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Employment Law Newsletter

Inside This Issue:

A New Year Brings New Challenges.....Page 1

New Regulatory Mandates Being Implemented and Proposed.....Page 2

U.S. Supreme Court to Issue Key Employment Law Decisions.....Page 3

A New Year Brings New Challenges

By: Philip M. Keating

Happy New Year! Let's hope that in 2011 the economy moves from recovery to thriving, and that each of your businesses experience much success.

One of the characteristics of the field of labor and employment law is that there always are new developments and issues to be addressed. As we start 2011, that certainly is the case as there are a number of major regulatory initiatives about which employers should be concerned. Furthermore, the U.S. Supreme Court will be issuing labor and employment law decisions in the first half of 2011 that potentially will have significant impact.

It is our goal to address major labor, employment and immigration law developments in the Employment Law Newsletter. We welcome your feedback. If you have questions or comments, please contact Philip M. Keating at pkeating@beankinney.com.

New Regulatory Mandates Being Implemented and Proposed

By: Philip M. Keating

Genetic Information Nondiscrimination Act ("GINA")

The long awaited final regulations implementing the Genetic Information Nondiscrimination Act ("GINA") were issued by the Equal Employment Opportunity Commission ("EEOC") on November 9, 2010. The regulations take effect on January 10, 2011.

As explained previously in the Employment Law Newsletter, GINA applies to employers who have 15 or more employees and prohibits discrimination against employees or applicants for employment because of genetic information.

Genetic information is defined to include information concerning genetic tests of employees or applicants for employment, as well as information about any disease, disorder, or condition of the employee's or applicant's family members. The definition includes a family medical history, the presence of a disease or disorder in the family member of an employee or applicant for employment, the participation of an employee or applicant for employment in clinical research or the request for genetic services, and

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New Regulatory Mandates Being Implemented and Proposed
Continued from Page 1

genetic information about a fetus or embryo carried or legally held by an employee or applicant for employment, or a family member.

GINA prohibits employers from requesting, searching for or purchasing genetic information concerning employees, applicants for employment, or their family members. The regulations address and prohibit acts such as searching the internet for genetic information, as well as more traditional questioning of individuals in an effort to obtain prohibited information.

GINA does allow employers to obtain genetic information in certain circumstances. These include when the employer inadvertently receives genetic information in the response of an employee to requested documentation in support, for example, of a request for Family and Medical Leave Act ("FMLA") leave. The EEOC does recommend that employers include a prescribed statement concerning GINA in FMLA documents in an effort to minimize inadvertent disclosures.

There also is no GINA violation if an employer inadvertently learns genetic information from an unsolicited e-mail containing the genetic information from the employee or applicant for employment, if the employee or applicant for employment volunteers the information, or if the employer learns of the information from a "social media" site if the employee or applicant for employment granted the employer (which includes managers and supervisors) access to the site.

It is important that employers review their files and be certain that any medical information about the employee, or any family medical history about employees or applicants for employment is separated from the main personnel file, and kept in a confidential location. Furthermore, employers need to implement policies to ensure that GINA is reflected in all appropriate employment practices, and that managers are educated on the prohibitions of this law. Finally, employers must post a new workplace poster that includes the GINA provisions. The poster is available through the EEOC at www.eeoc.gov

NLRB Proposes New Notice Requirements Concerning Right to Unionize

The National Labor Relations Act ("NLRA") provides individuals with the right to decide if they wish to be represented by a union, and sets forth a procedure for the organizational and representation process to occur. This process is the subject of much debate and would have been dramatically changed if the Employee Free Choice Act ("EFCA") had been passed. Now that it is clear that the EFCA will not be enacted, the National Labor Relations Board ("NLRB") is through regulation attempting to make the environment more conducive to union organizing efforts.

On December 22, 2010, the NLRB proposed a regulation that would require all employers covered by the NLRA to post a notice informing employees of their rights under the law. These include the right to organize a union to negotiate with an employer about wages, benefits and other terms and conditions of employment, to bargain collectively, to discuss terms or conditions of employment with the union, or to choose not to do any of these activities. The right to organize or not to organize is that of the employee, not the employer or the union. The NLRA prohibits employers and unions from threatening or coercing employees with respect to the exercise of their rights under the NLRA.

The NLRB states that the required notice will be similar to one that federal contractors already are required to post. A copy of that notice can be found at the following web site address: http://www.dol.gov/olms/regs/compliance/EmployeeRightsPoster11x17_Final.pdf.

As for who is covered by the proposed rule, it depends on the industry in which the employer is engaged. Most employers are covered by the NLRA in that the basic jurisdictional standard is having an annual purchase or sale of goods or services in interstate commerce of $50,000. For

New Regulatory Mandates Being Implemented and Proposed
Continued from Page 2

retail industries, the threshold amount is $500,000. By decision, the NLRB has decided that Architects are subject to the $50,000 threshold, but that Apartment Houses are subject to the $500,000 threshold. Colleges, universities and private schools are covered if they receive gross annual revenue from all sources of at least $1 million.

The NLRB is accepting comments on the proposed regulation until February 21, 2011.

Department of Labor Attempting to Connect Wage-Hour Claimants with Private Attorneys

In prior issues of the Employment Law Newsletter, we have addressed the importance for employers to review their wage-hour policies and overall compliance with the Fair Labor Standards Act ("FLSA"). Reasons for this include the fact that the FLSA places all record-keeping burdens on the employer and effectively creates a situation where the employer must establish compliance, rather than a plaintiff employee proving non-compliance. Furthermore, the FLSA provides for the awarding of attorney's fees to the lawyers for plaintiff's, which has created significant incentives for the filing of these actions. As a result of these factors, wage-hour law suits are the most common types of actions filed against employers.

The U.S. Department of Labor ("DOL") has made wage-hour compliance and enforcement a high priority and has added staff and resources to aid its efforts. Nevertheless, the number of cases in which the DOL actually files suit on behalf of individuals is relatively small and, in many cases, the DOL simply informs employees that they may pursue their case on their own through a private cause of action. This is similar to the "right to sue" notice regularly issued to employees by the EEOC.

The DOL has now entered into an arrangement with the American Bar Association ("ABA") to connect employees with wage-hour and FMLA complaints to attorneys who will handle their cases. Specifically, the DOL will connect employees with local attorneys identified through the ABA Standing Committee on Lawyer Referral and Information Service. The DOL also will provide the employee and their attorney with information concerning the DOL's investigation of the applicable complaint and will provide relevant documents through a special expedited process.

Needless to say, these actions are likely to result in even more law suits against employers alleging violations of the FLSA and FMLA. Employers should have even greater incentive to act promptly to ensure their compliance with applicable wage-hour, family and medical leave, and related laws.

For more information on these topics, please contact Philip M. Keating who is a shareholder of Bean, Kinney & Korman, P.C. Phil focuses his practice on Labor and Employment Law as well as Immigration Law. He can be reached at pkeating@beankinney.com.

U.S. Supreme Court to Issue Key Employment Law Decisions
By: Philip M. Keating

In December 2010, the U.S. Supreme Court heard oral arguments on two cases that will significantly impact employers. The Supreme Court will issue its decisions between now and June 2011.

The first case, *Chamber of Commerce of the United States v. Whiting*, involves the immigration law enacted in Arizona that requires all employers to utilize the E-Verify system and allows local courts to revoke the business license of employers who knowingly or intentionally hire aliens not authorized for work in the United States. The legal issue is whether a state or local government can enact laws on matters such as immigration, or whether the issue is "preempted." If an issue is preempted, that means that only the federal government can enact laws on that particular topic. This case is of particular importance because many state legislatures, including the Virginia General

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U.S. Supreme Court to Issue Key Employment Law Decision
Continued from Page 3

will be considering similar laws during their 2011 legislative sessions. The E-Verify requirement for all employers likely will be enacted on a federal level relatively soon, so the key issue is the ability of state and local governments to sanction employers above and beyond the sanctions and penalties under federal law.

The second case, *Thompson v. North American Stainless LP*, addresses the issue of whether a third party is protected under the retaliation provisions of Title VII of the Civil Rights Act of 1964. In this case, an employee alleges he was terminated by the employer in retaliation for his fiancée filing an EEOC charge. The employer terminated the employee approximately two weeks after being notified of the EEOC charge filed by the employee's fiancée. The lower courts ruled that the employee was not covered by the retaliation sections of the law because he himself had not engaged in any protected activity, such as opposing an unlawful employment practice, filing a charge, or participating or assisting in an investigation. If the U.S. Supreme Court disagrees with the lower courts and allows the claim to proceed, the key issue will be the scope of potential "relatives" covered by the decision.

For more information on these topics, please contact Philip M. Keating who is a shareholder of Bean, Kinney & Korman, P.C. Phil focuses his practice on Labor and Employment Law as well as Immigration Law. He can be reached at pkeating@beankinney.com.

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