Inside this issue:

Genetic Information Nondiscrimination Act 1

New Whistleblower Protections for Employees 3

EXPANDING THE PROTECTED CLASSES: GENETICS AND PRODUCT SAFETY REPORTING

With no significant new federal employment laws since the Family and Medical Leave Act was enacted in 1993, the federal employment law landscape has remained largely unchanged for over a decade. This summer, however, the federal government enacted two new laws that are bound to increase employment litigation in the near future.

In May 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (“GINA”) into law, with its employment discrimination provisions effective as of November 21, 2009. Among other things, GINA prohibits employment discrimination based on genetic information. In August 2008, Congress also enacted the Consumer Product Safety Improvement Act of 2008 (“CPSIA”). CPSIA is effective immediately, and limits employers’ rights to retaliate against or discipline employees who complain about product safety issues. This issue of the Resource will describe each statute’s substantive requirements so employers understand these laws and are prepared to comply.

GENETIC DISCRIMINATION HAS BEEN MADE ILLEGAL

Your company has just been sued by an ex-employee who was terminated shortly after your CEO asked her about her mother’s breast cancer treatment. A pregnant employee lets everyone know her unborn child has Down’s syndrome and is later demoted—the demotion is unrelated to the disclosure, but a lawsuit ensues anyway. An applicant advises his interviewer that he will need some time off to care for a relative with sickle cell anemia. When the applicant is not hired, he sues for failure to hire based on genetic discrimination.

If the above scenarios sound far-fetched, they may soon be all too common. Under the Genetic Information Nondiscrimination Act of 2008 (“GINA”), discrimination based on genetic information in
health insurance and employment is illegal. Although GINA includes numerous restrictions on genetic discrimination in health insurance, this article will describe only the employment discrimination provisions of GINA.

As noted above, GINA prohibits employers from discriminating against employees based on their genetic information. Importantly, GINA’s definition of “genetic information” is very broad, and includes information about: (1) an individual’s genetic tests, (2) the genetic tests of the individual’s family members, and (3) the manifestation of a disease or disorder in a family member. Under the statute, a “family member” includes an individual’s spouse or dependent child by birth or adoption, and certain other relatives of the employee or the employee’s spouse or dependent child.

In addition, although information about an individual’s sex or age are excluded from the definition of “genetic information,” the statute does cover other information, such as: (1) for a pregnant woman – the genetic information of any fetus carried by such pregnant woman; and (2) for an individual or family member using assisted reproductive technology – the genetic information of any embryo legally held by the individual or family member. Because the term “genetic information” is defined so broadly, GINA prohibits employers from discriminating against individuals not only based on the individual’s own genetic information, but also based on the genetic information of their family members.

GINA closely parallels the employment discrimination provisions of Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with Disabilities Act of 1990 (“ADA”). Like Title VII and the ADA, GINA applies to employers with 15 or more employees. In addition, GINA prohibits discrimination in a broad range of employment decisions, including hiring, firing, demotions, and other terms and conditions of employment. Also, under GINA, employers cannot limit, segregate, or classify employees or other individuals based on genetic information to deprive them of equal employment opportunities or otherwise adversely affect their employment.

GINA’s enforcement provisions also track those of Title VII and the ADA. Accordingly, employees who wish to bring a claim of genetic discrimination must first file a charge with the EEOC. As under Title VII and the ADA, a genetic discrimination charge must be filed with the EEOC within 180 days of the alleged discrimination. In addition, the remedies available to employees under Title VII are also available under GINA.

Although GINA’s genetic discrimination protections are broad, the statute does include certain exceptions. Employers do not violate GINA if they: (1) inadvertently request or require family medical history; (2) request information to comply with Family and Medical Leave Act certification requirements (or certification requirements of similar state laws); and/or (3) are required by law to monitor the biological effects of toxic substances in the workplace.

In addition, GINA provides other limited exceptions for employers who conduct genetic monitoring in connection with health or genetic services, such as employee wellness programs. For the exceptions to apply, however, the employee must give written permission in advance of the genetic monitoring, and the genetic information can only be released to the employee or a health care provider. GINA does allow employers to receive a pool of genetic information about its employees, so long as individual employees are not specifically identified.

Besides prohibiting genetic discrimination, GINA also prohibits retaliation against employees who oppose genetic discrimination in the workplace or who file a charge, testify, assist or participate in any litigation or proceeding related to genetic discrimination in violation of GINA. Currently, employees
cannot bring “adverse impact” genetic discrimination claims under GINA, but Congress plans to study the issue and revisit whether such protections should be added in the future.

Similar to the protection of employee medical information under the ADA is GINA’s requirement that employers keep any records of genetic information on separate forms and in separate medical files and treat all such records as confidential. If an employer is in compliance with the ADA’s confidentiality rules regarding any genetic information it receives as an employer, the employer will also be in compliance with GINA’s confidentiality rules.

GINA’s employment discrimination and retaliation provisions will not be effective until November 21, 2009. What can employers do now to prepare?

First, employers should immediately stop any and all inquiries into the medical histories of applicants, employees and/or their families. Second, employers should review their policies and consider what changes may be necessary to include prohibitions on genetic discrimination. Appropriate policy changes to consider implementing in light of GINA could include the following: adding genetic information to all non-discrimination policies, revisiting confidentiality procedures for employee medical records, and ensuring that nothing in your company’s application process requests genetic information (as defined by GINA) from applicants. Third, employers who receive genetic information in connection with a wellness program should ensure they have prior written authorization from each employee before collecting any such information. Lastly, employers should consider whether training their human resources personnel may be appropriate to ensure compliance with GINA.

NEW WHISTLEBLOWER PROTECTION FOR PRODUCT SAFETY COMPLAINTS

Think product safety has nothing to do with employment law? Think again. On August 14, 2008, President Bush signed the Consumer Product Safety Improvement Act of 2008 (“CPSIA”) into effect. CPSIA is a comprehensive overhaul of consumer product safety laws, including protections for “whistleblower” employees who engage in protected activity by complaining about product safety issues. Most provisions of CPSIA, including the whistleblower protection provisions described in this article, are effective immediately.

Under CPSIA, covered employers include manufacturers, importers, private labelers (owners of a brand or trademark on the private label of a consumer product), distributors and retailers. CPSIA prohibits covered employers from discriminating or retaliating against a public or private sector employee of a manufacturer, private labeler, distributor or retailer, if:

- The employee provided information related to a violation of, or any act or omission he/she reasonably believed to be a violation of any provision of CPSIA, the Consumer Product Safety Act (“CPSA”) or any other law enforced by the Consumer Product Safety Commission (the “Commission”);
- The employee testified or was about to testify in a proceeding about such a violation;
- The employee assisted or participated in, or was about to assist or participate in, such a proceeding; or
The employee objected to, or refused to participate in, any activity, policy, practice or assigned task that he/she (or other such persons) reasonably believed to be a violation of any provision of CPSIA or any other law enforced by the Commission, or any order, rule, regulation, standard or ban under such laws.

Whistleblowers are protected from discrimination whether they report violations internally to their employers, or externally to the Commission or the relevant state attorney general.

An employee who alleges a whistleblower claim under CPSIA may file a complaint with the Federal Department of Labor, Occupational Safety & Health Administration (“OSHA”), within 180 days of the allegedly discriminatory act(s). OSHA has the authority to investigate the allegations, determine whether reasonable cause exists to believe a violation has occurred, conduct a hearing and order relief. If OSHA finds that the evidence supports the employee’s claim, OSHA will issue an order requiring the employer to comply with CPSIA. After OSHA issues its findings and order (or if OSHA fails to issue an order within certain statutory deadlines), if the parties still have not resolved their claim, the dispute can go to federal court.

Because CPSIA is effective immediately, covered employers should be sensitive to employee complaints about product safety and take all such complaints seriously. Employers covered by CPSIA should consider amending their policies on investigative procedures to establish how they will handle such complaints. If an employee complains about product safety issues, and the employer disciplines or terminates the employee for any reason, the employer must ensure it has clearly articulated and documented a nondiscriminatory reason for its business decision.

CONCLUSION

Both GINA and CPSIA will pose challenges for employers and are likely to increase employment litigation nationwide. Because both statutes will put employers in a defensive posture regarding any adverse employment decision they make, employers should be more careful than ever to document the legitimate business reasons for their decisions. Bottom line—if you receive genetic information about an employee or if an employee makes a product safety complaint, take those issues seriously and get good counsel before taking adverse action.

For more information on the topics addressed in this newsletter, contact Diane Tindall at dtindall@wyrick.com, Mary Williams at mwilliams@wyrick.com or Kellam Warren at kwarren@wyrick.com.


All rights reserved. This Newsletter may not be reproduced in whole or in part without the written permission of Wyrick Robbins Yates & Ponton LLP.

Wyrick Robbins Yates & Ponton LLP
4101 Lake Boone Trail, Suite 300
Raleigh, NC 27607-7506
(919) 781-4000
www.wyrick.com