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January 2011

LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

New Regulations

Final GINA Regulations Now In Effect

On January 10, 2011, the EEOC's final regulations implementing Title II of the Genetic Information Nondiscrimination Act of 2008 ("GINA") took effect. GINA, like the Civil Rights Act of 1964 as amended, applies to employers with 15 or more employees during 20 or more calendar weeks this year or last year. It does not apply to an Indian tribe, or a bona fide private club that is exempt from taxation under §501(c) of the Internal Revenue Code of 1986. The regulations are available from the EEOC web site, www.eeoc.gov. Following is an excerpt of a summary from the EEOC's web page:

Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the

use of genetic information in making employment decisions, restricts employers and other entities covered by Title II (employment agencies, etc. referred to as "covered entities") from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

Definition of "Genetic Information": Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e. family medical history). Genetic information also includes an individual's request for, or receipt of, genetic services.

Discrimination Because of Genetic Information: The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment, including hiring, firing, pay, job

assignments, promotions, layoffs, training, fringe benefits, or any other term or condition of employment.

Harassment Because of Genetic Information: Under GINA, it is also illegal to harass a person because of his or her genetic information. Harassment can include, for example, making offensive or derogatory remarks about an applicant or employee's genetic information, or about the genetic information of a relative of the applicant or employee. The harasser can be the victim's supervisor, a supervisor in another area of the workplace, a co-worker, or someone who is not an employee, such as a client or customer.

Retaliation: Under GINA, it is illegal to fire, demote, harass, or otherwise "retaliate" against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination.

Rules Against Acquiring Genetic Information: It will usually be unlawful for a covered entity to get genetic information. There are six narrow exceptions to this prohibition:

- Inadvertent acquisition of genetic information.
- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain specific requirements are met.
- Family medical history may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member with a serious health condition.
- Genetic information may be acquired through commercially and publicly available documents like newspapers, as long as the employer is not searching those sources with the intent of finding genetic information or accessing sources

from which they are likely to acquire genetic information.

- Genetic information may be acquired through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace where the monitoring is required by law or, under carefully defined conditions, where the program is voluntary.
- Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted, but the genetic information may only be used for analysis of DNA markers for quality control to detect sample contamination.

Confidentiality of Genetic Information: It is also unlawful for a covered entity to disclose genetic information about applicants, employees or members. Covered entities must keep genetic information confidential and in a separate medical file. (Genetic information may be kept in the same file as other medical information in compliance with the Americans with Disabilities Act.) There are other limited exceptions to this non-disclosure rule, such as exceptions that provide for the disclosure of relevant genetic information to government officials investigating compliance with Title II of GINA and for disclosures made pursuant to a court order.

The regulations contain a "safe harbor" provision for employers that inadvertently receive genetic information in response to a lawful request for medical information. Under the regulations, such an acquisition of genetic information will only be considered inadvertent if the request for medical information explicitly notifies the employee or health care provider not to respond with genetic information. Employers may include the following EEOC-approved language in their requests for medical information to satisfy this notice requirement:

*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.

While the information contained in any inadvertent disclosure by a health care provider must be maintained as confidential, employers will be shielded from GINA liability by including this safe harbor language in their medical requests.

Computer Fraud

Eleventh Circuit Provides Guidance on Computer Fraud and Abuse Act

The 11th Circuit upheld the Computer Fraud and Abuse Act (“CFAA”) conviction and one -year prison sentence of a former Social Security Administration (“SSA”) employee who accessed the agency’s computer for non-business reasons. A critical element to prove a theft of data under the CFAA is that the defendant accessed the computer without authorization or exceeded authorized access. Previous cases have held that since an employee is permitted as part of his job to access the company computer, an employee cannot be found to have violated the CFAA. The 11th Circuit rejected this argument. While the CFAA is primarily a federal computer crime statute, it provides for civil

remedies for anyone injured by a violation of the statute. Title 18, U.S.C. § 1030(g).

The defendant in this case had worked at the SSA as a telephone service representative. His job was to respond over the phone to questions from the public about their social security benefits. As a part of his duties, he had access to SSA databases that contained sensitive personal information, including any person’s social security number, address, date of birth, father’s name, mother’s maiden name, amount and type of social security benefit received, and annual income. The SSA policy on access to its computers stated: employees are prohibited from obtaining information from its databases without a business reason. Further, the SSA informed its employees about its policy through mandatory training sessions, notices posted in the office, and a banner that appeared on every computer screen daily and also required employees annually to sign acknowledgment forms after receiving the policies in writing. The SSA warned employees that they faced criminal penalties if they violated policies on unauthorized use of databases.

The defendant refused to sign the acknowledgment form. At trial the prosecution showed that the defendant had accessed the personal records of 17 different individuals for non-business reasons on multiple occasions. All 17 of the individuals were women — his former wife, former girlfriends or women for whom he had a romantic interest. One of these women testified at trial that she received a letter from the defendant at her home address and was shocked because she had not given him her address, she ordinarily receives all her mail at a post office box, and her middle initial was on the envelope although she had not used it since grade school. Another woman testified that she received flowers from the defendant at her home and he showed up on her doorstep although she had not given him her address. The court specifically found that based on SSA’s policy that “use of databases to obtain personal information is authorized only when done for business reasons” and the plain language of the

CFAA, the defendant had exceeded his authorized access to the SSA's database. *U.S. v. Rodriguez*, 2010 WL 5253231 (11th Cir. Dec. 2010)

Lessons can be learned from this case. Employers need to have a policy regulating employees' use of their confidential and proprietary information, and restricting access to that information to legitimate business reasons. This policy should be reinforced regularly in a variety of ways including monitoring employees' use of data bases and other sources of confidential and proprietary information.

Retaliation

No Nexus To Compensation Bias Complaints Shown

A female doctor complained that a hospital's compensation system discriminated against women. The doctor argued that she engaged in protected activity when she complained that the hospital's system of paying equal compensation to all doctors in the obstetrics department discriminated against female doctors because they delivered more babies than male doctors delivered. The appellate court agreed, however, the court ruled that the doctor failed to show a

causal connection between her complaints and her discharge. The hospital argued that it fired her because of her hostility toward the nursing staff and patients. Although the doctor asserted that there was temporal proximity between her latest complaint and the hospital's decision, "suspicious timing alone is almost always insufficient to survive summary judgment," the court said. The doctor had been complaining about the compensation system for years before the hospital fired her, the court noted, adding that the hospital had been dissatisfied with her interpersonal flaws for a long time. *Leitgen v. Franciscan Skemp Healthcare Inc.*, No. 09-1496 (7th Cir. January 2011)

Miscellaneous

EEOC Statistics

The U.S. Equal Employment Opportunity Commission (EEOC) has announced that private sector workplace discrimination charge filings hit the highest level ever with 99,922 filed during fiscal year (FY) 2010. Last year retaliation under all statutes (36,258) surpassed race (35,890) as the most frequently filed charge, while allegations based on religion (3,790), disability (25,165) and age (23,264) increased.