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## **GENETIC TESTING: IMPLICATIONS FOR THE COLLECTIVE BARGAINING RELATIONSHIP**

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### **ABSTRACT**

This article outlines issues related to genetic testing that could arise within the context of the collective bargaining relationship. After providing an overview of the Human Genome Project and genetic testing, labor and management views on such testing are discussed. The discussion primarily focuses on safety, privacy, cost control, and job design issues. As society continues to examine the impact of genetic testing, we suggest that collective bargaining positions on this technology will remain fluid.

### **INTRODUCTION**

The completion of the Human Genome Project (HGP) suggests that future collective bargaining agreements may have to consider the implications of genetic testing. This article outlines issues related to genetic testing, provides an overview of both labor and management positions on such testing, and describes the implications of the use of genetic information for collective bargaining relationships.

## Genetic Testing Overview

The goal of the HGP was to map and understand human genetic composition. The completion of the HGP in 2003 allowed specific disease-linked gene locations to be identified through testing [1]. The hope is that research to identify disease treatment will now occur. The possibility of genetic disease identification has led to discussions of the ethics of genetic testing within society in general, and within the workplace specifically [2, 3]. These discussions center, to a great extent, on discrimination and privacy, issues that are of importance in the management of human resources and therefore the collective bargaining relationship.

Brandt-Rauf and Brandt-Rauf indicate that there are health and risk management issues facing employers which make work organizations likely places for genetic testing [3]. They describe how this testing process can lead to workers' loss of autonomy and privacy. Hence, their article clearly presents the dilemma that will face many organizations: how do you keep employees healthy without harming them in other ways as well as effectively manage risk? While the question applies to any work organization, in a unionized environment, the questions will be debated within collective bargaining, therefore adding another layer of complexity.

In order to better understand genetic testing within the context of the collective bargaining relationship, one must first understand the types of genetic testing. Each type of testing could present different collective bargaining challenges. The first type, genetic monitoring, involves testing current employees for genetic changes that occur because of workplace exposure to agents such as chemicals. In this type of testing only employees exposed to chemicals or other types of workplace risks would be tested. Diamond indicates that monitoring is designed to find actual harm [4]. Employers may have a legal obligation under current laws and collective bargaining agreements to conduct such tests to prevent individuals from being harmed on-the-job.

In the second type of testing, genetic screening, individuals, regardless of job, could be tested to identify variations from a "healthy" human genotype. The genetic test is not related to a specific job process; all applicants or employees could be screened. This information, even with limited dissemination, has been perceived as leading to possible discriminatory action. Much of the debate about the use of genetic testing focuses on possible discrimination in hiring or in insurance coverage of those found to have a genetic predisposition to a disease. A variety of sources have discussed the ethical issues related to testing in considerable depth [1, 5, 6]. The reader is directed to those sources for more background on the current ethical debate. This article will now focus on genetic testing issues related specifically to collective bargaining.

## Collective Bargaining Issues

There are a variety of employment and collective bargaining concerns linked to genetic testing. At this time, these issues are primarily connected to genetic monitoring. This section will examine the interrelationship of safety, costs related to both health and doing business, risk assessment and management, privacy, and job design concerns.

As stated earlier, genetic monitoring can help to identify individuals who are at risk for developing a genetically linked disease. Organizations have legal obligations under the Occupational Safety and Health Act (1970) to “furnish each employee with conditions free from recognized hazards that may cause illness, injury, or death . . .” [7, p. 465]. Individuals who are identified as being at risk could be relocated to different environments. However, Diamond has expressed concern that such reassignment still leaves other individuals in the unchanged environment that might still be at risk [4]. For example, there are individuals who are predisposed to carpal tunnel syndrome. If these individuals were tested, the employer could have the option to move these individuals to a different job. However, those employees remaining in the original job could still develop carpal tunnel if they continue to work in the job as designed. Another option for an employer in this situation would be to modify the work environment to reduce repetitive stress for all employees once the problem is discovered. Holley and Jennings report that the Ford Motor Company paid a \$1.2 million dollar fine based on an OSHA plant inspection that found ergonomic violations [7]. In addition, Ford Motor Company had to implement an ergonomic program to improve overall conditions in the company. This suggests that not changing the environment for all employees could have significant costs for the employer. Returning to genetic monitoring, our example identifies several concerns. The testing could identify, and make public, the medical condition of employees through job re-assignment, a privacy issue. The employees left in that job (not re-assigned) might incur additional health costs for the employer, a risk management issue. Redesigning the job also accrues costs to the employer through equipment or training, a cost issue. If this redesign takes place in a unionized environment, negotiation may also have to occur to redefine the job or address issues of job security which would be both a cost and risk issue. Unions have already addressed the handling of exposure to harmful agents or toxic materials. In their contract with Chrysler, LLC, the United Auto Workers has a memorandum of understanding that provides employees exposed to these harmful materials not only the appropriate medical treatment, but access to the results of any tests relevant to that exposure [8]. The Union is working with Chrysler to manage the risk not only to the company for said exposure, but for the protection of its unionized workforce.

Although risk assessment and management has often been viewed as a management prerogative, much of the published literature on risk management for

employers focuses on employee safety [9], a topic that is also of concern for labor. Risk assessment and management tries to identify and control hazards within the work environment. Genetic testing will no doubt lead to additional aspects of hazard identification and control. As genetic tests become more precise and sophisticated, there are likely to be new ways to determine associations between different genetic conditions and disease as well as genetic conditions and sensitivity to work hazards.

For example, a recent court case that weighed the relative risk to both the employer and employee led to a 9-0 Supreme Court Case in favor of the employer's action [10]. In *Echazabal v. Chevron*, Echazabal was denied employment because he had hepatitis C. The employer claimed that the work environment would have made his condition worse. The Supreme Court said, "by hiring employees whom they know will be injured by the job, employers could be complicit in injury" [9, p. 302]. While this case is not related to genetic testing, it suggests that employers could use assorted medical tests to reduce a variety of risk exposures. In a unionized environment, labor may also have a duty to make sure that members are not exposed to injury. As workers view the union as a means to insure that their interests are represented in the workplace, issues related to their health and well-being are inherent in that relationship.

Similarly, many employing organizations are attempting to control health costs. In the past several years, the Chrysler Group (U.S.) offered 18,000 salaried workers discounts on their health insurance for the following year if they submitted to an illness-detecting blood test [11]. The workers who agreed were also required to have their blood pressure checked and be tested for diabetes and high cholesterol to earn a \$120 health care discount. Workers were also eligible to receive an additional discount for completing a life-style questionnaire. It is unclear what the next step in employee testing may be or how that information can be used. In this particular example, only salaried employees were involved. It is possible that genetic testing will be approached in a similar way since some genetically-linked diseases can be minimized through early intervention. In addition, if this information is used in relation to a medical benefits plan, collective bargaining would be involved.

Hymowitz and Bendana report that both employers and insurers use genetic testing to get more medical data on employees [12]. They note, however, that employees have privacy expectations with regard to their genetic make-up by reporting that the Supreme Court has "held that requiring employees to provide blood and body samples triggers an employee's rights against unreasonable searches and seizures under the Fourth Amendment" [12, p. 23]; on the other hand, they also report that employees and unions have requested genetic testing in hazardous work environments. It would appear that privacy versus hazard issues will be a topic for both collective bargaining and the legal system.

## Organized Labor's Views

While some labor groups, such as the European Trade Union Commission, have called for bans on genetic technology [13], other labor groups have taken positions that such testing should be part of the collect bargaining agreement [14] or have made members aware of genetic-links to diseases with which the members might be familiar [15]. While it is not unreasonable to assume that unions are likely to object to an employer's use of genetic testing to either recruit or allocate work for its membership, unions also understand that genetic testing is an issue that may present them with challenges. For example, the International Association of Machinists and Aerospace workers included a session on Genetic Testing in the Workplace at their meeting last summer [16]. To this end, future collective bargaining agreements may outline what tests can be used for specific organizational purposes. In order to better negotiate such use, an active understanding of the technology is necessary. For example, it may be more acceptable to unions that employers use genetic monitoring in hazardous work environments (e.g., nuclear plants) than in relatively safe environments (e.g., office environment).

The Brotherhood of Maintenance of Way Employees (BMWE) was involved in a lawsuit centered on the inappropriate use of genetic screening. The Burlington Northern Santa Fe Corporation [17] was found to have illegally tested employees for genetic defects (specifically, a predisposition to carpal tunnel syndrome). In an interim settlement reached with the Equal Employment Opportunity Commission through mediation, the company agreed to pay \$2.2 million to 36 workers. The company, which was found in violation of the Americans with Disabilities Act, took blood samples from employees to ascertain whether they were genetically predisposed to carpal tunnel syndrome. The BMWE claimed labor law was also violated. In an unusual settlement decision with the Union, the Railway acknowledged the need for national legislation on genetic testing in employment and agreed to send written statements reflecting this position to Congress and the President of the United States. Inclusion of this unusual term implies that the Union was not confident that any law would adequately protect workers against genetic discrimination at the time this case arose. This illustrates the role that unions may need to play in managing the use of genetic information for their constituents [18].

## Employer Views

As discussed earlier employers do have a responsibility for monitoring health hazards within their environments. Brandt-Rauf and Brandt-Rauf report that Dow Chemical Company was sued by the widow of a deceased employee who had been diagnosed with leukemia [3]. The claim was that he should have been "cytogenetically" tested because he was exposed to benzene. Holley and Jennings report that employers have been ordered by the NLRB to honor union requests for

information about industrial chemicals [7, p. 466]. If an employer does medical testing in a union environment, that information is to be accessible to employees, their representatives, and OSHA [7, p. 466]. Based on discussions concerning hazardous environments in general, it is not unreasonable to expect more organizations to consider genetic monitoring in order to minimize risk as genetic-testing technology becomes more sophisticated.

In addition, when employers identify and label individuals, issues of diversity and potential discrimination arise. The use of genetic screening is likely to be a diversity management issue because many genetic conditions have protected class links (e.g., race and gender). Nicholson indicates, "current regulations do not allow testing based on racial origin, but, for many genes, the results of the tests may help define race" [19, p. 3]. For example, in the United States it is illegal for employers and unions to use information on racial background to make employment decisions. Organizations will have to defend the use of genetic testing especially if protected classes are increasingly screened out of certain jobs as a result [1]. Flynn suggests that employers "become proactive" and clearly explain the reasons why they use genetic testing to alleviate concerns about the improper use of such technology [20].

Any organization wishing to pursue a genetic testing program would have to clearly specify the reasons for such testing. Any testing protocol that involves the perception of invasion of privacy or discrimination would face resistance by both employees and organized labor. Testing that involves keeping employees safe would no doubt be more readily accepted as long as it is clearly job-related.

### **Implications for Collective Bargaining**

According to the American Civil Liberties Union, genetic testing in workplaces is on the rise [21]. In 1982, the results of a federal government survey reported that 1.6% of companies responding were using genetic testing for employment purposes. In a similar survey conducted by the American Management Association in 1997, 6-10% of employers were found to be conducting genetic testing [21]. As testing rates rise, more collective bargaining agreements will contain language related to genetics and testing protocols. Some recent labor agreements have already started to address some of the issues raised in this article. An American Federation of State, Country and Municipal Employees (AFSCME) Local 2019 agreement with the East Bay Municipal Utility District in 2002 clearly states that there be no discrimination based on medical condition, including genetic characteristics [14].

We believe that much of the initial collective bargaining discussion will focus on the health and safety obligations as well as the privacy issues discussed above. In addition, employers and unions may find themselves interacting in new ways. For example, if genetic testing is provided to employees via medical benefits, unions and management may need to make sure that Employee

Assistance Programs are available as there are high suicide rates/psychological problems for individuals who learn they have certain conditions [1]. The parties may find that they are partners in discussions with health providers to responsibly disseminate this sensitive information.

It is also important to understand the legal context surrounding these issues from both the employer and union perspective. In many countries, there has been legislation passed that bans the use of genetic information in employment decisions in the private sector [1]. Therefore, just as in the history of safety compliance, there are likely to be legislative developments addressing the appropriate use, handling, and dissemination of genetic information. It is in these areas that unions are likely to be proactive in ensuring that employees are adequately protected and involved in the use of genetic testing as well as the information gathered as a result. Unions typically address employee concerns regarding controversial management decision making proactively through the collective bargaining process. The issue of genetic testing is likely to be brought to the bargaining table as: the tests become more reliable in assessing employee disease risk; employees want their own access to genetic testing as part of their own health care; a process for handling this sensitive information needs to be detailed; and lastly, employers increase their use of genetic screening and monitoring for job-related decision making.

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