textsuperscript{155} For example, reporting of gunshot wounds promotes the greater societal interest of identifying crimes and criminals; reporting of communicable diseases assists public health officials to prevent or control the spread of such diseases. Note, \textit{supra} note 152, at 167-68.

\textsuperscript{156} \textit{See} \textit{29} U.S.C. \textit{§} 657(a), (b) (1988) (conferring broad investigatory powers on the Secretary of Labor).

\textsuperscript{157} \textit{29} U.S.C. \textit{§} 669(b), 671 (1982).


\textsuperscript{159} One court noted, "[a]s a practical matter, the absence of any notice to the employees of the subpoena means that no person other than Westinghouse would be likely to raise the privacy claim. Indeed, this claim may be effectively lost if we do not hear it now." \textit{Westinghouse Elec. Corp.}, 658 F.2d at 574 (6th Cir. 1980). Since the request for information was made to the company and not the employee, if the company had not raised the privacy claim and simply complied with NIOSH's subpoena, the privacy issue would not have been raised at all. The employees would not have known their records were released, nor would they have had the opportunity to object.


\textsuperscript{162} \textit{See} \textit{Westinghouse Elec. Corp.}, 638 F.2d at 570; \textit{Lasco Indus.}, 531 F. Supp. at 256; \textit{Allis-Chalmers Corp.}, 498 F. Supp. at 1027.

\textsuperscript{163} 42 C.F.R. \textit{§} 85.11(b) (1990) (copies of the determination will be mailed to the employer and to the authorized representatives of employees); 42 C.F.R. \textit{§} 85a.8 (1990). Vari-
medical examinations, measurements and tests will be released to company physicians, private physicians or others only if the employee gives written authorization.\textsuperscript{164} If, however, an employee shows "positive significant medical findings," NIOSH will immediately notify the employee and the designated physician.\textsuperscript{165} A summary of findings of the examinations will be sent to the individual.\textsuperscript{166}

Generally, government agencies seek medical information for legitimate reasons, such as protection of public health or other regulatory activities. However, there have been instances in which records legitimately obtained have been redisclosed to other governmental agencies for unrelated purposes.\textsuperscript{167}

In response to this, the United States Privacy Act\textsuperscript{168} restricts the type of information the federal government may collect. The Act limits agency collection of personal information to that which is relevant and necessary to accomplish a lawful purpose.\textsuperscript{169} If the information is disclosed to another agency, the written consent of the individual involved is not required if the agency uses the records only for statistical research or reporting (that is, if the records are not individually identifiable),\textsuperscript{170} the records are used for criminal or civil law enforcement activity,\textsuperscript{171} or the records are disclosed pursuant to a court order.\textsuperscript{172} Furthermore, when the government collects medical information from the health care provider, instead of from the patient, the Act does not mandate patient notification of the collection.\textsuperscript{173}

The Freedom of Information Act (FOIA) allows the public to obtain information from federal agencies. FOIA creates an exception for public disclosure of medical records,\textsuperscript{174} which applies not only to third parties, but also to individuals seeking their own medical records under the Act.

\textsuperscript{164} 42 C.F.R. § 85a.8(b)(1) (1990).
\textsuperscript{165} Id. at § 85a.8(b)(2).
\textsuperscript{166} Id. at § 85a.8(b)(3).
\textsuperscript{167} Privacy Protection Study Comm'n, Personal Privacy in an Information Society 377 (1977), cited in Winslade, supra note 18, at 511.
\textsuperscript{169} Id. at § 552a(e)(1).
\textsuperscript{170} Id. at § 552a(b)(5).
\textsuperscript{171} Id. at § 552a(b)(7).
\textsuperscript{172} Id. at § 552a(b)(11).
\textsuperscript{173} See id. at § 552a(e)(3).
E. Disclosure to Other Third Parties

1. Disclosure to Spouses

When a married individual is diagnosed as a carrier of a genetic disorder, the individual generally asks that his or her spouse also be informed.\textsuperscript{175} However, sometimes an individual may not want personal genetic information disclosed to his or her spouse. In this instance, the question is whether the health care provider can disclose this information without breaching confidentiality.

Some courts allow physicians to disclose medical information about individuals to spouses or potential spouses in order to protect them.\textsuperscript{176} The origin of this precedent is in cases allowing disclosure of communicable diseases, including disclosure of venereal disease or AIDS.\textsuperscript{177} In this context one can argue that sacrifice of confidentiality and notification of spouses and lovers is necessary for public health and welfare, and is essential to warn endangered third parties in a special relationship.

The case law supporting this approach holds that a physician has a duty to prevent the spread of infectious diseases. As a result, a physician may inform the patient’s family or third parties about a disease. In Gammill v. United States, for example, the court held that a physician is liable for failing to warn a patient’s family, treating attendants or other persons likely to be exposed to the patient.\textsuperscript{178} The physician has a duty to warn about the nature of the disease and the danger of exposure.\textsuperscript{179}

Because genetic disorders are not communicable, one can argue that there is no legitimate reason for disclosing them to a spouse.

\textsuperscript{175} Ethical Issues in Human Genetics: Genetic Counseling and the Use of Genetic Knowledge 70 (B. Hilton, D. Callahan, M. Harris, P. Condiffe & B. Berkeley eds. 1975) [hereinafter Ethical Issues in Human Genetics] (statement of J. Lejeune).

\textsuperscript{176} E.g., Curry v. Corn, 52 Misc. 2d 1035, 277 N.Y.S.2d 470 (N.Y. Sup. Ct. 1966) (during marriage each partner has the right to know about the existence of any disease which may have a bearing on the marital relation); Berry v. Moench, 8 Utah 2d 191, 531 P.2d 814 (1958). Earlier cases allowed disclosure of women’s health status to their husbands. E.g., Pennison v. Provident Life & Accident Ins. Co., 154 So. 2d 617, 618 (La. Ct. App. 1963) (“the husband, during the marriage, has a right to a full report from his wife’s doctor” since “[h]e is head and master of the community and responsible for its debts”), cited with approval in Curry, 52 Misc. 2d at 1037, 277 N.Y.S.2d at 472. This rationale was subsequently pronounced “outmoded” in MacDonald v. Clinger, 84 A.D.2d 482, 446 N.Y.S.2d 801 (1982), where a psychiatrist’s disclosure to his patient’s wife provided a basis for an action for breach of fiduciary duty. Id. at 486, 446 N.Y.S.2d at 805. The court recognized, however, that there might be circumstances when disclosure to a spouse by a psychiatrist is justifiable if there was a danger to the patient, spouse or another person. Id. at 487, N.Y.S.2d at 805.

\textsuperscript{177} See, e.g., Simonsen v. Swenson, 104 Neb. 224, 177 N.W. 831 (1920).

\textsuperscript{178} Gammill v. United States, 727 F.2d 950, 954 (10th Cir. 1984).

\textsuperscript{179} Similarly, it is argued that a physician has a duty to inform a patient’s spouse about a patient’s HIV status. Piorkowski, Between a Rock and a Hard Place: AIDS and the Conflicting Physician’s Duties of Preventing Disease Transmission and Safeguarding Confidentiality, 76 Geo. L.J. 169, 176-78 (1987).
However, the spouse might have a great interest in the genetic information because he or she would like to protect any potential children from risk.\textsuperscript{180} Because of the importance of reproductive decisions, therefore, such information is crucial to the individual. However, because the spouse is not personally at risk, the importance of genetic information should not give rise to a legal right to obtain this information from the physician.\textsuperscript{181}

2. Disclosure to Subsequent Employers

In most circumstances, it is improper to disclose medical information to a patient’s subsequent employer without his or her consent.\textsuperscript{182} However, several cases allow disclosure by physicians to employers, and these cases might authorize an occupational health care provider or an employer to provide information to subsequent employers. In \textit{Horne v. Patton}, for example, the physician disclosed the plaintiff’s longstanding nervous condition to the employer.\textsuperscript{183} The court held that the patient could maintain an action on several grounds for this breach of confidentiality, subject to a defense of supervening interests of society.\textsuperscript{184}

Not all potential interests of an employer justify disclosure. For example, in one case, defendants disclosed to the employer charges brought against an employee six years earlier.\textsuperscript{185} The Maryland Court of Appeals reversed the decision for defendants because the information did not bear on the person’s ability to perform the subsequent job.\textsuperscript{186}

\textsuperscript{180} One commentator further argues that “those who know of their carrier status also have a right to know who else are carriers so they might make an intelligent choice of a mate.” Murray, \textit{Screening: A Practitioner’s View}, in \textit{Ethical Issues in Human Genetics}, supra note 175, at 121, 128.

\textsuperscript{181} The right of reproductive decision-making is viewed as the right of the individual. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972). For example, a woman can abort without her husband’s consent even if this will interfere with her husband’s reproductive plans. Planned Parenthood v. Danforth, 428 U.S. 52, 69-70 (1976).

\textsuperscript{182} See Gellman, \textit{supra} note 18, at 263-64.

\textsuperscript{183} \textit{Horne v. Patton}, 291 Ala. 701, 287 So. 2d 824 (1973).

\textsuperscript{184} \textit{Id.} at 708-09, 287 So. 2d at 829-30. The dissent went further in the physician’s favor, opining that:

the overriding competing interest and responsibility of an employer for the welfare of all of his employees, to the public who come to his establishment and who buy his merchandise, and to the furtherance of his own business venture, should entitle him to be free from the shackles of secrecy that would prevent a physician from disclosing to the employer critical information concerning the physical or mental condition of his employees.

\textit{Id.} at 714, 287 So. 2d at 835 (McCall, J., dissenting).

\textsuperscript{185} Carr v. Watkins, 227 Md. 578, 177 A.2d 841 (1962).

\textsuperscript{186} \textit{Id.} at 584-85, 177 A.2d at 844. Note that the information released in this case was not medically-related.
3. Disclosure to Insurance Companies

The issue of insurance is related to workplace genetic screening and monitoring in two ways. First, employers might not hire or might fire workers whose genetic status indicates that they could incur health care expenses that would increase the employer's premium.\(^{187}\) This is especially likely for the approximately fifty percent of employers who self-insure.\(^{188}\) Second, insurance companies might want access to the testing results to do their own underwriting and reserve decisions about an individual. If such information is shared with an insurance company, it can be particularly damaging to those who are rejected for jobs or fired because of their genetic status. Without a job, they will not be part of a group insurance plan and will have to obtain insurance in the private market, where the same genetic information will be used to deny them coverage, to set the premium at a more expensive rate or to exclude from coverage health care benefits relating to the genetic disorder. As Oppenheimer and Padgug point out, "it is ordinary and rational insurance practice to eliminate wherever possible from coverage the highest utilizers of care, that is ironically, those who need the most care."\(^{189}\) This is what has led some states to establish state insurance plans for individuals who cannot obtain coverage through the marketplace.\(^{190}\)

While states have attempted to create a more equitable situation within the private insurance marketplace, state regulators cannot compel self-insured employer plans to provide coverage to employees. Thus, although the insurance industry is regulated by the states, the authority of state insurance commissions does not reach self-insured

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\(^{188}\) Oppenheimer & Padgug, supra note 187, at 21.

\(^{189}\) Id. at 20.


For a discussion of recent state efforts to finance health care for the uninsured, see G. Annas, S. Law, R. Rosenblatt & K. Wing, AMERICAN HEALTH LAW 159-62 (1990).
employers, whose activities are governed by ERISA. This is significant because many of the state laws and regulations which protect individuals from discriminatory and unfair practice do not apply to self-insured plans. ERISA regulations do not have the same protection, thus, the employee is left without protection from abuses by employers.

Recognizing the potential for abuse, the association of state insurance regulators, the National Association of Insurance Commissioners (NAIC), has developed a model law which restricts the dissemination of individual insurance records. However, only ten states have adopted such provisions. Currently, many insurers share data on individuals through the Medical Information Bureau (MIB), so it is likely that if one insurance company obtained data on an individual’s genetic status, others would as well.

When insurance companies make underwriting decisions, they rely on a variety of sources for medical information, including personal disclosure and general health care reports on an individual from the MIB. Individuals or groups denied coverage are not given the detailed reasons for this denial. Generally, if an individual is refused by one company as being a “high risk,” he or she will be asked on the subsequent insurance applications if he or she was ever refused insurance, and if so, why and by whom. Thus, once an individual is refused insurance by one insurer because of medical conditions, it is difficult for that individual to receive an unbiased, independent medical review from subsequent insurers.

When an employer is told of a high risk individual, this information might cause the denial of a group application for health insurance or limit coverage to only certain members of the group. There is no statutory authority to discover the information contained in MIB records. Some states, however, have taken steps to protect individuals from inaccurate and unauthorized disclosures. In Rhode Island, for example, the “Confidentiality of Health Care Information Act” allows the release of medical information to insurers only if the patient has consented in writing and the release describes the need for and purpose of

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193 Perkins, supra note 191, at 299.
194 Id. at 299-300.
196 R.I. GEN. LAWS §§ 5-37.3-1 to .3-11 (Supp. 1986).
the disclosure and the extent of the information to be disclosed. Additionally, some state laws prescribe how insurance companies should use certain genetic information. A number of states prohibit denying an individual life insurance\(^{197}\) or disability insurance\(^{198}\) or charging a higher premium\(^{199}\) solely because the individual has sickle cell trait. A California statute prohibits discrimination by insurance companies against people who carry a gene which has no adverse effects on the carrier, but which may affect his or her offspring.\(^{200}\) A related statute prohibits such discrimination by health care service plans.\(^{201}\) As various genetic markers are identified, policy issues will be raised regarding whether insurance companies should be allowed to use that information in making insurance decisions about individuals or groups.\(^{202}\)

If a law prohibiting insurers from using the results of workplace genetic tests is adopted on the state or federal level, insurers might argue that such a law unconstitutionally infringes upon their right of due process. However, such a challenge by insurers was unsuccessful in *American Council of Life Insurance v. District of Columbia*. The court rejected insurers' due process challenge to a District of Columbia law prohibiting insurers from using all AIDS-related tests for a five year period.\(^{203}\)


\(^{202}\) Currently, the national trade organization for the life insurance industry has not taken a position because they suggest that companies do not conduct genetic testing. *American Council of Life Ins., President's Report to the Board of Directors 31* (Aug. 30, 1990). The Health Insurance Trade Association is developing a position on this issue.

\(^{203}\) American Council of Life Ins. v. District of Columbia, 645 F. Supp. 84 (D.D.C. 1986) (denying insurance company's claim that a moratorium on AIDS testing for rate adjustment purposes was unconstitutional). *See also D.C. Code Ann.* § 35-230(a) (1989) (prohibits basing the decision to test for AIDS on a person's sexual orientation or other traits).
VI. THE IMPORTANCE OF PROTECTING AGAINST GENETIC DISCRIMINATION

Employees are naturally fearful that disclosure of genetic information to employers will cause adverse employment decisions. Employers often refuse to hire applicants with any health impairment, even a mild one.204 A new form of discrimination is occurring in which employers screen to reject candidates (such as diabetics) who are qualified for the job, but who are more likely to use medical benefits programs.205

The Americans with Disabilities Act (ADA),206 passed in 1990, may help contain such discrimination, as it prohibits pre-employment medical examinations and inquiries designed to uncover information about disabilities, unless the examination or inquiry is designed to reveal the applicant’s ability to perform job-related tasks.207 The ADA also prohibits discrimination against individuals with disabilities in any terms, conditions or privileges of employment. However, it is not clear whether a person with an increased risk of disease due to genetic factors will be viewed as having a disability.

The potential for discrimination on the basis of genetic information has been addressed directly by some state legislatures, which adopted statutes that prohibit discrimination in employment based on carrier status for certain genetic disorders. In the early 1970s, employers discriminated against employees and job applicants who had sickle cell trait even though that genetic trait had no relation to the individual’s ability to perform his or her job.208 Consequently, a few states have specifically adopted statutes to prohibit mandatory sickle cell screenings as a condition of employment.209 to prohibit discrimination in employment against people with sickle cell trait210 and to prohibit discrimination by unions against people with sickle trait.211

A more comprehensive New Jersey law prohibits employment dis-

204 See Weinstock & Haft, The Effect of Illness on Employment Opportunities, 29 ARCHIVES ENV'TL. HEALTH 79, 83 (1974) ("the results of this study suggest that in the area sampled, even patients with mild illnesses, which may not increase their morbidity or mortality, are being denied work").

205 See Baram, Charting the Future Course for Corporate Management of Genetics and Other Health Risks, in 3 GENETICS AND THE LAW 475, 480 (A. Milunsky & G. Anna eds. 1985).


209 E.g., FLA. STAT. ANN. §§ 63.043, 228.201, 448.076 (West 1987).


crimination based on an "atypical hereditary cellular or blood trait."\textsuperscript{212} This law would seem to prohibit the use of genetic screening results in making employment decisions, since such screening reveals the pre-existing genetic traits of the person. However, it might not provide protection against the use of genetic monitoring, which reveals damage to genetic material that arguably affects certain cells but does not make a sufficient overall change in the individual's genetic makeup to be considered a trait.\textsuperscript{213}

VII. CONCLUSION: TOWARD A MODEL LAW

There is a need for new policies protecting the confidentiality of medical information (including genetic information) obtained in the workplace, to give the employee access to that information and to protect employees from genetic discrimination. The current laws regarding the permissible disclosure of genetic information collected in the workplace vary from state to state. An analysis of the most comprehensive laws suggests the elements that would be appropriate in a model law.

A model law should provide the following protections. Job applicants and employees should be informed if they will be subjected to genetic screening or genetic monitoring. The results of such testing should be available to the employee on request, whether or not the test is undertaken by a private physician, an occupational physician or a non-physician geneticist, and regardless of the employer's motive for requiring the test. Disclosure to the employer should be limited to information about the individual's fitness to perform a particular job. Disclosure to other individuals or entities should not be made unless the employee consents. However, non-identifying genetic information (such as aggregate results on testing of many employees) may be permissibly released to employers, unions, governmental agencies and other interested bodies.

If the employee does consent, the consent should be construed narrowly. In addition, provisions should be enacted to assure that genetic information is not misused. Such a provision might prohibit employers or unions from making employment decisions based on genetic information unless the genotype has a clear relation to the capability of performing the job. Further protections from misuse could prohibit employers from using the information for health benefit decisions.

\textsuperscript{213} See OTA 1990 Report, supra note 1, at 127.