New Developments in Employment Law

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Missouri Legislature Amends Missouri Human Rights Act & Approves Whistleblower Protection Act

In legislation approved by both the Missouri Senate and House on April 13, 2011, the Legislature has presented Governor Jay Nixon with amendments to the Missouri Human Rights Act that will overturn decisions of the Missouri Supreme Court and bring Missouri Law in line with existing federal laws prohibiting discrimination on the basis of race, color, religion, national origin, ancestry, sex, age, or disability as interpreted by federal courts. The legislation also establishes the Missouri Whistleblower Protection Act to define the claims that could be brought by whistleblowers and preclude further erosion of the employment-at-will doctrine.

Beginning with the decision of *State ex rel. Diehl v. O'Malley* in 2003, which recognized the right to trial by jury in employment discrimination cases, the Missouri Supreme Court has sought to differentiate the Missouri Human Rights Act from Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. These Missouri Supreme Court decisions resulted in a lower burden of proof, unlimited damages, and the ability to sue individuals as well as the employer, and the perception in the plaintiffs' bar that state court juries would be more receptive to discrimination claims than federal juries.

The legislation submitted to the Governor conforms interpretations of the Missouri law to federal court interpretations of analogous federal laws and imposes limits on the damages available under the Missouri Human Rights Act. Key provisions of the changes to the Missouri Human Rights Act as interpreted by the Missouri Supreme Court include:

- Moves the burden of persuasion from whether the claimed act of unlawful bias was a "contributing factor" in the challenged decision to a "motivating" factor in that decision.

- Imposes caps on damages for plaintiffs that are equivalent to those under federal law, from $50,000 for employers that employ less than 100 employees to $300,000 for those that employ more than 500 employees.

- Excludes individuals from the definition of employer.

- Requires Missouri courts to rely heavily upon judicial interpretations of federal discrimination laws.

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- Requires that, if requested, the court must give a business judgment instruction to the jury that in considering the employer's reason for the adverse action at issue, that it is not the jury's role to second-guess a business decision by the employer so long as it was not made for a discriminatory reason.

- Directs Missouri courts to utilize the summary judgment procedures of the Missouri Rules of Civil Procedure to remove factually insubstantial cases from crowded dockets, and in considering such motions, courts are to analyze the cases following U.S. Supreme Court framework, depending on the nature of the evidence.

- Precludes the award of punitive damages against the state or political subdivisions of the state.

The approved legislation also contains the Whistleblower's Protection Act to provide the sole and exclusive remedy for any unlawful employment discharge or retaliation against an individual who:

- reported to proper authorities unlawful acts of the employer or its agent,

- reported to an employer serious misconduct of the employer or its agent of "a clear mandate of public policy as articulated in a constitutional provision, statute, regulation promulgated or statute, or rule created by a governmental body," or

- refused to carryout a directive of the employer or its agent if that directive, if completed, would be a violation of the law.

This act would also protect individuals from discharge or retaliation because of that person's status as a protected person under the Missouri Human Rights Act. Damages for violations of the Whistleblower Protection Act would be limited to the caps as defined in the amendments to the Missouri Human Rights Act. The purpose of the Whistleblower's Protection Act is to "codify existing common law exceptions to the at-will employment doctrine, and to limit their future expansion by the courts."

On April 29, 2011, Governor Nixon vetoed the legislation. However, Missouri legislators have until May 13, 2011, the last day of the legislative session, to override Governor Nixon's veto. Given the number of republican legislators, a legislative override is a distinct possibility.

What This Means to You

If this legislation becomes law, Missouri employers will have greater protection against runaway verdicts, and it will be more difficult for plaintiffs to prove intentional

discrimination. In recognition of this fact, we are already seeing a great influx of case filings in state court as plaintiffs anticipate the law soon will change, and they want as many cases as possible to be filed under the existing law. Employers with their principal place of business outside the state of Missouri will have the option to remove cases from state court to federal courts, which are generally perceived to provide a more favorable venue because of the pulling of juries from a broader area and the greater likelihood that the meritless cases will be discarded by motion practice.

Missouri Workers' Compensation Law: Legislative Updates

On February 10, 2011, the Missouri House passed HB 162 seeking to overturn two recent cases that narrowed the exclusivity of remedy provisions of the Missouri workers' compensation law to allow civil claims against coworkers for their negligence, and to allow civil claims for damages for occupational diseases. A similar bill is pending before the Missouri Senate.

In 2005, the Republican-dominated Legislature passed, and Republican Governor Blunt signed into law, revisions to the Missouri workers' compensation law to modify how the law was to be interpreted, from "[A]ll provisions of the [Act] shall be liberally construed with a view to the public welfare" to "shall construe the provisions of this chapter strictly." After this change in the law, the Missouri Court of Appeals for the Western District held in *Robinson v. Hooker* that the long line of cases interpreting the workers' compensation law as covering workplace injuries brought about by the negligence of coworkers could not be sustained when the workers' compensation law was strictly construed. Therefore, the workers' compensation law was no longer the sole and exclusive remedy for such injuries, and the injured employee could pursue a tort claim against the negligent coworker.

Nothing in the *Robinson* opinion limited the protections afforded employers by the exclusive remedy provisions of the law. Nor did it deprive the injured employee of the right to receive workers' compensation benefits. All that it held was that a co-employee was not an employer, and therefore not immune from civil suit for negligence.

The effect of the *Robinson* holding was amplified by a recent ruling of a City of St. Louis Circuit Court Judge that a civil tort claim for damages due to a worker's death from asbestos exposure was not required to be filed as a workers' compensation claim (*Franklin v. CertainTeed Corp).* This ruling raised further concerns in the employer community, and gave further impetus to the legislation in the Missouri House to include language in the House Bill explicitly including occupational disease as being covered by the workers' compensation law.

Both the House (HB 162) and the Senate (SB 8) contain provisions effectively voiding the decision in *Robinson* by restoring the workers' compensation law as the sole and exclusive remedy for claims of injury based on coworker negligence. Rulings to the contrary after the change to "strict construction" were clearly unintended consequences of the 2005 amendments.

There is a significant difference between the bills on the treatment of occupational diseases.

Under the House Bill, all occupational disease claims would be covered by workers' compensation. The Senate bill explicitly excludes from the workers' compensation law, occupational diseases that are related to toxic exposure, defined as "any prolonged chemical, substance, or material exposure that can cause death, abnormalities, disease, mutations, cancer, deformities, or reproductive malfunctions in a human organism if consumed, inhaled, or absorbed by a human or when otherwise entering the human body in sufficient quantities to do so." Under the Senate Bill, a disease such as mesothelioma, a fatal lung disease believed to be brought on by prolonged asbestos exposure, would not be covered by workers' compensation.
Currently, the bills are in conference to be reconsidered before being sent to Governor Nixon.

What This Means to You

Lawsuits against coworkers for their acts of negligence remain viable under the *Robinson* decision until the legislature changes the law. There is no question employers remain protected against common law claims for death or personal injury by accident that arise out of and in the course of employment, including vicarious liability for torts committed by coworkers or supervisors. However, claims continue to be asserted against coworkers for damages beyond those available under the workers' compensation law where death or serious injury has occurred.

These coworkers, if sued, are unlikely to be insured for such claims, and unlikely to have the means to aggressively defend such claims. They are also likely to come to the employer for assistance in defending these cases. Unless and until the law is amended, employers should discuss these claims with their general liability insurance carriers and evaluate whether the employer's interests would be best served by providing a defense to the coworker. Employers should also consider including language in releases settling significant workers compensation claims that releases all employees and supervisors from personal liability.

Given the absence of direct case law to the contrary, employers should rely on the reasoning in *Idekr* and continue to seek dismissal of occupational disease cases from court proceedings on the basis that the Missouri workers' compensation law is the sole and exclusive remedy for "an identifiable disease arising with or without human fault out of and in the course of employment."

Bridge to Justice Program

As of December 13, 2010 the Department of Labor (DOL) and the American Bar Association (ABA) will assist plaintiffs in obtaining private legal counsel for claims brought under the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA).

According to the DOL, the Wage and Hour Division receives 35,000 employment-related legal complaints in a typical year – 25,000 of those complaints relate to the FLSA or FMLA. The DOL lacks the capacity to prosecute all of the claims it receives. In the past, when the DOL decided it did not have the resources to pursue a complaint, the DOL would inform the aggrieved individual of his/her right to bring a private cause of action under the FLSA or FMLA.

Now, through the Bridge to Justice program, the DOL will not only inform complainants of their right to a private cause of action, but also connect these individuals to a newly created ABA referral system that will provide access to attorneys willing to assist with their claims. When a complainant is informed that the DOL is declining to pursue a complaint, the complainant will be given a toll-free number and the opportunity to contact and retain a local, qualified private sector attorney.

In addition, where the DOL has conducted an investigation, the complainant will also receive information about any violations found and back wages owed. This information will be included in the letter informing the complainant that the DOL will not be pursuing further action, and will be immediately available to prospective attorneys deciding whether to take the case. Also, the DOL has developed a special process for complainants and representing attorneys to quickly obtain certain relevant case information and documents from the DOL's investigation.

What This Means to You

Employers should closely monitor what is provided to the DOL during an investigation. Employers must assume that any information it provides to the DOL during an investigation will not be confidential and will be made available to the complainant's attorneys. Nevertheless, you should consider adding language to the response that the information provided is for the sole purpose of responding to the claim, and is confidential and/or proprietary information that the DOL is not authorized to release without specific written authorization of the respondent. At the very least, this language will avoid a claim of waiver to future objections to the disclosure of the information.

Illinois Civil Union Law

On February 1, 2011, Illinois Governor Pat Quinn signed SB 1716, the Illinois Religious Freedom Protection and Civil Union Act ("Civil Union Act"), which will become effective on June 1, 2011. The new law provides that a "party to a civil union" is to be included in *any definition* used in state law where the term "spouse," "family," "immediate family," "dependent," "next of kin," and other terms that denote "spousal relationship," are stated. The Civil Union Act stops short of granting same-sex couples the right to "marry;" however, it does guarantee "[a] party to a civil union . . . the same legal obligations, responsibilities, protections, and benefits as are afforded or recognized by the law of Illinois to spouses."

What This Means to You

It is still too early to tell what legal challenges, if any, the Civil Union Act will face and how far reaching it will be following enactment. For example, the Illinois Family Military Leave Act (the "Military Leave Act") requires Illinois employers to provide unpaid leave to individuals if certain members of their family, including spouses, are called away on military duty. If interpreted literally, the Civil Union Act will extend the protections afforded by the Military Leave Act to couples who enter into civil unions.

In addition to determining if health and benefits plans comply with the Civil Union Act and appropriately define the term "spouse," employers should be mindful of other areas that may also be affected by the law, including, but not limited to:

- Terms and conditions of employment contracts and/or collective bargaining agreements;
- Employment tax liability, especially under state law;
- Leave of absence policies where spouse has not been defined;
- Statutory leaves such as family medical leave, leave for victims of domestic abuse, sexual assault and related crimes; and
- Other policies, such as sick leave that applies to family members' illnesses, procedures, and training.

EEOC Publishes Final Regulations Under Americans With Disabilities Act Amendments Act (ADAAA)

On March 25, 2011, the Equal Employment Opportunity Commission (EEOC), having obtained approval of the proposed final regulations by the Office of Management and Budget (OMB), published regulations interpreting the 2008 amendments to the Americans with Disabilities Act. These approved regulations, effective on May 24, 2011, closely follow the legislation overturning several restrictive court decisions and broadening employee rights under the disability laws. The ADAAA and these implementing regulations make it much easier for persons claiming disability discrimination to advance their claims. Before the ADAAA, the focus was on whether the individual making a claim under the law was a qualified individual with a disability that substantially limited a major life activity. Under the ADAAA and these regulations, the focus moves from the existence of a disability to the employer's compliance with its obligations under the law not to discriminate against and to accommodate those individuals with disabilities.

One of the most significant features of the regulations is the EEOC's decision to list what are de facto "per se" disabilities, something not contained in the ADA Amendments Act. This non-exhaustive list of conditions that the EEOC has determined to be protected disabilities under the law includes some impairments that historically resulted in some

analysis of whether there was a disability within the meaning of the law. While some of the listed conditions (deafness, blindness, missing limbs, for example) were generally conceded as disabilities, other listed conditions (such as cancer, diabetes, major depression and bipolar disorder) were subject to a more rigorous examination of whether the mere existence of the condition or impairment constituted a disability.

Keeping with the tenor of the ADAAA, the definition of "disability" in the regulations defines the sweep of the changes:

The definition of "disability" in this part [of the regulations] shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA. The primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.

29 CFR § 1630.1(4).

Similarly, whether impairment constitutes a disability under the ADA depends on whether the impairment "substantially limits an individual in a major life activity. The term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard." 29 CFR § 1630.2(j). The regulations set forth nine rules of construction of "substantially limits," among which are the following:

> The comparison is with "most people in the general population."
>
> The "threshold issue of whether an impairment 'substantially limits' a major activity should not demand extensive analysis."
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> The determination of substantial limitation is to be made "without regard to the ameliorative effects of mitigating measures (excluding ordinary eyeglasses or contacts)". However, "non-ameliorative effects of mitigating measures, such as negative side effects of medication or burdens associated with following a particular treatment regimen may be considered when determining whether an individual's impairment substantially limits a major life activity." 29 CFR § 1630.2(j)(4)(ii).
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> "An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."

29 CFR §1630.2(ii), (iii), (vi), (vii).

In determining whether there is a substantial limitation in a major life activity, the analysis can include "the condition under which the individual performs the major life activity; and/or the duration of time it takes the individual to perform the major life activity, or for which the individual can perform the major life activity" (29 CFR § 1630.2(4)(i)).

"Major life activities" as defined in the regulations are more expansive, adding sitting, reaching and interacting with others to the activities listed in the ADAAA. (29 CFR § 1630.2(i)(1)(i)) The regulations also expand the list of "major life activities" as defined in the statute to include special sense organs and skin, genitourinary, bladder, cardiovascular, hemic and musculoskeletal function, the operation of major bodily functions and systems and the operation of an individual organ within a body system. In determining a major life activity, the term "major" is not determined by reference to whether it is of "central importance to daily life." (29 CFR § 1630.2(i)(ii)(2)).

Another provision to note is the prohibition against discrimination against disabled individuals in regard to leaves of absence, sick leave or any other leave. 29 CFR § 1630.4((a)(v). The EEOC has been challenging, with some success, maximum leave time policies as violating the ADA requirement of an individual assessment of whether a reasonable accommodation is available. These regulations may provide further impetus for such claims, claims which — by their nature — may give rise to class action treatment.

What This Means to You

The ADAAA has resulted in a 23 percent increase in the number of disability charges filed with the EEOC in FY 2010 from the prior fiscal year. These regulations, while not as difficult for employers as the regulations proposed in September 2009, still place the onus on employers to demonstrate that they have complied with the ADA, as amended. Employers should reexamine their employment practices to ensure that they are consistent with the law and these regulations with the understanding that the ground rules that existed prior to January 2009 are no longer in play.

U.S. Supreme Court Rules on Retaliation by Association

In *Thompson v. North American Stainless, LP*,[2] a male employee and his fiancée worked together. Three weeks after the fiancée filed a sex discrimination charge with the Equal Employment Opportunity Commission (EEOC) against the employer, the employer terminated the male employee. The male employee argued that his discharge was in retaliation for his fiancée's filing of the sex discrimination charge. On January 24, 2011, the U.S. Supreme Court held that the male employee was a "person aggrieved" within the meaning of Title VII, and therefore could sue his employer.

Generally speaking, Title VII prohibits an employer from discriminating against any employee on the basis of any protected characteristic, including race, color, religion, sex, and national origin with respect to the employee's compensation and terms and conditions or privileges of employment. In addition, Title VII prohibits employers from taking an adverse employment action against an employee on the basis of his protected characteristic and from retaliating against an employee for bringing a charge of discrimination against the employer. Title VII permits any "person claiming to be aggrieved" by an alleged adverse employment action to filed a civil action.

[2] No. 09-291, 561 U.S. __ (2011).

In determining that the male employee was a "person aggrieved" and therefore entitled to sue the employer, the Court relied on precedent that it set in *Burlington Northern Santa Fe Railway Co. v. White*.[3] In that case, the Court held that unlike Title VII's antidiscrimination provision, the anti-retaliation provision covers any employer action that has the potential to dissuade an employee from making or supporting a charge of discrimination. Based on this interpretation, the Court explained that a reasonable employee could be dissuaded from making or supporting a charge of discrimination if he knew that either he or his fiancée could be fired for providing such support. Therefore, the Court held that the male employee was a "person aggrieved" and could sue his employer for the adverse employment action.

What This Means to You

The Supreme Court's interpretation of Title VII's anti-retaliation provision in *Thompson* means that employers now face a risk of suit every time an employee who has some connection to a different employee who files a charge of discrimination is discharged. In *Thompson,* the Court refused to identify a fixed class of relationships that could fall within the third-party retaliation scheme, however, stated that "firing a close family member" will always meet the test. Before taking an adverse action against any employee, it would be best to consider the familial or other close relationships that the individual has with other employees in the workplace who may have recently engaged in protected activity.

Recent NLRB Rulings, Proposed Rules, and Policies

NLRB Issues Ruling on Employer's Social Networking Policy

In November 2010, the National Labor Relations Board (NLRB) concluded that an employer's termination of an employee based in part on Facebook postings critical of the employer and its supervisors, was improper because such posting constituted concerted activity protected by the National Labor Relations Act (NLRA). This complaint adds another potential risk for employers utilizing Internet sources to obtain information about its employees and using that information in making employment decisions.

The rapid expansion of social media by the work force has raised significant issues for employers. Many employers have responded by developing detailed policies defining limits on an employee's rights and responsibilities, placing the employee on notice of limitations on their expectations of privacy, and obtaining express consent to the employer's access to this information. However, as this NLRB charge points out, employers must be careful that their policies are not overly broad and be aware that using information from such sites can give rise to liabilities under federal and state law.

Section 7 of the NLRA protects employees' right to engage in concerted activity for the purpose of "mutual aid and protection." Employers interfering with these rights may have violated section 8(a)(1) of the Act. It is also important to note that these rights are *not*

[3] 548 U.S. 53 (2006).

limited to the union setting. Employees are protected by Section 7 even if they are not part of a union work force.

In the case mentioned above, the company's blogging and Internet posting policies barred employees from making disparaging remarks about the company or its supervisors, and further prohibited employees from depicting the company on the internet without permission of the company. When the employee was terminated after making her remarks, she filed an unfair labor practice charge with the NLRB. The facts, according to the NLRB, were as follows: After a customer complained about the employee's conduct, she was approached by her supervisor to prepare an incident report about the interaction with the customer. The employee claimed that she had requested representation from her union, but the supervisor threatened to discipline her for making that request. After the employee went home that day, she posted negative comments on her personal Facebook page from her home computer. This posting drew responses from co-workers, which led to further negative comments about the supervisor by the employee. The employee was terminated several weeks later.

After its investigation, the NLRB determined that the postings were "protected concerted activity" within the meaning of the NLRA, and discipline taken as a result of the postings was a violation of the Act. The Board also found that the company's social media policies contained unlawful provisions, including those that barred employees from making disparaging remarks when discussing the company or supervisors, and those, which prohibited employees from depicting the company in any way on the Internet without permission. "Such provisions constitute interference with employees in the exercise of their right to engage in protected concerted activity," according to the NLRB.

What This Means to You

Social media policies must be drafted with care to be sure that they give the employees fair notice of limitations of their expectations of privacy, yet must not be so overbroad in their prohibitions as to rise to a violation of the law. Below is an example of a social media policy that is specific enough to comply with the NLRB's mandate. It is important to remember that one policy will not fit the needs of every employer. If you would like to implement a social media or online communications policy, or edit a pre-existing policy, please do not hesitate to consult with one of our attorneys.

Sample Online Communications Policy

Personal Online Communication:
[COMPANY] respects the right of employees to use online means of self-expression and communication during personal, non-work time, including email, instant messaging, text messaging, chat room postings, multi-media/social networking websites, personal and Company-sponsored websites and web logs ("blogs"). However, employees must also understand that statements made online—even during personal, non-work time—can impact the Company, its employees, and the workplace.

Employees are reminded that they are prohibited from disclosing any confidential, sensitive, or trade secret information of [COMPANY]. In addition, employees are expected to comply with all applicable Company policies when engaged in online communication, including but not limited to our Code of Conduct, EEO/Anti Harassment policy, and Confidentiality Guidelines.

In addition:

- Don't respond to negative feedback about [COMPANY]. Any official [COMPANY] response must be coordinated through [COMPANY].
- Employees may not make any postings about [COMPANY]'s services unless approved by management
- At no time (before, during, or after working hours) may employees make any postings while representing themselves as an employee of [COMPANY] or state/imply that your postings are the position of, endorsed by, or condoned by the Company unless approved by management.
- Your online postings should reflect your point of view. Because you are legally responsible for your postings, you may be subject to liability if your online post are found defamatory, harassing, or in violation of any other applicable law. When posting your point of view, you should neither claim nor imply you are speaking on [COMPANY]'s behalf, unless you receive prior authorization from [COMPANY].
- Your Internet postings cannot include [COMPANY]'s logos or trademarks, and should respect copyright, privacy, fair use, financial disclosure and other applicable laws.
- Do not post or publish confidential, private, or personal information about [COMPANY] or your fellow employees.
- Do not post or publish any information about any client of [COMPANY], whether or not you believe that the information is confidential.
- [COMPANY] shall not be held liable, under any circumstances, for any errors, omissions, losses, or damages claimed or incurred due to any of your online postings.

Employees are prohibited from engaging in personal on-line communications while using Company property or equipment and/or during working hours.

Employees who violate this Personal Online Communication policy may be subject to disciplinary action, up to and including termination. If you have questions about this policy or how it may apply to your online communications, please contact your manager and/or the Human Resources department.

Company Sponsored Online Communication Tools:

In the case of Company sponsored online communication tools, all above policies still apply. Special considerations must be taken when sponsoring, contributing content and/or monitoring such online communications; therefore any Company-sponsored online communication tool must be approved by the Communications department before it can be launched or made available for any employee or non-employee.

This policy does not apply to online communication by [COMPANY]'s marketing department that has been specifically approved by [COMPANY] management.

NLRB Issues Ruling on Secretly Tape Recording

On February 14, 2011, the NLRB issued an order that will require some employers to re-think their tape recording policies. In *Hawaii Tribune-Herald*, 356 NLRB No. 63, the Board found that an employee could not be discharged for secretly tape-recording a meeting with a supervisor, as the employer had not only violated the employee's *Weingarten* rights,[4] which were invoked in concert with the wishes of his co-workers, there was no work rule in place barring such recordings, and it was not otherwise unlawful to make such a recording in the state where the incident took place. The key to this finding by the Board is that the employee was found to be acting in concert with other employees in invoking his *Weingarten* rights. In other words, the decision has a relatively narrow focus.

However, given the speed that such decisions make their rounds across the Internet, for employers this decision will undoubtedly result in some unions informing their members to secretly tape-record any conversations with their managers that might be relevant to any workplace issues, regardless or whether the issue is common to other employees or in a disciplinary context. Even if a union is not in the picture, some employees will, after hearing of this decision, think it appropriate to secretly record workplace conversations without regard for the facts under which this case was decided. With cell phone technology being what it is today, employees can easily record or videotape such conversations or other supervisory acts going on in the workplace.

What This Means to You

This decision points out the need for properly drafted work rules regarding workplace confidentiality, including records to which employees may have access, or discussions during meetings at which they are in attendance where confidential matters are discussed. The NLRB has, in recent years, been very active in striking down overly broad work rules in this area,[5] but those which are carefully crafted can easily do the job. In addition, this case points out the fact that rules which are promulgated and enforced in direct response to concerted, protected activity,[6] will almost always be found unlawful by the Board. Most commonly, this is seen in the context of no solicitation/no distribution rules

[4] *Weingarten* Rights: A specific kind of protected concerted activity. The right of employees to have union representation at an investigatory meeting, which the employee reasonably believes may result in discipline. These rights are limited to union workplaces.

[5] *See Steeltech Mfg*., 315 NLRB 213 (1994) (holding work rule prohibiting non-disclosure of confidential information unlawful as overly broad).

[6] Protected concerted activity. A term derived from § 7 of the NLRA, which provides the basis for employees' rights in both union and non-union work environments.

being implemented in the face of the union organizing campaign. In the *Hawaii Tribune-Herald* case, the rule was implemented in the face of an employee attempting to invoke his *Weingarten* rights. So, it is important to have these rules in place. Now is the best time to reexamine employee handbooks and work rules. Below is an example of a tape recording policy that is specific enough to comply with the NLRB's mandate.

Sample Tape Recording Policy

We encourage open communications among employees and between employees and management. This policy is intended to facilitate such open communication and to ensure compliance with applicable federal, state, and local wiretapping, eavesdropping, and/or privacy laws.

Without the prior written approval of [COMPANY], employees are prohibited from taping or otherwise recording (whether opening or secretly) any conversation, communication, activity, or event that occurs in [COMPANY]'s facilities and/or is directly or indirectly related to [COMPANY]'s business.

This policy applies regardless of whether the conversation, communication, activity, or event occurs in person, over the telephone, or via any other communication device or equipment and regardless of the method used to tape or record the conversation, communication, activity, or event (*i.e.*, tape recorder, cellular telephone, video recorder, mechanical recording, or wiretapping equipment).

Any employee, including but not limited to staff, employees, supervisors, managers, and/or senior managers who violate this policy may be subject to disciplinary action up to and including discharge.

NLRB Proposes Rule to Require Employers to Post Notice of Employees' Right to Unionize

Acting in part on a response to a petition filed on February 9, 1993 by Professor Charles L. Morris, the NLRB published notice of a proposed rule in the Federal Register on December 22, 2010, requiring employers subject to the NLRA to post a notice advising their employees of their rights under the NLRA to unionize, bargain collectively, picket or strike, and of their rights to be free from adverse actions from their employer for engaging in actions protected by the NLRA. Federal contractors have been required to post such a notice of rights under the NLRA pursuant to Executive Order 13496, issued January 30, 2009 and effective June 21, 2010.

The NLRA, enacted in 1935, did not include posting requirements. Almost all more recent federal employment laws (the Fair Labor Standards Act, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, the Occupational Safety and Health Act, the Americans with Disability Act, the Family and Medical Leave Act, the Uniformed Service Employment and Reemployment Rights Act, the Railway Labor Act, the Employee Polygraph Protection Act and the Migrant and Seasonal Agricultural Workers Protection Act) or implementing regulations have required that employers

subject to these Acts be advised of their rights by posting in areas where the information is readily accessible to the employees. The proposed regulation is intended to include rights under the NLRA in the required notices.

The content of the proposed notice is set forth in Appendix A to the proposed regulation, and includes:

The right to organize, form or assist a union

The right to bargain collectively with the employer

The right to discuss the terms and conditions of employment or union organizing with co-workers or a union

The right to strike and picket for lawful purposes

The right to be free from employer interference or reprisal for engaging in conduct protected by the Act

The right to be free from unlawful actions by the union

Information on how to contact the NLRB

In addition to the physical posting of the notices, an employer that regularly communicates with its employees electronically will be required to also post the notice electronically, and if a significant portion of the employees are not proficient in English, they will be required to post the notice in the language which those employees speak. Translations of the notice will be provided by the NLRB.

The regulation will apply to all employers, including those already unionized. The only exceptions are those exempt from the NLRA (federal, state and local governments, Federal Reserve banks, employers subject to the Railway Labor Act, employers of agricultural workers, race tracks and small employers over which the NLRB has chosen through regulation or adjudication not to assert jurisdiction).

Employers not in compliance with the regulation when adopted and effective, would not be subject to a fine or penalty, but the failure to post would permit the NLRB to extend the six-month statute of limitations for filing an unfair labor practice against the employer, and could be used by the NLRB as evidence of an unlawful motive by the employer in an unfair labor practice case involving other alleged violations of the NLRA.

What This Means to You

Until the regulations are finalized and effective, no action on your part is necessary. If and when the regulation becomes effective after the comment period, we will advise you of the requirements of the final regulation and its effective date.

Three Policy Measures From the NLRB's General Counsel

Acting General Counsel of the Labor Relations Board Mandates Default Language in All Settlement Agreements of Board Charges, Challenges State Laws Mandating Secret Ballots in Representation Elections and Recommends the Board No Longer Automatically Defer to Arbitrations and Grievance Settlements in Unfair Labor Practice Cases.

On June 21, 2010, President Obama appointed Lafe E. Solomon, a career attorney at the NLRB, as the Acting General Counsel, and on January 5, 2011, nominated him to serve as General Counsel. Since his nomination, Solomon has issued three significant directives and recommendations that could have significant implications for employers with union-represented employees.

Mandatory Settlement Default Provisions

On January 12, 2011, Solomon issued Revised Casehandling Instructions Regarding the Use of Default Language in Informal Settlement Agreements and Compliance Settlement Agreements, requiring all NLRB offices to include language in settlement agreements that would provide for a default procedure against the charging party or respondent that was either unable or unwilling to fulfill obligations agreed to in the settlement agreement. The General Counsel's memorandum notes that eight of the NLRB's regional offices already propose or require default language in settlement agreements, and states that adoption of this default procedure language would result in uniformity in all settlement agreements and "considerable savings of resources and avoidance of delays in the event of a breach of the settlement agreement in requiring the inclusion of default provisions in such agreements and enforcing such provisions in a summary proceeding in the event of a breach." The required provision is as follows:

"The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party/Respondent, the Regional Director will [issue/reissue] the [complaint/compliance specification] previously issued on [date] in the instant case(s). Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the [complaint/compliance specification]. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned [complaint/compliance specification] will be deemed admitted and its Answer to such [complaint/compliance specification] will be considered withdrawn. The only issue that may be raised before the Board is whether the Charged Party /Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the [complaint/compliance specification] to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte."

Although similar language is often included in many settlement agreements, it is most likely to impact the employer respondent who in almost all instances is the party with the obligations under the agreement. As such, it is much more likely to be invoked by the union as a tactical weapon.

Preemption of State Laws Mandating Secret Ballots in Union Elections

In the Fall of 2010 elections, four states—South Dakota, Arizona, Utah and South Carolina—in response to concerns about the Employee Free Choice Act (EFCA) legislation, enacted state laws that require union elections be conducted only by secret ballot. By letters dated January 13, 2011 directed to the Attorneys General of those four states, Acting General Counsel Solomon gave notice that it was the NLRB's position that the NLRA preempts these state laws. Solomon's letter noted that under the Act and U.S. Supreme Court rulings, federal law "provides employees two different paths to vindicate their Section 7 right to choose a representative: certification based on a board-conducted secret ballot election or voluntary recognition based on other convincing evidence of majority support." Because the state laws preclude the right to organize on the basis of voluntary recognition under federal law, it is the NLRB's position that these laws are preempted by the Supremacy Clause of Article VI of the U.S. Constitution.

Solomon's letter requested the Attorneys General agree to "a judicially sanctioned stipulation concerning the unconstitutionality of these amendments" within two weeks of receipt of the letter, and if those were not forthcoming, he would initiate civil actions in federal courts to invalidate the state statutes.

Solomon has since announced his intent to initiate lawsuits against two of those states – South Dakota and Arizona. He will hold off on filing similar lawsuits against Utah and South Carolina "to conserve limited federal and state agency resources and taxpayer funds." However, he maintains that all four state constitutional provisions are preempted and reserves the right to initiate lawsuits against Utah and South Carolina at some point in the future.

Limits on Deferral to Arbitration Procedures and Grievance Settlements of Unfair Labor Practices

On January 20, 2011, Solomon issued Memorandum GC 11-05 "Guideline Memorandum Concerning Deferral to Arbitral Awards in Grievance Settlements in Section 8(a)(1) and (3) Cases." These sections of the NLRA make it an unfair labor practice for an employer to discriminate against or otherwise interfere with, restrain, or coerce employees to engage in concerted activity. The NLRB has a long practice of deferring to the parties' resolution of NLRA rights. The Acting General Counsel believes that the NLRB should not defer to the settlement of claims unless the party urging deferral meets the burden of demonstrating that the statutory rights under Sections 8(a)(1) and (3) have adequately been considered:

"Specifically, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have

adequately been considered by the arbitration. This includes not only cases involving Section 8(a)(1) and 8(a)(3) discipline and discharge, but also other cases involving Section 8(a)(1) conduct that is subject to challenge under a contractual grievance provision."

Memorandum GC 11-05 recognizes that if the NLRB adopts this recommendation, then in cases where the regions would normally defer consideration and investigation to pre-arbitral procedures under the *Collyer* and *United Technologies* decisions, in cases brought under 8(a)(1) and (3), the regions should take affidavits from the charging party and from all witnesses within the control of the charging party before a determination to defer is made. Moreover, in all pending and future cases deferred to arbitration, the region should review the arbitration award to determine if (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) the arbitrator correctly applied the statutory principles in deciding the issues; and (3) the arbitral award is not clearly repugnant to the NLRA. The region's recommendation would then have to be submitted to the NLRB's Division of Advice for review.

What This Means to You

The mandatory settlement language leaves no discretion with the regional offices of the NLRB. When an employer settles with the NLRB, unions can use either the threat of a claim of default or file for default against the employer. Should this occur, it may well make employers less inclined to enter into settlement agreements or settle only when there are conditions or contingencies in the agreement to its obligations to perform. However, the delays and costs to employers of litigating charges are likely to significantly deter the benefits of prompt and certain resolution of these disputes.

The preemption battle lines have now been drawn, and it will be up to the courts to decide. There have been judicial limitations to the breadth of Constitutional preemption where the state law did not intrude on the regulatory scheme, but by and large preemption remains a significant legal impediment to these attempts to limit or amend federal law.

The recommendation concerning deferral to arbitral awards and grievance settlements will not come into play unless and until the NLRB accepts the guideline recommendation of the Acting General Counsel. As his memorandum recognized, the NLRB has limited agency resources that are not likely to expand in this cost-cutting political environment. The NLRB may well decide it is more prudent to retain the benefits of arbitration and settlement and rely upon the aggrieved parties to ensure that rights under Sections 8(a)(1) and (3) are enforced.

Ten Changes in Place or Coming With the Occupational Safety and Health Administration

"There is a new sheriff in town…Make no mistake about it, The Department of Labor is back in the enforcement business. We are serious, very serious."

Secretary of Labor Hilda Solis, June, 2009

Introduction

Under the Obama Administration, the Occupational Safety and Health Administration (OSHA) has been much more aggressive in citing and pursuing penalties against employers. Led by Secretary of Labor Hilda Solis, the Agency's leadership has made it clear that they are dissatisfied with OSHA's penalty structure (which they believe imposes inadequately low penalties), and that they believe employers have been lax in compliance. When addressing the convention of the union American Federation of State, County and Municipal Employees (AFSCME), Assistant Secretary of Labor Jordan Barab told the group of union leaders "You are not alone. We have your back and your fight is our fight." Mr. Barab is the former director of AFSCME's Safety & Health Program for six years before becoming a Health & Safety specialist for the AFL-CIO. The Assistant Secretary of Labor for OSHA, David Michaels, an epidemiologist and former professor at George Washington University, has been described by the *Washington Times* as "a virulently anti-business epidemiologist." He is the author of the book *Doubt Is Their Product: How Industry Assault on Science Threatens Your Health.*

With backgrounds like these, and after making chest-thumping remarks at the outset of their service to the agency, OSHA's new leaders are changing the way this agency goes about its business. Several changes have already been implemented in connection with OSHA's approach to enforcement and others are on the way. Here is our view of the top ten.

Ten Changes Already in Place or Coming

1. Severe Violators Enforcement Program.

   This program, rolled out in the fall of 2010, targets recalcitrant employers. OSHA may increase its penalties four-fold under this new program. Coverage will be triggered in the event of a fatality or in the event of catastrophes resulting in at least one Willful, Repeat, or Failure-to-Abate citation. Under this approach, OSHA will take a corporate-wide inspection strategy, potentially inspecting every workplace owned by the company.

2. Criminal Referrals.

   OSHA has already begun working more closely with the Department of Justice to increase the number of criminal actions. If a case involves a fatality and a Willful citation, consideration for a criminal referral is automatic. In our experience, citations with more than one Willful citation/item are sometimes being considered for criminal referral as well.

3. Possible Increases in Civil and Criminal Penalties.

OSHA supports legislative efforts to increase civil and criminal penalties. The average civil penalty is now less than $1,000, which the Agency's leaders do not believe provides a sufficient deterrent. Pending legislation, if passed, would increase the maximum penalty for a "Serious" violation from $7,000 to $12,000. In the case of "Willful" violations, the penalty would increase from $70,000 to $250,000. Agency leaders are not waiting for the new penalty structure to make its way through Congress. In the last 16 months, OSHA has been issuing multiple Citation/Items for the same basic violation or the same set of circumstances in order to generate higher proposed penalties.

4. Informal Settlement Conferences Are Becoming Less Productive

OSHA headquarters has issued a mandate for tougher settlement negotiations. In our experience, OSHA Area Directors remain willing to meet and confer, but their counteroffers on penalty amounts, in particular, are very limited. The settlement of Willful violations has become nearly impossible at the Informal Settlement Conference stage. More cases than ever are being contested.

5. Inspections Are More Intrusive, Time Consuming and Probing.

OSHA has hired more inspectors, and we expect a record number of investigations to be conducted during this fiscal year. Last year, more citations were issued for Serious, Repeat, and Willful violations than ever before in OSHA's history. In addition, the total amount of penalties are higher.

6. Violations Are More Likely to be Characterized as Willful.

7. OSHA's "Lookback" Period for Repeat Violations Has Been Extended From Three Years to Five Years.

8. OSHA is Putting More Pressure on State Plan States to be More Aggressive.

In a case we defended last year, Nevada OSHA informed us that Federal OSHA had issued a mandate not to group citations, but to issue separate citations were the state program had, in the past, found it appropriate to group. Separate penalties were charged, of course for each item which had previously been grouped.

9. The Agency Believes There is Widespread Cheating on Injury and Illness Logs.

As a result, OSHA inspectors are routinely asking for copies of each employer's OSHA 300 Logs (and related documentation) at the beginning of inspections. Expect an inspector to request at least three years of 300 Logs, and possibly five.

10. National Emphasis Programs Are on the Rise.

The Agency appears to be enamored with national emphasis programs under the Obama Administration. Examples include Process Safety Management Compliance Programs at Refineries and Combustible Dust Hazard Emphasis Programs at grain handling facilities.

What happens when OSHA expands its penalty structure by issuing multiple citations?

- BP agreed to pay $50.6 million after the Texas City, Texas explosion.
- Kleen Energy was fined $16 million after a power plant explosion killed six workers.
- Imperial Sugar agreed to pay over $6 million after an explosion killed 14 workers.
- Sea World was fined $75,000 following the death of an animal trainer.

Penalties are also increasing in cases which do not involve fatalities or major catastrophes.

- A farmer-owned cooperative was fined over $1 million.
- Whitesell Corporation was fined $3 million in connection with alleged amputation and noise hazards.
- Goodman Manufacturing received a $1.2 million proposed penalty for alleged inadequate recordkeeping.
- Scuba Clean, Inc., a company in the boat maintenance business, received a proposed penalty of $200,000 for alleged inadequate training.

Producing Medical Records in Response to Subpoenas

In an administrative appeal decision issued on January 11, 2011, the EEOC ruled that an employer providing medical records pursuant to a subpoena issued by a court of law, but without the employee's written consent, violates the privacy provisions of the Americans with Disabilities Act (ADA), and directed that the employee be given the opportunity to establish entitlement for compensatory damages and attorney fees for the unlawful disclosure.

Although this was a ruling in a federal government discrimination claim, and not a court decision, employers would be prudent to consider how this ruling could impact its responses to discovery requests and court and administrative subpoenas.

This ruling came in the EEOC's consideration of an appeal of an administrative claim of discrimination raised by a Postal Service employee for violations of the Rehabilitation Act of 1973 and the Age Discrimination Act. Among the issues presented by the appeal to the EEOC was whether the Postal Service had violated the Rehabilitation Act when it released the employee's medical information in unrelated litigation between the employee and a third party in response to a lawfully obtained court subpoena. The subpoena requested production of the employee's payroll and personnel records, including his medical records. The Postal Service complied with the subpoena and produced the medical records along with the other requested documents. Although the employee had not provided written authorization for the release of those records, neither his counsel in the claim against the third party nor the Postal Service objected to the production of the medical records.

When determining whether the production of medical records violated the privacy provisions of the Rehabilitation Act (which incorporates the provisions of Title I of the ADA) the Postal Service decided there was no violation because it was under legal compulsion to produce the records and therefore no written release was required. This ruling was appealed by the employee to the EEOC pursuant to the administrative procedures for the Postal Service.

In its decision, the EEOC determined the disclosure without the written release of the employee was a violation of the ADA, and held that a subpoena issued by a court clerk does not fall within the exceptions in the law: "A request for an employee's medical records pursuant to a discovery request in a civil action would not fit into one of the exceptions to the ADA's confidentiality requirement." The EEOC also concluded that a discovery request pursuant to a subpoena does not fall within the exception under the Privacy Act for disclosures "pursuant to the order of a court of competent jurisdiction" because there was no court order, only a clerk-issued subpoena provided at the request of the third party's attorney.

What This Means to You

This administrative decision by the EEOC signals how the agency will view disclosures made pursuant to a subpoena without written authorization of the involved employee. Employers who respond without the written authorization will be exposed to claims for compensatory damages and attorney fees, even when the disclosure was made in good faith that compliance was required by the subpoena. Given the number of statutes that protect medical records from disclosure (the ADA, the Rehabilitation Act, HIPAA, the Family and Medical Leave Act, and the Genetic Information Nondisclosure Act, to name a few), employers should establish internal procedures to ensure that medical records privacy law and regulations are not violated by the tender of protected documents pursuant to subpoenas or discovery requests during litigation or administrative proceedings. Such procedures should also ensure that inadvertent disclosure of medical records misfiled in personnel files rather than in the required limited access medical record files, does not occur.

EEOC Issues Final Regulations Implementing the

Genetic Information Nondiscrimination Act of 2008 (GINA)

On November 9, 2010, the Equal Employment Opportunity Commission ("EEOC") published its final regulations implementing the Genetic Information Nondiscrimination Act of 2008 ("GINA"). GINA, which became effective on November 21, 2009, precludes covered entities (employers, unions, employment agencies and joint apprenticeship organizations) from requesting or obtaining an individual's genetic information and from making any employment decisions on the basis of such information. Although the final regulations are largely consistent with the proposed regulations, there are a few significant changes. The more significant changes are noted below.

Significant Changes

1. *Section 1635.1. Purpose*:

   Because a violation of GINA can occur without specific intent to acquire genetic information, the reference to "deliberate acquisition" of genetic information in the proposed regulations was removed.

2. *Section 1635.2. Definitions - General*:

   The final regulations make it clear that the term "employee" extends to applicants and former employees.

3. *Section 1635.3(a). Family Member*:

   The EEOC has determined that dependents covered by Title II of GINA are limited to persons who are or become related to an individual through marriage, birth, adoption or placement for adoption.

4. *Section 1635.3(b). Family medical history*:

   Although the statute did not contain a definition of "family medical history," the EEOC's definition protects the employee from the discriminatory use or disclosure of genetic information obtained from a family member who is also an employee of the covered entity.

5. *Section 1635.3(c). Genetic Information*:

   Information obtained by the employer about race and ethnicity not derived from a genetic test (obtained in connection to health or genetic services being provided on a voluntary basis) is not genetic information within the meaning of GINA.

6. *Section 1635.3(d). Genetic Monitoring*:

A covered entity may acquire genetic information as part of genetic monitoring required by law or voluntarily undertaken provided certain conditions are followed to protect disclosure of individual genetic information.

7. *Section 1635.3(g). Manifestation or Manifested*:

The final rule includes a definition of this term to mean, with respect to a disease, disorder or pathological condition, "that an individual has been or could reasonably be diagnosed with the disease, disorder, or pathological condition by a health care professional with appropriate training and expertise in the field of medicine involved.

Thus, where a diagnosis of a disease, disorder or pathological condition depends on both the presence of signs and symptoms *and* genetic information, then it will be considered manifested within the meaning of GINA. The fact that an individual has the disease will not be considered genetic information, nor will information about the signs or symptoms the individual has.

8. *Section 1635.4. Prohibited practices – In general*:

The final rule makes it clear that harassment on the basis of genetic information is a violation of GINA.

9. *Section 1635.5. Limiting, segregating and classifying*:

This section confirms that neither the statute nor the final regulation creates a cause of action for disparate impact. The regulation also clarifies that limitations or restrictions on an employee's job duties based on genetic information as required by law or regulation mandating genetic information, such as regulations administered by the Occupational and Safety Health Administration (OSHA), is not a violation of GINA.

10. *Section 1635.8. Acquisition of genetic information*:

The prohibition against acquisition of genetic information applies to the family members of individuals, as well as to that of the individuals themselves. The rule also interprets a "request" for genetic information to include conducting an Internet search in a way that is likely to result in obtaining genetic information, actively listening to third-party conversations, searching personal effects to obtain genetic information and making requests about current health status in a way likely to result in obtaining genetic information.
The following are exceptions to the prohibition against the acquisition of genetic information.

- Social Media: The final rule provides a safe harbor where information is acquired through a social media platform from which a covered entity unwittingly receives genetic information.

- Authorized Requests for Medical Information: The final rule provides a safe harbor where the genetic information is received in response to a lawful request provided that the requesting entity makes it clear in the request that genetic information is not to be included in the response.

  Specific approved language is included in the final regulation, 1635.8(b)(1)(i)(B):

  "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information,' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

  This warning language is *required* where a covered entity requests a healthcare professional to conduct an employment-related medical examination on its behalf.

- Wellness Programs: A covered entity may obtain genetic information as part of a voluntary wellness program with prior knowing, voluntary, and written authorization from the individual, which the regulations clarify can be in electronic format. An employer may not offer a financial inducement to provide genetic information, but may offer financial inducements for completing a health risk assessment, provided that the inducement is available to those individuals who do not respond to the genetic information questions.

- Family and Medical Leave Act: Family medical history received from individuals requesting leave to care for a family member under the FMLA or similar state or local law would not constitute a violation of GINA. This exception applies to an employer that is

not covered by FMLA or comparable statute provided it has a policy of allowing leave to care for ill family members.

- Commercially and Publicly Available Information: The final rule creates a safe harbor for genetic information that is commercially and publicly available. However, the rule makes it clear that the exception does not apply where the information acquired from commercially and publicly available sources is obtained with the intent of obtaining genetic information.

  Specifically, this exception does not include genetic information contained in medical databases or court records. Media sources (e.g. Facebook, Linked In, My Space) where access to that information requires permission of an individual or is conditioned on membership in a protected group, are not deemed commercially and publicly available and not an exception to GINA.

11. *Section 1635.8(d)*:

This section was added to cover situations where external healthcare professionals conduct examinations for covered entities and request genetic information, including family history, as part of that examination.

The final rule requires the covered entity to advise the healthcare professional not to request genetic information as part of a medical examination intended to determine the employee's ability to perform a job. Additionally, the covered entity must take additional measures as necessary to preclude that practice, including no longer using the services of healthcare professionals who continue to request the information after being advised not to do so.

What This Means to You

It is important that employers make sure their human resources and management employees become familiar with the obligations under the law and the final regulations that became effective on January 10, 2011. Employers should be sure that any requests for medical information use the "safe harbor" language approved by the EEOC in Section 1635.8(b)(1)(i)(B), the text of which is included above. Standard form waivers and releases should include references to claims under GINA, and employee records should be reviewed to ensure that genetic information and other medical information is maintained in a separate file as required by both GINA and the ADA.