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Labor and Employment Update: Congress Passes the Genetic Information Nondiscrimination Act of 2008 and the Supreme Court Expands Employees' Ability to Bring Retaliation Claims

Genetic Information Nondiscrimination Act of 2008

By Ronald J. Stolkin and Jessica L. Tom

Progress in the science of genetics has given rise to fears of potential misuse of genetic information by employers and health insurance companies. After spending thirteen years in Congress, the Genetic Information Nondiscrimination Act of 2008 ("GINA") became law on May 21, 2008 to address these fears. GINA will become effective in November 2010.

In general, GINA forbids discrimination in employment on the basis of an individual's genetic information. Specifically, GINA makes it unlawful for: (1) employers to fail or refuse to hire, discharge, or otherwise discriminate against an employee; (2) employment agencies from failing or refusing to refer an individual for employment; and (3) labor organizations from excluding a member or causing an employer to discriminate against a member on the basis of the individual's genetic information. GINA further prohibits retaliation against employees who oppose or participate in the investigation of alleged acts that violate GINA.

GINA also makes it unlawful for employers to request, require or purchase genetic information of an employee or of an employee's family members, except in limited circumstances. These circumstances include: (1) compliance with family and medical leave laws; (2) genetic monitoring of the effects of toxic substances in the workforce, when such monitoring is otherwise required by law; or (3) where genetic services are offered by the employer, such as those available as part of a wellness program, and the employer does not receive any individually identifiable genetic information. When employers do possess genetic information, GINA requires that they apply the same confidentiality protections for "genetic information" as are applicable to other types of medical information protected under the Americans with Disabilities Act, including maintaining such information in separate forms in separate medical files, and that they not disclose such information except (1) when necessary for the employee to comply with federal or state medical leave laws, (2) to government agencies investigating compliance with GINA, and (3) in response to a court order, provided that the employer notifies the employee of the disclosure if the court order was issued without the employee's knowledge.

Genetic information is defined as information that relates to genetic tests taken by the employee or the employee's family members and any request or receipt of genetic services, including genetic counseling, genetic education or participation in genetic research. Genetic information also includes information relating to the manifestation of a disease or disorder in the employee's family members. Genetic information does not include information relating to the age or sex of an individual.

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The prohibition against discrimination based on genetic information is not new in the majority of states, including Arizona and Nevada. See A.R.S. § 41-1463(B)(3) (prohibiting employers from failing or refusing to hire, discharging, or otherwise discriminating against any individual based on the results of a genetic test received by the employer); N.R.S. § 613.345 (prohibiting employers, labor organizations, and employment agencies from asking prospective or current employees to submit to genetic testing; from requiring genetic testing as a condition of employment; and from altering the terms, conditions or privileges of employment based on genetic information). GINA creates a national, uniform standard for employers to follow.

Supreme Court Expands Employees' Ability to Bring Retaliation Claims

By Ronald J. Stolkin and Joshua L. Waltman

In its May 27, 2008 decision in *CBOCS West, Inc. v. Humphries*, the U.S. Supreme Court held that employees may bring retaliation claims under 42 U.S.C. § 1981. Section 1981 is an 1866 federal law providing that “[a]ll persons . . . have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens.” Section 1981’s coverage was extended by the Civil Rights Act of 1991 to include conduct *after* the formation of a contract. In *CBOCS West*, the Court held that Section 1981 “encompasses a complaint of retaliation against a person who has complained about a violation of another person’s contract-related ‘right.’” Although the statute does not specifically mention retaliation, the Court held that Section 1981 nevertheless encompasses retaliation claims.

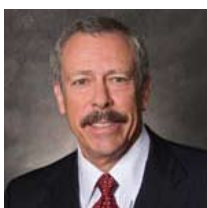
The decision is important to employers because: (1) plaintiffs will have more time to file Section 1981 retaliation claims than is permitted under Title VII; (2) plaintiffs may circumvent the EEOC’s administrative process; (3) small employers with fewer than 15 employees will be covered; and (4) retaliation claims filed under Section 1981 are not subject to the damages cap that applies to claims under Title VII.

In light of the *CBOCS West* ruling, employers must have an effective anti-retaliation policy and train supervisors and employees to ensure compliance with race-related anti-discrimination and anti-retaliation laws.

Ronald J. Stolkin is co-chair of the firm’s labor and employment law practice. He also practices in education law and complex commercial litigation. Mr. Stolkin counsels management on personnel practices, employee discipline and labor relations. He defends employers in litigation alleging employment discrimination, breach of contract, wrongful discharge and other employment related torts. He has represented clients in connection with a broad range of employment related issues before government agencies such as the EEOC, the Department of Labor, the Arizona Civil Rights Division, and the Department of Education, and has counseled clients on a wide range of employment issues including employment handbooks and personnel policies, employment-at-will issues, wage/hour issues, drug and alcohol policies, sexual issues, employee disability issues, and leave of absence issues. He earned his B.A. (1967) and his J.D. (1970) from the University of Arizona.

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