

GENETIC TESTING IN THE WORKPLACE

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1. In her excellent paper *Genetic Testing in the Workplace: The Employer's Coin Toss*, Samantha French, dealing with the position in the United States of America, states that a toss of the coin by the modern-day employer reveals two options regarding genetic testing in the workplace. The employer may choose to take advantage of increasingly precise, available and affordable genetic testing in order to ascertain the genetic characteristics – and deficiencies – of employees. This exposes the employer to a vast array of potential litigation and liability relating to the Americans with Disabilities Act, the Fourth Amendment, Title AVII of the Civil Rights Act, and state legislation designed to protect genetic privacy. Alternatively, the employer may neglect to indulge in this trend of genetic testing and may face liability for employer negligence, violations of Federal legislation, such as OSHA Regulations, and increased costs associated with insuring the health of genetically endangered employees. In the rapidly developing universe of genetic intelligence, the employer is faced with a staggering dilemma.
2. In the Republic of South Africa, Section 7 of the Employment Equity Act, 55 of 1998 (“EEA”) deals with medical testing and provides:
 - “(1) *Medical testing of an employee is prohibited, unless-*
 - (a) *legislation permits or requires the testing; or*
 - (b) *it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of a job.*
 - (2) *Testing of an employee to determine that employee' s HIV status is prohibited unless such testing is determined to be justifiable by the Labour Court in terms of section 50 (4) of this Act.”*
3. Section 1 of the EEA defines “*medical testing*” as follows:

“‘ medical testing’ includes any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition.”

4. It seems to us that genetic testing would fall within the definition of “*medical testing*” – see generally, Marylyn Christianson “*The testing of employees: The selective prohibition of medical, psychological and other testing in terms of the Employment Equity Act*” *Contemporary Labour Law*, vol 9, no. 2, September 1999 at pp 12-13. The result of this is that that section 7 of the EEA will be of application to such tests, i.e. (in the absence of legislation, which does not yet exist) genetic testing is prohibited unless justifiable under section 7(1)(b).

5. In *Joy Mining Machinery, A Division of Harnischfeger (SA) (Pty) Ltd v NUMSA & others* (2002) 23 ILJ 391 (LC), the Labour Court dealt with the first ever case under section 7(2) of the EEA, in terms of which the employer sought permission to conduct HIV tests. The court had this to say about the test of justifiability and related issues in that context in granting an order allowing the testing on the facts of the case:

“In my opinion the Labour Court, in determining whether the testing of employees for their HIV status is justifiable, will take the following considerations into account, insofar as they are applicable to the factual circumstances of the case:

- *the prohibition on unfair discrimination;*
- *the need for HIV testing;*
- *the purpose of the test;*
- *the medical facts;*
- *employment conditions;*
- *social policy;*
- *the fair distribution of employee benefits;*

- *the inherent requirements of the job;*
- *the category or categories of jobs or employees concerned.*

The court will also so wish to be informed about the following which does not go to justifiability but which is also relevant to arriving at a proper decision:

- *the attitude of the employees;*
- *whether the test is intended to be voluntary/compulsory;*
- *the financing of the test;*
- *preparations for the test, ie whether the employees are able to give their informed consent;*
- *pre-test counselling;*
- *the nature of the proposed test and procedure;*
- *post-testing counselling.”*

6. There are no other reported cases that have dealt with HIV testing and none, to the best of our knowledge, that have ever dealt with section 7(1)(b) of the EEA *per se*. The matter is thus entirely *res nova*.
7. The most that can really be said at this stage is that a company considering conducting genetic tests must:
 - 7.1. be satisfied that such tests are justifiable in the light of the requirements set out in section 7(1)(b) of the EEA read with the list of factors set out in *Joy Mining*; and
 - 7.2. have careful consideration to the ancillary factors raised by the court in *Joy Mining* in the second part of the quotation set out above.

8. Without having investigated the matter in any detail, we are of the view that the line will be very strictly drawn by the Labour Court. In this regard, we believe that the following passage from Samantha French's article, read with the changes required by the context, accurately reflects the present situation:

“Public policy underlying such statutes [those prohibiting genetic testing] is relatively clear and straightforward, with little variation among the various states. Legislators are worried about the uncertainty inherent in genetic tests, which remain relatively new and imprecise in many respects. Additionally, concern over the creation of ‘genetic underclass’ defined by genetic defects has prompted lawmakers to use caution when considering genetic testing in the work environments. Lastly, legislators are apprehensive regarding the use of genetic tests to test for conditions unrelated to job performance. Where an employee may be at risk or places co-workers at risk, the necessity for genetic diagnostic testing may be increased and its use justified.”