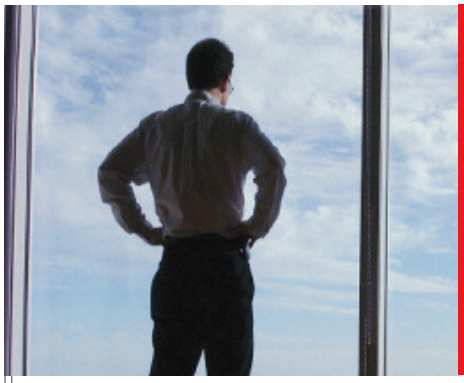

Employer Law Report

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NLRB Issues Complaint In Facebook Firing Case

» Posted on November 3, 2010 by Brian Hall

On November 2, 2010, the NLRB issued a press release reporting that its Hartford, Connecticut, regional office had issued a Complaint alleging that American Medical Response of Connecticut, Inc., ("AMR") had published an overly broad blogging and Internet posting policy that violated employee Section 7 rights, and then illegally fired an employee for negative posts about a supervisor.

As described in the Complaint, the AMR policy prohibited employees from making disparaging remarks when discussing the company or supervisors and from depicting the company "in any way" over the Internet without company permission. Such provisions, according to the NLRB's Complaint, constitute a violation of 8(a)(1) of the National Labor Relations Act because they interfere with employees' right to engage in protected concerted activity under Section 7 of the NLRA. (The NLRB and courts typically interpret Section 7 as protecting employees' right to discuss the terms and conditions of their employment with other employees or even non-employees.) The NLRB also alleged that the employer illegally fired an employee pursuant to that policy for posting negative remarks about a supervisor on Facebook, which the NLRB said drew supportive remarks from her co-workers.

Back in December 2009, the NLRB's Office of the General Counsel issued an Advice Memorandum that addressed the circumstances under which an employer's social media policy might violate Section 8(a)(1) of the NLRA because it might chill employee participation in concerted activities. Though the Memorandum does not constitute binding precedent, the General Counsel's office concluded that the policy at issue, published by Sears Holdings, did not violate Section 8(a)(1) because, read as a whole, the policy could not be reasonably viewed by an employee as chilling union activity. The disputed provision in the policy prohibited "Disparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." The prohibition against disparaging the company, while perhaps read by itself might tend to discourage employees from engaging in concerted activity, was included among several other provisions that clearly did not violate Section 8(a)(1). In addition, there was no evidence that the employer has used the

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Keeping Pace with Labor and Employment Law Developments

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You don't have to wait for this newsletter arrive to get the latest news impacting employers. We invite you to sign up for *Employer Law Report* either through an RSS feed or email. Visit us at www.employerlawreport.com and see what we're blogging about today.

– Brian Hall, *Employer Law Report Editor*

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policy to discipline any employee for engaging in protected activity, nor that the Policy was promulgated in response to any other concerted or union activity.

It is in this context that the NLRB likely will evaluate the AMR policy and termination. Keep in mind that the issuance of this Complaint is not a final decision of the NLRB. It is the first step in the processes that might lead to a hearing before an Administrative Law Judge (ALJ) and a decision. As a result, if this Complaint goes to an ALJ hearing, we can expect the ALJ to carefully evaluate the context in which the policy was enacted and enforced. Right now, we do not know any of the other provisions in the AMR policy, but the provisions cited by the regional office generally prohibiting disparaging comments and requiring approval for any posts of any kind regarding AMR have the potential by themselves to discourage concerted or union activity. In addition, the NLRB's press release also suggests that the employee was terminated after she was denied union representation at a disciplinary meeting.

The NLRB's press release and its recent embracing of social media for its own communications – I obtained the press release from an NLRB "tweet" – suggests that social media may be becoming a point of emphasis for the Board. Regardless of whether they are unionized or not, employers should be reviewing their social media policies to ensure that any restrictions on communications about the Company are tailored to things that the company can legitimately restrict, like violations of the company harassment policy, or disclosure of confidential or trade secret information. But those restrictions should not be so broad as to prohibit all employee discussion of the company on their social media pages because the NLRB will likely consider that overbroad and a violation of Section 7 rights.

EEOC Issues Final Rule to Implement Title II of GINA

» Posted on November 10, 2010 by Sara M. Schroth

The EEOC issued its final rule implementing Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA), which was published in the Federal Register on Tuesday, November 9, 2010. As promised, we are following up with our analysis of the EEOC's new rule.

The proposed regulations were issued in March 2009 for public comment. Title II took effect almost a year ago on November 21, 2009, before the regulations were finalized. GINA prohibits the use of genetic information in employment decisions and restricts employers and other entities from requesting, requiring or purchasing genetic information. Title II also requires that genetic information be maintained as a confidential medical record, and places strict limits on its disclosure.

GINA applies to an individual's status as an employee, member of a labor organization, or participant in an apprenticeship program. The final rule, like the proposed rule, includes applicants and former employees in the definition of employee.

The regulations clarify that they do not apply to an employer's actions that do not pertain to an individual's status as an employee, such as a law enforcement agency investigating criminal conduct, even where the subject of the investigation is an employee, or a healthcare facility providing a medical examination to an employee for the purpose of diagnosis and treatment unrelated to employment.

GINA prohibits retaliation against individuals who complain about the acquisition, use or disclosure of genetic discrimination and provides remedies for employees whose genetic information is acquired, used, or disclosed in violation of its protections.

The EEOC's preamble to the final rule also recognizes the viability of claims of harassment on the basis of genetic information.

Definitions

Genetic information is defined as information about: (1) an employee's genetic tests; (2) the genetic tests of that employee's family members; (3) family medical history; (4) an employee's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the employee or a family member of the employee; or (5) the genetic information of a fetus carried by an employee or by a pregnant woman who is a family member of the employee and the genetic information of any embryo legally held by the employee or family member using an assisted reproductive technology. A family member is defined as a person who becomes related to an individual through marriage, birth, adoption, or placement for adoption.

In the final regulations "family medical history" is not limited to inheritable diseases or disorders. Rather, family medical history is broader, defined as information about the manifestation of disease or disorder in family members of the individual.

Specific Prohibitions & Exceptions

With regard to the prohibition on requesting genetic information, the final rule provides that "requesting" genetic information includes: (1) conducting an Internet search on an

individual in a way that is likely to result in obtaining genetic information; (2) actively listening to third-party conversations or searching a person's personal effects for the purpose of obtaining genetic information; and (3) making requests for information about an individual's current health status in a way that is likely to result in the employer obtaining genetic information.

Although GINA prohibits employers from limiting, segregating, or classifying employees based on genetic information, the final rule clarifies that an employer will not violate this prohibition by limiting or restricting an employee's job duties based on genetic information because the employer is required to do so by a law or regulation mandating genetic monitoring.

All six of the exceptions that we previously addressed in our March 2009 post on the proposed rules, are included in the final rule, with certain caveats. These are exceptions to the general rule prohibiting requesting, requiring, or purchasing genetic information:

(1) where the employer inadvertently obtains genetic information (referred to as the "water cooler" exception);

(2) where the employer offers qualifying health or genetic services, including such services offered as part of a voluntary wellness program;

(3) where the employer requests family medical history to comply with the certification provisions of the Family and Medical Leave Act (FMLA) or state or local family and medical leave laws;

(4) where the employer acquires genetic information from documents that are commercially and publicly available, including print and internet publications, except that an employer may not research medical databases or court records for the purpose of obtaining genetic information about an individual;

(5) where the employer acquires genetic information for use in the genetic monitoring of the biological effects of toxic substances in the workplace, provided that the employer complies with monitoring restrictions provided in the proposed regulation; and

(6) where an employer that conducts DNA analysis for law enforcement purposes requires genetic information of its employees, apprentices, or trainees for quality control purposes to detect sample contamination.

Regarding the first exception, the final rule explains that an employer will not violate GINA if genetic information is inadvertently obtained in a casual conversation or in response to a general question such as "how are you?" Where an employer requests or requires genetic information of the employee or family member, the prohibition does not apply if the information is acquired in response to a lawful request for medical information and the employer directed the employee not to provide genetic information. The final rule includes safe-harbor language for employers to use on request forms to direct employees not to provide genetic information. Such a warning is mandatory when an employer requests a health care professional to conduct an employment-related medical examination.

The EEOC's safe-harbor language is as follows:

"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."

This safe harbor applies to employers' lawful requests for documentation: (1) where an employee requests accommodation under the Americans with Disabilities Act (ADA) (requests are lawful if the disability and/or need for accommodation is not obvious); (2) where an employee requests FMLA leave; or (3) to comply with FMLA return to work certification requirements. Again, the EEOC adds that such requests for medical information should include the warning language discussed above in order to meet the exception.

With regard to the second exception for employer-provided wellness programs, the EEOC specifically sought comments on what constitutes a "voluntary" wellness program. The final rule concludes that employers may offer certain kinds of financial inducements to encourage participation in health or genetic services, but they may not offer an inducement for individuals to provide genetic information. Again, it is important that employers offering incentives to employees who, for example, complete a health risk assessment that includes questions about family medical history or genetic information, identify that the employee need not respond to those questions in order to receive the incentive.

The second area in which the EEOC sought comments with respect to these exceptions focused on what should be included in the "commercially and publicly available" exception, particularly with respect to blogs and social networking sites. The final rule makes the determining factor whether access to media sources, such as a database or a website, requires permission for access from a specific individual, as opposed to a media source that just requires users to obtain a username and password. Or, if access is conditioned on membership in a particular group, such as a professional organization, then the acquisition of genetic information through these sites does not fall under the "publicly available" exception.

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Finally, despite requesting comments on how the law enforcement exception should apply, the EEOC did not add additional requirements. Several comments suggested that the genetic information acquired by this exception should be destroyed after a designated time period and that samples should not be entered into any law enforcement databases. The EEOC concluded it was unnecessary to add these further limitations.

Confidentiality Requirements

Employers may maintain genetic information about an employee or member in the same file in which it maintains confidential medical information subject to the ADA; separate from personnel files and treated as a confidential medical record. Employers are not required to remove genetic information placed in personnel files prior to November 21, 2009 and will not be liable under GINA for the existence of this information in the personnel files. However, the prohibition on use and disclosure of this information still applies. As set forth in the Act, there are a number of exceptions to the prohibition on the use and disclosure of this information, such as for disclosure to the employee or family member to whom the information relates, for disclosure to health researchers, or pursuant to a court order. The exception does not apply to disclosure pursuant to discovery in litigation, though. Thus, consistent with GINA, employers should refuse to provide genetic information in response to a discovery request, subpoena or court order that does not specify that genetic information must be disclosed.

U.S. Supreme Court to Decide Significant Class Action Issues in *Dukes v. Wal-Mart*

» Posted on December 8, 2010 by Brian Hall

On December 6, the U.S. Supreme Court announced that it would hear Wal-Mart's appeal of the Ninth Circuit's en banc decision upholding the certification of a class action gender discrimination lawsuit in *Dukes v. Wal-Mart Stores, Inc.*

As previously noted in our blog, the plaintiffs in Dukes sought to obtain certification of a nationwide class of women who allegedly have been subjected to discriminatory pay and promotion policies. The proposed class consists of women employed since December 26, 1998, in a range of Wal-Mart positions, from part-time, entry-level hourly employees to salaried managers.

Plaintiffs contend that Wal-Mart's strong, centralized structure fosters or facilitates gender stereotyping and discrimination, that the Wal-Mart's pay and promotions policies and practices are consistent throughout Wal-Mart stores, and that the alleged discrimination is common to all women who work or have worked in Wal-Mart stores. The lawsuit seeks not only injunctive relief, but also monetary damages for each of the approximately 1.5 million workers who would be included within the class.

In short, if it is permitted to proceed in accordance with the Ninth Circuit's ruling, this would be a mammoth class action with billions of dollars of potential monetary relief at stake. A Supreme Court decision upholding the Ninth Circuit will make it easier and more profitable to bring class action employment discrimination actions with the result that employers, particularly large national and international ones, will have giant targets on them.

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We hope you find this resource helpful and welcome your questions or feedback. Please send your comments or questions to Erin Hawk at ehawk@porterwright.com, or contact her at 614/227-1983.

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