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EMPLOYMENT & THE LAW

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Is the Customer Always Right?: The Hidden Danger of Always Giving Your Customers What They Ask For

By Caroline Anderson and Evan H. Pontz

Imagine that an airline, in an effort to increase lagging profits and market share, conducts market research to determine what its customers prefer. Beyond the normal requests for better food and more on-time flights, one preference is the most prevalent: customers prefer female flight attendants. How should the airline proceed in light of this information? Should it fire its male flight attendants and replace them with females? Should it retain its current male flight attendants, but hire only female flight attendants going forward? If the airline chooses either of these two courses, its decision to honor customers' preferences will risk serious liability under federal non-discrimination laws.

Title VII of the Civil Rights Act of 1964 (Title VII) protects individuals from discrimination based on religion, gender, national origin, and race. The Age Discrimination in Employment Act (ADEA) protects individuals over the age of forty from age discrimination. An employer may hire individuals based on any of the characteristics protected by these statutes only if the characteristic qualifies as a bona fide occupational qualification (BFOQ) for that particular position. For instance, to show that "being female" is a BFOQ for the position of flight attendant, the airline would have to meet a stringent test of showing that having all female attendants is essential for the business to run successfully and that a factual basis exists for believing that all or substantially all males would be unable to safely and efficiently perform the duties of the job. The Fifth Circuit Court of Appeals held long ago that an actual airline's policy of exclusively hiring females for its flight attendant positions would not meet this test because female attendants were only "tangential" to the essence of the airline's business – transporting passengers safely from one point to another – and no one had suggested that having male attendants would "so seriously affect the operation of an airline as to jeopardize or even minimize its ability to provide [that service.]"

In light of cases such as this, job qualifications based on mere customer preference simply do not satisfy the BFOQ test. So what would satisfy that test? Here are two examples:

1. A manufacturer of women's clothing advertising for only female models.
2. The Transportation Security Administration (TSA) assigning only female screeners to conduct full-body checks of female airline passengers.

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Is the Customer Always Right? *Continued*

In both scenarios, the protected characteristic qualifies as a key function of the job. The clothing manufacturer cannot require that its designers all be female, however, because the gender of the designers would have no effect on his or her ability to perform the job. Similarly, the TSA cannot require that its agents who check passenger identification all be female for the same reason. Rather than selecting employees based on a particular customer preference relating to a protected characteristic, then, employers should be sure to select employees based on their abilities to perform the key functions of the job in question.

In addition to affecting companies that directly serve the public, the temptation to cater to customer preference may also affect staffing agencies, security companies, and other companies that provide employees to another entity. For example, what if a sports venue informs its security company that it should only provide young males for security detail at the venue? If the security company honors that request without analyzing its ramifications, both the sports venue and the security company could face liability under Title VII and the ADEA for that decision. State anti-discrimination laws could also be implicated. Indeed, a group of female security guards recently claimed that a well-known Atlanta institution instructed its security company not to employ females for its outside security detail, resulting in women losing their jobs or being reassigned. The Equal Employment Opportunity Commission determined that reasonable cause existed to conclude that both the Atlanta institution and the security company had discriminated against the women in violation of Title VII. If a court agrees, the security company's decision to honor the preferences of its customer (the institution) could lead to disastrous results in litigation.

So how should you manage this risk? During these tough economic times, it is probably not the best practice to ignore customer preference altogether. Instead, understand that honoring some customer preferences for individuals of certain genders, ages, races, religions, or nationalities or other protected classifications could create liability under federal non-discrimination laws. Be sure that your customer understands this as well. Rather than immediately implementing a potentially discriminatory customer preference, first try to determine what, if anything, may be motivating that preference for individuals of certain genders, ages, races, religions, or nationalities.

Perhaps the sports venue discussed above believed that it needed security guards who could lift fifty pounds to sufficiently safeguard the area, and further believed that only young men could lift fifty pounds (thereby considering only young men qualified for the job). Knowing this information would provide the security company with the opportunity to remind the customer that both men and women of many ages are able to lift fifty pounds. If lifting fifty pounds were truly a key function of the job, the security company could then assure the sports venue that it would supply guards who could lift fifty pounds, regardless of gender or age. The sports venue gets what it needs (qualified security guards) and both parties avoid potential legal liability.

If there is no hidden or other motivation behind a discriminatory customer preference that can be addressed in a non-discriminatory fashion (like the example of the security guards above), remind the customer that there are laws prohibiting discrimination in the workplace and alert them of the potential liability that comes with hiring decisions based on protected characteristics that do not qualify as BFOQ's. If the customer insists and you ultimately decide to honor that preference, understand that you are taking on potential liability under Title VII and other laws prohibiting discrimination.

What You Know Could Hurt You: The ADA's Limitations on Pre-Employment Medical Inquiries

By Ashley Z. Hager and Brandon Dhande

If you are involved in your company's hiring process, you probably already know that the Americans with Disabilities Act (ADA) prohibits you from asking job applicants about their disabilities. You may also know that there are numerous questions that employers are allowed to ask applicants about their ability to perform job functions. But you may be unsure about how far you can go with these questions, so you avoid asking an applicant anything that could possibly lead to an answer relating to a medical condition. This article addresses the types of questions that you can (and cannot) ask a job applicant under the ADA. For information on the types of inquiries that can and cannot be asked of *employees* (as opposed to applicants) see "Speaking of Disabled: The ADA's Limitations On Disability-Related Inquiries of Current Employees" in the Summer 2010 edition of Employment & The Law, available online at http://www.troutmansanders.com/lesummer2010-05/.

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What You Know Could Hurt You *Continued*

Pre-Offer: Stick to the (Job-Related) Facts

Before a conditional job offer has been extended, the ADA has one simple rule for employers: don't ask applicants questions that are *likely* to reveal information about disabilities. Indirect questions like "how long have you been in a wheelchair?" are just as unacceptable as direct questions such as "do you have a disability?" Employers are still allowed, however, to ask a range of job-related questions that *might* (but are not intended to) reveal information regarding an applicant's disability. For example, the following questions are generally acceptable during the interview process:

- **Can you perform the functions of the job, either with or without reasonable accommodations?** While employers may ask questions such as this, they may not ask whether the applicant needs an accommodation to perform the job unless the applicant has an obvious disability or has voluntarily disclosed a disability.

- **Can you describe how you would operate the forklift to unload a truck?** Employers may ask an applicant to describe or demonstrate how he or she would perform the functions of job. Be careful, though, as this is only acceptable if: (a) all job applicants are asked this same question, or (b) the applicant has an obvious disability or has voluntarily revealed a disability that would prevent the applicant from performing a job function. (For example, an employer may ask an applicant in a wheelchair whether he or she could meet a ladder-climbing requirement.)

- **You have requested an accommodation for your condition . . . what type of accommodation would you need?** If an applicant reveals a disability and requests an accommodation, employers may ask what kind of accommodation might be needed. Employers may also ask for documentation of the disability and the need for an accommodation.

- **Can you meet the attendance requirements of this job?** Because there are numerous reasons why an applicant might be unable to meet attendance requirements, this question is not *likely* to reveal information about a disability and is therefore an appropriate inquiry under the ADA. However, an employer cannot ask *why* an applicant missed work at a prior employer or how much workers' compensation or sick leave the applicant used.

- **Do you currently use any illegal drugs?** An applicant's current illegal drug use is not protected by the ADA, but an employer may not ask about past drug addiction or treatment. Similarly, an employer may not ask an applicant about prescription medications or legal drugs that he or she is taking.

- **Do you drink alcohol?** While an employer may ask about an applicant's use of alcohol, it may not ask questions designed to determine how much alcohol the applicant uses or whether the applicant has ever been treated for alcohol abuse, as alcoholism is considered a disability under the ADA.

It is critical that employers always follow these rules, even if they feel certain that an applicant does not have a disability. Recent cases have established that, in most jurisdictions, an applicant does <u>not</u> need to be disabled under the ADA to sue an employer for asking impermissible disability-related questions.

Post-Offer (But Pre-Employment): Ask Disability-Related Questions, But Be Careful!

Once a conditional job offer has been extended to an applicant, but before the individual begins work, employers are free to ask disability-related questions (including questions about the individual's workers' compensation history), if the employer follows these rules:

- **The conditional job offer must be real.** The employer must have already evaluated all non-medical information that is reasonably available before asking a disability-related question. This means that any medical inquiry must occur at the last stage of the hiring process – after any background checks, drug tests, and other pre-employment tests have been completed.

- **All employees in the same job category must be subject to the same questions.** Thus, an employer cannot single out an employee it suspects may have a disability for further questioning about his or her medical condition.

- **Medical information must be kept confidential, with limited exceptions.** One exception: supervisors may be informed of a new hire's work restrictions.

- **Medical information cannot be used to disqualify an applicant unless the employer's reason is job-related and consistent with a business necessity.** For example, an employer may disqualify an applicant for manual labor if his or her work caused the applicant to suffer multiple back injuries, progressively worsening a pre-existing condition. In this situation, keeping the individual on the job would create a significant risk of further injury.

Remember that the Genetic Information Non-Discrimination Act (GINA) prohibits an employer from asking questions about the medical condition or history of an individual's family member – even at the post-offer stage.

Employers may feel like they are walking a tightrope when asking job applicants

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What You Know Could Hurt You *Continued*

about medical information. Now is a great time to audit your job application processes and hiring procedures to ensure that interviewers are not asking questions prohibited by the ADA. You may decide to instruct interviewers to avoid questions that relate to an applicant's medical condition, leaving such questions to human resources professionals who have been trained on the rules discussed above for pre-employment medical inquiries.

Keep Business as Usual: Tips for Developing a Successful Union Avoidance Program

By Matt Almand and Mike Kaufman

President Obama believes in unions and is strongly committed to strengthening the ability of workers to organize. In all likelihood, your employees may have no interest in being represented by a union. But at the same time, a single termination, reduction in force, or pay freeze that is perceived as unfair could change everything. One such perceived slight can suddenly cause employees to feel like their work conditions are unstable and prompt them to seek out a third party to help them. (And if you think your employees would never seek out or vote for a union, think again.) Moreover, union targets are not entirely predictable these days. Unions have been expanding their organization efforts by focusing on new industries, new job classifications, and new geographic regions that have not historically been union targets. This article provides guidance on how to assess your workforce's vulnerability to union organization efforts and how to remain proactive in developing an effective personnel program that will, in turn, reduce the likelihood that your workforce becomes unionized.

What is a Union?

Broadly speaking, labor unions are organizations that purport to represent members in negotiations and grievances with employers about wages, rates of pay, hours of work, discipline, terminations, and other terms and conditions of employment. But unions are also in business to make money to pay the salaries of union officials and employees. And the only way unions make money is through membership initiation fees, fines, assessments, and monthly dues. Unions may claim to be helping the "working man," but like any other business, unions possess a strong profit motive and a very keen spirit of self-interest.

Despite significant support from the Obama administration, it seems that unions have nevertheless been taking significant blows to their membership count and, consequently, their available revenue. For instance, the Bureau of Labor Statistics (BLS) recently reported that the share of private workers who belong to a labor union fell to a record low of 6.9% in 2010 – a number that is dramatically lower than the percentage of the private workforce that was unionized in the 1980s and 1990s. Not surprisingly, unions feel compelled to recruit new members, and your company may be the next target.

How Do I Know if My Employees Are Interested in a Union?

First, it is critical that you understand that your employees have every right to join a union if they choose to do so. The National Labor Relations Act (the Act) gives your employees: (1) the right to self-organization; (2) the right to form, join, or assist labor organizations; (3) the right to bargain collectively through representatives of their choice; and (4) the right to engage in other concerted activity for the purpose of collective bargaining. By the same token, the Act gives your employees the right to refrain from all of the above and be free from harassment by pro-union personnel.

So how do you determine whether possible unionization of your workforce is looming on the horizon? Unfortunately, finding out whether your employees are interested in joining a union is not that simple. You cannot directly ask your employees whether they want to join or are considering joining a union. That would be unlawful interrogation. You also cannot follow employees to rumored meeting places or park outside of a union hall to see if any of your employees are entering the premises. That would be considered unlawful surveillance. If you are caught engaging in any of these so-called

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"unfair labor practices," you may be required by the National Labor Relations Board (NLRB) to remedy the perceived effects of these practices.

There are several signs that may indicate that union organization efforts could be happening in your workforce:

- Groups of employees act nervously and/or stop talking when supervisors approach
- Employees ask atypical questions about wages, fringe benefits, and working conditions
- Employees start using terminology that is historically associated with unions, such as "pay scale" or "seniority" or "grievance"
- Terminated employees begin meeting your employees after work
- An employee is regularly observed leaving his department to talk to employees in other departments
- Employees are coming in early or leaving late (but not for work) or congregating in the parking lot
- Union leaflets are found in trash cans or littering the parking lot
- Employees ask questions about how the company feels about unions

If you learn that a specific individual or group of employees is pro-union or otherwise involved in unionization efforts, keep in mind that it is unlawful to interfere with, restrain, or coerce your employees in the exercise of the rights given to them by the Act. This also means that you cannot discharge, harass, or otherwise discriminate against any of your employees that you discover to be pro-union or involved in unionization efforts.

Why Is a Union Targeting Me?

If you have reason to believe that a union is looking to organize your employees, you need to consider why you are the target. As difficult as it may be to accept, your employees may have initiated the efforts on their own as a result of their own frustration or disagreement with the terms and conditions of their employment, recent personnel decisions, or certain company policies and practices. Employees have historically decided to join a union for several reasons, including the following:

1. Perceived Unfairness. A union petition is often prompted by a single personnel decision viewed by employees as unfair. Did you conduct a layoff without considering the seniority of the affected employees? Did you give a pay raise to employees in one job classification, but not in another? Are you paying wages to new employees that are comparable to the wages paid to more senior employees? Did you recently impose a new second, third, and/or weekend shift, and then use subjective criteria to determine who will work these shifts? Have you recently disciplined a large group of employees for a reason with which they vocally disagreed? All of these questions involve the issue of perceived unfairness, which historically has been one of the principal reasons employees reach out to unions for assistance.

2. Job Security. Employees are concerned about their jobs, even if business is booming or no layoff has been announced. A common perception about unions is that they make employee terminations more difficult. Thus, employers often find that job security is the driving force behind a union campaign.

3. Peer Pressure. It is highly unlikely that all of your employees will simultaneously decide that they want a union. Rather, a handful of ringleaders are usually the driving force behind the union organization efforts. The good news is that, if the leaders are not respected by a majority of the workforce, their efforts will not likely be successful. However, if some respected leaders are associated with the effort, they will likely be able to successfully convince other employees to support the effort.

4. Group Action v. Individual Action. An employee may feel like he or she does not have the ability to individually voice concerns. In these instances, employees often feel like group action is the only way to achieve certain goals.

5. Targeted Industry or Geographic Regions. Another reason a union may be trying to unionize your workforce may be that you are in a targeted industry or geographic location. Unions tend to focus their efforts on industries and geographic regions where they have proven success. For example, according to the BLS, workers in education, training, and library occupations have the highest unionization rate at 37.1 percent. In the private sector, industries that historically have been targeted by unions include transportation and utilities (currently at 21.8%), telecommunications (15.8%), and construction (13.1%). Among states, New York (24.2%), Washington (19.4%), and New Jersey (17.1%) have some of the highest union membership rates.

How Do I Avoid a Union?

While a union's organization efforts may sometimes be unavoidable, this is rarely the case. In most instances, the reasons that union petition was filed are identifiable and could have been avoided. And a loyal employee is less likely to turn to outside third parties, like unions, for assistance. But an employee's loyalty cannot be purchased. It must be earned, and one

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way to do so is by attending to your employees' needs through a personnel program that benefits both the company and its employees. Here are some tips for developing a personnel program that will help reduce the likelihood that a union will successfully organize your employees:

1. Listen to Employees. Employees often seek union assistance when they believe that they don't have a voice to express their concerns. You can outwardly show your employees that you are listening in numerous ways, such as conducting employee surveys, having management participate in informal conversations with employees, holding monthly or quarterly meetings with employees, and interviewing employees in connection with job changes, rate of pay changes, promotions, transfers, and open enrollment for employee benefits.

2. Be Uniform and Consistent. As explained above, a perception of unfairness and mistreatment is often a key motivator for seeking union assistance. One simple way to avoid the perception of unfairness and mistreatment is to make sure that discipline, policies, and procedures are uniformly and consistently administered.

3. Address Employee Questions and Grievances. A company should not "give in" to every employee's request. But it is necessary for management to give employees answers to their requests and problems, hopefully with plausible reasons for the company's course of action. If you have not already done so, it is imperative that you implement an employee concerns program and then make sure that your program fully investigates and addresses employee complaints and grievances. Even if the issue is minor or cannot be fixed, at the very least, make sure the employee feels like his or her concern has been heard and taken seriously.

4. Train and Evaluate Your First-Line Supervisors. From an employee's standpoint, his or her immediate supervisor is the face of the company on a daily basis. Employees appreciate personal and direct communications with their supervisors, and often expect their supervisor to serve as their communication channel with senior management. So if employees are seeking the assistance of a union to perform this function, it is likely that employees believe that your first-line supervisors are not fulfilling this role. Thus, a necessary component of any supervisor training should be how to effectively communicate with employees. You should regularly evaluate your supervisors to confirm that they are successfully performing in this area.

5. Create a Positive and Rewarding Work Environment. Your employees want to work for a profitable business that provides a steady and secure place of employment with regular improvements in wages and benefits. While some companies are in the fortunate position to provide such a utopian work environment for their employees (and other companies are close), a perfect workplace is not required to avoid a union. Rather, focus on other ways to make your employees feel appreciated and proud of their company, such as providing opportunities for personal growth and job advancement, meaningful and interesting work, recognition and incentive for good work performance, respect for the self-esteem and needs of the individual employees, a safe and healthy work environment, and wages and benefits comparable to other employees in the industry or community.

If the tips above are implemented, you will have developed a well-rounded union avoidance program that will, in turn, improve your relationships with employees and improve the overall success of your company.

A Brave New World: EEOC GINA Regulations With Tips for Employer Compliance

By Chad Almy, Rebecca Shanlever and Gary Knopf

In November 2010, the Equal Employment Opportunity Commission (EEOC) issued regulations implementing Title II of the Genetic Information Non-Discrimination Act of 2008 (GINA). GINA took effect in November 2009, but these long-delayed final regulations became effective January 11, 2011 for employers with fifteen or more employees.

GINA strictly prohibits employers from discriminating against employees and applicants on the basis of their genetic information. With several key exceptions, GINA also prohibits employers from requesting or obtaining employee and applicant genetic information. Because GINA's non-discrimination provision is very similar to other federal anti-discrimination statutes, the Regulations focus on GINA's unique prohibition against acquiring and using genetic information.

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"Genetic information" under GINA includes information about an individual's genetic tests and the genetic tests of an individual's family members, and 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, or the participation in clinical research that includes genetic services by the individual or a family member of the individual, and the genetic information of a fetus carried by the individual or a pregnant woman who is a family member of the individual.

The four exceptions to GINA's prohibition against requesting, requiring, or purchasing genetic information are: (1) inadvertent acquisition of genetic information, (2) a request pursuant to a voluntary wellness program, (3) information acquired from public sources, and (4) a request as part of the Family and Medical Leave Act (FMLA) certification process. The Regulations clarify and provide compliance tips for these four exceptions, each of which is discussed separately below.

1. Exception for Inadvertent Acquisition of Genetic Information

An example of an inadvertent acquisition would be a manager or supervisor overhearing a conversation regarding an employee's genetic information, learning about genetic information during casual conversation, or inadvertently discovering genetic information through e-mail or social media. In each of these examples, the manager or supervisor does not solicit or seek the information, and thus no liability arises under GINA.

Tip for Employers: *In the case of inadvertent acquisition, the supervisor should not ask follow-up questions after the inadvertent discovery of genetic information. The supervisor should also refrain from taking any action based on the inadvertently-discovered information. In either scenario, the employer could lose the protection of this exception.*

The Regulations also clarify that genetic information received from an employee's health care provider in response to an employer's request for medical information will meet this exception, but only if the employer specifically directs the health care provider <u>not</u> to provide genetic information.

Tip for Employers: *The Regulations provide the following magic language that employers may use when requesting an employee's medical information from health care providers in order to meet the exception:*

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.

2. Exception for Requests Pursuant to a Voluntary Wellness Programs

GINA expressly allows employers to request genetic information as part of a "voluntary wellness program," but the law itself provides little guidance as to what constitutes such a program. The Regulations fill that gap. For a program to be considered "voluntary," three requirements must be met: (1) the employer cannot require an individual to provide genetic information or penalize employees who do not provide it; (2) the employee must provide knowing, voluntary, and written authorization stating that he or she understands the type of genetic information to be obtained and how it will be used; and (3) individually identifiable genetic information may be provided only to the health care professionals involved in providing the services.

Employers may give employees a financial inducement to complete a health risk assessment, but they must provide it to all participating employees (regardless of whether they answer questions seeking genetic information). Additionally, the risk assessment form must identify which questions seek genetic information and specifically state that employees are not required to answer those questions to receive the financial inducement.

Tip for Employers: *Revise directions in all health risk assessment forms to state in bold that employees need not answer any question about genetic information to qualify for any financial inducement. Identify all questions that arguably seek genetic information by an asterisk or other symbol that clearly indicates an answer is not required.*

Interestingly, if an employer takes the above measures and learns that an employee is at risk of developing a specific health condition in the future (through his or her voluntarily disclosure of genetic information), the employer may offer that employee a financial inducement to participate in a health program designed to reduce his or her risk for developing that condition. To offer such an inducement, however, the employer must offer the same programs to employees who currently have the specific health conditions that the employee providing the genetic information is at risk of developing.

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3. Exception for Information Acquired from Public Sources

If an employer acquires genetic information while reading material that is commercially or publicly available, no liability under GINA arises if the employer was not intentionally searching for genetic information. The Regulations clarify that court records and medical databases are not covered by this exception, and thus obtaining genetic information from those sources will violate GINA.

Tip for Employers: *Again, follow-up questions will forfeit the employer's protection under this exception, so employers should not make any further inquiries about genetic information.*

4. Exception for Requests as Part of the FMLA Certification Process

GINA considers information on family medical history to constitute "genetic information." However, the Regulations specify that an employer's request for family medical history information as part of the certification process for FMLA leave to care for a family member does not violate GINA. This exception applies only to an employee's request for FMLA leave to care for a family member. Any genetic information acquired during the FMLA certification process for an employee's own serious health condition would fall under the "inadvertent acquisition" exception discussed above, but only if the employer provides the magic language to health care providers.

Tip for Employers: *All genetic information obtained from an employee, including family medical history in connection with a FMLA leave request, must be maintained in confidential medical files that are separate from the employee's personnel file. Genetic information that was placed in an employee's personnel file before November 21, 2009 is exempted from this requirement.*

Violations of GINA may have significant consequences and penalties, including compensatory and punitive damages, reinstatement, back pay, and other remedies. Because this is a relatively new area of the law, it remains to be seen how courts will interpret GINA and its regulations. In 2010, the EEOC received 201 charges of discrimination alleging violations of GINA. That number is sure to grow.

Therefore, it is important that employers understand GINA's prohibitions and provide thorough training to their managers. Employers should also post the most recent version of the "Equal Opportunity is the Law" poster provided by the EEOC, since this version of the poster references the new GINA regulations.

NLRB Expands Notice-posting Requirements: Remedial Notices Must Be Posted Electronically

By Laura D. Windsor and Seth T. Ford

For nearly seventy years, where the National Labor Relations Board (Board) has determined that an employer violated labor law, it has routinely ordered the employer to post a written "remedial notice" at the work site. Traditionally, this remedial notice was in hard-copy paper format that included a brief recitation of employees' labor law rights, a list of the violations that the employer was found to have committed, a stated commitment by the employer to cease and desist from that conduct in the future, and a description of the remedial actions the employer would take to resolve the current violation. The remedial notice was required to be posted in "conspicuous places" at the employer's work site, meaning locations where the postings were likely to be viewed by employees. Long before the existence of the Internet and telecommuting, these places included company bulletin boards, time clocks, and department entrances. However, on October 22, 2010, in the case of J & R Flooring Inc. d/b/a J. Picini Flooring, 356 NLRB No. 9, the Board held that, in today's age of electronic communications, employers must to do more than merely post notices on bulletin boards.

In its decision, the Board first noted the importance of remedial notices because they inform employees of their rights, encourage free exercise of employee rights, and deter future labor law violations. The Board recognized that the use of "paper notices and wall mounted bulletin boards" for employee communications is no longer prevalent in the workplace and, therefore, does not serve as an effective means of communicating labor law violations to employees. The Board held that "given the increasing prevalence of electronic communications at and away from the workplace, respondents in Board cases

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NLRB Expands Notice-posting Requirements *Continued*

should be required to distribute remedial notices electronically when that is a customary means of communicating" with employees or those represented by the unions. As such, the Board specifically expanded its current notice-posting requirements to encompass electronic communication formats.

Board Member Brian Hayes dissented from the majority opinion, arguing that the Board transformed "what has been an extraordinary remedy into a routine remedy." He also noted that disseminating notices electronically increases the risk that such notices could be "anonymously altered and broadly distributed to nonemployees, customers, stockholders or competitors." For instance, once an employee receives a remedial notice through e-mail, he could easily copy the content of that notice to a social media website or forward the e-mail to non-employees. The majority dismissed such concerns on the grounds that any electronic posting requirements would be limited to methods customarily used by employers and therefore could not be considered "extraordinary."

Thus, depending on its "customary" method of electronic communication, an employer may now be required to send remedial notices to employees by e-mail or to post remedial notices on internal and external websites. The decision does not expressly address posting via social media sites; however, it appears that posting on such sites may also be required where an employer regularly uses social media to communicate with its employees.

Significantly, this decision could signal that the Board is also moving toward union-friendly decisions on other issues involving electronic media. The Board's expansion of posting requirements to include electronic media may indicate that it will look favorably upon a recent claim that disciplining an employee for criticizing an employer's practices on a social media site violates the employee's labor law rights. It may also indicate that the Board is inching closer to overturning prior Board decisions that held that an employer may lawfully prohibit the use of employer e-mail to distribute union-related solicitations and distributions as part of a policy prohibiting non-business use of its e-mail systems.

High Unemployment Leads to Record-Breaking Claims of Discrimination

By Tashwanda Pinchback

The Equal Employment Opportunity Commission (EEOC) has reported a record number of workplace discrimination claims filed in 2010. According to the EEOC, employees filed 99,922 discrimination claims against private employers and state and local governments in the 2010 fiscal year ending September 30, which represents a 7% increase compared to the 93,277 claims filed in 2009. The EEOC has also announced that, for the first time since it opened in 1965, retaliation claims surpassed race discrimination claims as the most frequently filed allegation. The EEOC reported other claims of discrimination in 2010:

- Sex discrimination allegations, which made up 29.1% of total claims filed, climbed 3.5 percent to 29,029 claims filed.
- Disability discrimination allegations claims, which made up 25% of all allegations filed, climbed 17.3 percent to 25,165 claims filed.
- Age discrimination allegations remained relatively unchanged with 23,264 reported claims.
- Discrimination claims based on national origin also remained unchanged with 11,304 reported claims.
- Religious discrimination claims continued to represent one of the lowest amount of claims filed with 3,790 reported claims.

Despite the rising number of discrimination claims, the EEOC's litigation actions are down 13.7 percent compared to 2009, showing a steady decline since fiscal year 2004. In 2010, the EEOC filed 271 lawsuits under the Americans with Disabilities Act, Title VII, the Age Discrimination in Employment Act and the Equal Pay Act of 1963. In 2010, the EEOC also resolved 285 lawsuits and 104,999 private sector claims, which included 9,777 settlements. The EEOC has placed more emphasis on its mediation programs, which resulted in a record-breaking 9,370 resolutions in 2010, an increase of 10% over the previous year, and $142 million in monetary benefits. In 2010, the enforcement, mediation and litigation efforts collectively brought in more than $404 million from employers, which according to the EEOC, was the highest level of monetary relief it has obtained through the administrative process.

Sea Change: A Very Different Congress Sets Its Labor and Employment Law Agenda, While the President Explores Regulatory Options

By Rebecca E. Ivey

Following the midterm elections, many pundits predicted that Congress would overlook labor and employment legislation in the lame duck session, and that the Democratic legislative agenda would screech to a halt in the 112th Congress.

As to the first, the pundits were right – the lame duck session achieved a repeal of Don't Ask, Don't Tell and renewal of the Bush tax cuts, but employment issues fell by the wayside. As to the second, the GOP hit the ground running. On January 5, 2011, the very first day of the Congressional session, Republican representatives introduced a flurry of employment-related legislation, and Democratic representatives were not far behind.

Republicans also changed the name of the primary House committee with jurisdiction over employment issues from the Education and Labor Committee to the Education and the Workforce Committee, a symbolic move that echoes the remarks of the committee chair, Rep. John Kline, that the Republicans' top priority is to provide employers with "certainty and simplicity" in federal law, rules, and regulations. In response to the Democrats' loss of control of the House, however, some experts speculate that they will push their agenda in the arena of regulation rather than legislation. For this reason, this update includes some key legislation and proposed regulations, which employers should follow closely.

Dodd-Frank Repeal (H.R. 87)

CURRENT STATUS OF THE LAW: The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank), signed into law on July 21, 2010, contains various employment-related provisions dealing with executive compensation, arbitration, and whistle-blower protections, some of which were described in our Financial Institution Practice Group's October 25, 2010 article, "Dodd-Frank Act Increases Protections and Incentives for Whistle-blowers," available at http://www.troutmansanders.com/dodd-frank-act-increases-protections-and-incentives-for-whistleblowers-10-25-2010/.

WHAT WOULD CHANGE: This bill would repeal the whole enchilada.

WHY YOU CARE: Those employers covered by Dodd-Frank sure wouldn't mind a return to the time of lesser regulation and a whistle-blower scheme without problematic incentives.

LIKELIHOOD OF BECOMING LAW: Highly unlikely. With Democrats still in control of the Senate and White House, Dodd-Frank isn't going anywhere. Affected businesses, however, are still awaiting the SEC's final regulations, due April 17, 2011, which will fully implement certain aspects of Dodd-Frank.

Davis-Bacon Repeal Act (H.R. 746, H.R. 745)

CURRENT STATUS OF THE LAW: The Davis-Bacon Act, enacted by Herbert Hoover in 1931, established the requirement for paying prevailing wages on public works projects. All federal government construction contracts, and most contracts for federally assisted construction over $2,000, must include provisions for paying workers no less than the locally prevailing wages and benefits.

WHAT WOULD CHANGE: This bill would repeal the Act in its entirety.

WHY YOU CARE: To the extent your business involves government construction or federally assisted construction contracts, this would mean that you may no longer need to worry about the prevailing wage rules for covered employees.

LIKELIHOOD OF BECOMING LAW: Very slim. This Act has been around for a very long time, and has survived multiple attempts at repeal or revision – in 1993, 1995, 1994, and 2004. The latest effort, however, is part of the Republican Party's effort to cut $2.5 trillion from the budget over the next 10 years, with $1 billion in annual savings from repeal of Davis-Bacon alone. While budget cutting is fashionable, Davis-Bacon is a historical survivor.

Right to Know under the FLSA (Department of Labor Regulation)

CURRENT STATUS OF THE LAW: There is no requirement under the FLSA that employers undergo a classification analysis to determine whether workers are exempt from FLSA coverage.

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WHAT WOULD CHANGE: This rule, included in the Department of Labor's (DOL's) regulatory agenda in the spring of 2010, would require any business that claims workers to be exempt from FLSA coverage to perform a classification analysis and disclose that analysis to its workers. The rule would also require the employer to retain the analysis, in case the DOL wants to review it.

WHY YOU CARE: Regardless of who performs this analysis, it is unlikely to be cheap, particularly for larger employers with many levels of employees. The rule could cause a spike in employment litigation.

LIKELIHOOD OF BECOMING A FINAL RULE: Fairly likely. The notice of proposed rule making is slated for April, but the rule's form then (and its final form) is up in the air. A good strategy for employers is vocal participation in the rule making process.

Injury and Illness Prevention Programs Rule (DOL Regulation)

CURRENT STATUS OF LAW: Traditionally, the Occupational Safety and Health Administration (OSHA) has identified specific hazards first. After the rule making process produces a specific standard, employers must comply with this standard.

WHAT WOULD CHANGE: The Injury and Illness Prevention Programs Rule (I2P2) would require employers to identify hazards in the workplace and take steps to mitigate or eliminate them, shifting the responsibility for finding and addressing workplace hazards from OSHA to employers.

WHY YOU CARE: Not only does this impose a duty (and the associated additional costs) on employers, but it also raises the concern that OSHA will fault employers for not recognizing and dealing with problems before an injury or illness occurs, regardless of how unusual the circumstances of any individual accident may be.

LIKELIHOOD OF BECOMING A FINAL RULE: This rule has not yet been proposed, but OSHA has repeatedly indicated that the I2P2 rule is at the top of its list of priorities. While the clock is not yet ticking on this measure, and while employers will undoubtedly have their say in the rule making process, it is likely that I2P2 will become part of the regulatory scheme in some way.

Employer and Labor Relations Consultant Reporting (DOL Regulation)

CURRENT STATUS OF LAW: The DOL's Office of Labor-Management Standards broadly interprets the Labor-Management Reporting and Disclosure Act (LMRDA) provisions regarding the advice exception to disclosure, such that lawyers working with companies in the context of union-organizing drives or collective bargaining do not trigger a disclosure requirement.

WHAT WOULD CHANGE: The scope of the advice exception would be narrowed, which could very well result in a requirement that these attorneys be disclosed.

WHY YOU CARE: This disclosure would also require that the affiliation between the company and the lawyer or law firm be made public, and the financial aspects of that relationship, which many companies prefer to keep confidential.

LIKELIHOOD OF BECOMING A FINAL RULE: It is highly likely that some narrowing of the advice exception will occur, although the scope is much less certain. The notice of proposed rule making is slated for June. Again, employer participation in the rule-making process is essential.

Equal Employment For All Act (H.R. 321)

CURRENT STATUS OF THE LAW: The Fair Credit Reporting Act (FCRA) restricts the use of consumer credit checks by employers and requires that employers that use credit checks make a specific disclosure to employees, and obtain employee authorization. The FCRA also requires notifications to employees if an employer takes an adverse action on the basis of information in the employee's credit information.

WHAT WOULD CHANGE: The Equal Employment For All Act would amend the FCRA to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions, with some relatively narrow exceptions. Those exceptions would apply to positions that implicate national security concerns or FDIC clearance, to state or local government employees, and to managerial, executive, professional, or supervisory positions at a financial institution.

WHY YOU CARE: If you routinely obtain consumer reports on your potential and existing employees, this may impact you, unless you fall within a specific exception.

LIKELIHOOD OF BECOMING LAW: This is not the first time we've seen this bill. It died in committee in 2009 when the House was controlled by the Democrats. The Act is on course to meet the same fate this Congress.

Jobs Recovery by Ensuring a Legal American Workforce Act of 2011

CURRENT STATUS OF THE LAW: The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) established the voluntary Internet-based pilot program known as E-Verify, through which employers

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Sea Change *Continued*

verify the work authorization of new hires, whether U.S. citizens or not. The government amended the Federal Acquisition Regulation (FAR) in 2009 to require contractors with the federal government to agree, through language inserted into their federal contracts, to use E-Verify to confirm the employment eligibility of all persons hired during a contract term, and to confirm the employment eligibility of federal contractors' current employees who perform contract services for the federal government within the United States. The rule included exceptions for contracts for amounts less than $100,000 and contracts for commercially available off-the-shelf items.

WHAT WOULD CHANGE: The Jobs Recovery by Ensuring a Legal American Workforce Act of 2011 (the E-LAW Act) is the most expansive of these bills, and would make the E-Verify Program permanent and mandatory. Employers would need to comply based on size over the course of a phased-in timeline. The E-LAW Act would mandate penalties for noncompliance and create tax disincentives.

WHY YOU CARE: Under the E-LAW Act, you would be required to use E-Verify within the next few years.

LIKELIHOOD OF BECOMING LAW: The bill does not appear to be highly controversial, and use of E-Verify is supported by the Obama administration, but the bill is at the beginning of the journey toward becoming law.

Healthcare Incentive Act (H.R. 42)

CURRENT STATUS OF THE LAW: The FLSA establishes a national minimum wage of $7.25 per hour with no offset for healthcare benefits received.

WHAT WOULD CHANGE: The Healthcare Incentive Act would require the Secretary of Labor to promulgate a rule requiring that, for any employer required by federal or state law to pay a minimum wage at a rate that is higher than the federal minimum in effect on September 1, 1997 ($5.15), the employer will be permitted to include the value of creditable healthcare benefits it provides to an employee in determining the wage the employer is required to pay that employee. However, the credit permitted by this rule may not exceed the difference between $5.15 and the wage rate otherwise applicable.

WHY YOU CARE: If passed, this would alter the way minimum wage is calculated for those employees who earn an hourly amount close to the minimum wage and receive healthcare benefits from their employer. If you employ these workers, it would save you money.

LIKELIHOOD OF BECOMING LAW: As with many other bills this cycle, previous versions have died in committee, which suggests that there is little likelihood of the bill becoming law.

Labor Relations First Contract Negotiations Act of 2011 (H.R. 129)

CURRENT STATUS OF THE LAW: The National Labor Relations Act (NLRA) establishes the current standards for collective bargaining, which include the obligation on the parties to meet at reasonable times and places, to bargain in good faith, and to bargain to reach a consensual agreement.

WHAT WOULD CHANGE: This bill would amend the NLRA to require the mediation and, ultimately, the binding arbitration of initial contract negotiation disputes if they are not resolved within a prescribed period of time.

WHY YOU CARE: For employers with a newly unionized workforce, this dramatically changes the collective bargaining process. If the newly certified union and the employer fail to reach agreement by the sixtieth day after bargaining commences, this bill requires mediation if either party requests it. And, if no agreement is reached by the thirtieth day following the request for mediation, the matter may be referred to binding arbitration.

LIKELIHOOD OF BECOMING LAW: The Employee Free Choice Act (EFCA), which failed to advance during the 111th Congress, contained similar provisions. Those provisions were a controversial portion of the EFCA. We doubt this bill will ever make it out of committee.

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