A Year in Review: Key U.S. Employment Law Developments in 2010 and What to Expect in 2011

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Introduction
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What is GINA?

• A federal law that took effect on November 21, 2009

• Title I prohibits health plans from using genetic information to determine premiums and eligibility for health insurance
GINA

What is GINA? (cont’d)

- Title II prohibits employers (and other covered Title VII entities) from: (i) requesting, requiring, or purchasing genetic information; (ii) using it for any employment purposes; and (iii) disclosing it except under limited circumstances

- Issued November 9, 2010, the final Title II regulations took effect on January 10, 2011
GINA

Who is protected?

- Applicants
- Employees
- Former employees
GINA

What is “genetic information”?

• Results of an individual’s or a family member’s genetic tests
• Family medical history
• Requests for and receipt of genetic services by an individual or a family member
• Genetic information about a fetus carried by an individual or a family member or of an embryo held by the individual or family member using assisted reproductive technology
GINA

- Obtaining genetic information
- Disclosing genetic information
- Storing genetic information
Do’s and don’ts

• Can genetic information be used in making an employment decision?
• Can an employer or health care provider (HCP) obtain family medical history during a post-offer or fitness for duty medical examination?
• What about requests to HCPs for other legitimate reasons, e.g., to excuse an absence or support a request for ADA accommodation?
• What about the exception for FMLA and other leave requests?
GINA

Enforcement

• Just like Title VII

• The time to file a charge with the EEOC may be 180 (not 300) days if no state or local law prohibiting discrimination based on genetic information
Other Discrimination Law Issues to Watch

“Inflexible leave policies” under attack

- Policies that:
  - provide for automatic termination after specific period
  - restrict light duty work to employees hurt on the job
  - deny job transfers to employees unable to perform their current job

- EEOC claims these policies violate ADA’s accommodation requirement

- Major settlements include Jewel/Osco [$3.2M in December 2010], Sears [$6.2M in September 2009], Chase [$2.2M in November 2006], with pending cases against UPS, United Airlines, and Denny’s
Other Discrimination Law Issues to Watch

Employer use of credit checks under attack

• Growing minority of states prohibit employer reliance on credit history except in limited circumstances (IL, OR, WA, HI)
• October 2010: EEOC held a public hearing
• December 2010: EEOC brought a pattern and practice case in Cleveland against Kaplan Higher Education Corp. alleging disparate impact on black applicants
• H.R. 3149 is pending in Congress designed to restrict employer use
Other Discrimination Law Issues to Watch

How big can a class action suit get?

• *Wal-Mart Stores v. Dukes*, cert. granted, 12/6/2010

• Sex discrimination class of 1.5 million members consisting of any woman who has worked for Wal-Mart since December 1998 in any of 170 job classifications in any of its 3400 stores
Other Discrimination Law Issues to Watch

The “cats paw theory:”
When does biased advice to a non-biased decision-maker create liability?

• Staub v. Proctor Hospital, cert. granted, 4/19/2010

• How much influence must the underling have on the decision-maker?
Other Discrimination Law Issues to Watch

Is retaliation based on a relationship with the charging party illegal?


- Does an employee who was terminated because his fiancée filed a sex discrimination complaint have a claim under Title VII?
Other Discrimination Law Issues to Watch

Accommodating religious practices

• EEOC is aggressively pursuing these claims
• Must be “bona fide” "religious" practice
• Accommodation must be "reasonable"
• Impact on overseas operations
Other Discrimination Law Issues to Watch

Accommodating religious practices (cont’d)

• Holidays
• Sabbath
• Praying during the day
• Attire
• Body art and piercing
Other Discrimination Law Issues to Watch

Non-discriminatory harassment

- 45% of Americans have worked for a bully
- Most H.R. folks know who the bullies are
- Lots of recent media coverage
- Many states are considering new laws
- Be proactive: expand sexual harassment training and policies to include bullying
Other Discrimination Law Issues to Watch

Hot wrongful termination lawsuits

• Breach of oral contract
• Aggressive recruiting
• Promises made following layoffs
Blogging, Texting, and Social Media

Policies to Implement and Avoid
Some Potential Minefields

- Cyberbullying
  - Burlington Northern
  - Workplace Protective Orders

- Sexting
  - “Severe and pervasive conduct”
Some Potential Minefields (cont’d)

• Blogs/posts/tweets/comments that convey “TMI”
  – Release of trade secrets or insider information
  – Notice of protected status under GINA, PDA, ADA, etc

• Government employers: First Amendment
Queen of the Sky

• Delta Airlines flight attendant hosts blog about her adventures and misadventures
• Employee posts pictures of her posing in flight attendant uniform
• DAL terminates employee under policy governing use of employee uniform
• Employee sues for retaliation and discriminatory enforcement of policy
American Medical Response of Connecticut (NLRB)

Blogging and Internet Posting policy

- Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;
American Medical Response of Connecticut (NLRB) (cont’d)

Blogging and Internet Posting policy (cont’d)

• Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.
American Medical Response of Connecticut (NLRB) (cont’d)

- Employee requests union representation in investigation
- Employee criticizes supervisor in Facebook post
- Employee is terminated under Blogging and Internet Posting policy
- NLRB: Employee’s Facebook post is a “concerted activity with other employees” and therefore protected activity under Section 7
Policy Do’s

• Clear privacy/technology monitoring policy
• Clear internet/cellular phone/personal digital assistant usage policy
• Clear policy on confidential information
• Clear policy on use of company brands, trademarks, and uniforms
• Clear reporting and anti-retaliation policy
• Enforce all policies consistently
Policy Don’ts

• Ignore the issue
• Blanket prohibitions on social media use
  – ESPECIALLY if your state prohibits termination on the basis of lawful activities during non-work hours
• Internet/cellular phone policy that prohibits discussion concerning the terms and conditions of employment
ADAAA Proposed Regulations

ADA Amendments Act

- Expanded scope of “substantially limits”
- Expanded scope of “major life activity”
- Created two-tiered definition of “disability:”
  - “SL-MLA” – pretext and duty to accommodate
  - “Regarded as” – pretext only, but applies to “actual or perceived impairment”
- Removed mitigation measures from consideration
Proposed ADAAA regulations – 4 key issues

1. Add *per se* list of disabilities
2. Further expand “substantially limits” by removing consideration of “condition, manner, duration” or impairment
3. Expand MLA of working by replacing “broad class or range of jobs” with “type of job”
4. Include symptoms and mitigating measures in “regarded as” prong of disability definition
1. *Per se* list
   
   • “Substantially limits” expanded by
     
     – Requiring broad construction
     – Adding “major bodily function”
   
   • *Per se* list dropped from bill as compromise
   
   • Adding list by regulation violates 2008 deal
   
   • List is counter to individualized inquiry at heart of ADA
ADAAA Proposed Regulations

2. Substantially limits
   • ADAAA already requires broad interpretation of SL
   • Regs would remove from consideration:
     – Condition, manner, or duration under which individual performs MLA in question
     – Nature and severity of impairment
     – Expected duration of impairment
     – Permanent or long-term impact of impairment
ADAAA Proposed Regulations

3. Working as Major Life Activity

• Before ADAAA, working not firmly established as MLA – *Toyota Motor MFG. v. Williams* (2002)
• Proposed reg replaces current reg’s “class of jobs” or “broad range of jobs” with “type of job”
• Goal of ADAAA business community supporters was to *reduce* reliance on working as the MLA at issue
• Increases likelihood of disputes by creating argument that ADA covers anyone who can’t do a particular job
4. Regarded as

- Under revised “regarded as” prong of disability test, requirement is only of “actual or perceived impairment” (unless both transitory and minor)
- Reg. would make actual or perceived symptoms and effects of mitigating measures “regarded as” disabilities
- Effect is to eliminate employee’s burden of proving that an impairment was the reason for adverse action
Binding Arbitration – Dead or Alive?

What is arbitration?

• Use of private individual decision makers to resolve disputes with little or no judicial intervention
What’s Good about It?

- Speedier
- Less expensive than jury trials
- More predictable, say some
- Arbitrators have more expertise in specialized areas, such as employment law
- Private, as opposed to public, proceeding
What Insiders Say

Pro:
Arbitration “is more efficient for both sides, and compared to the unknowns of the courtrooms, there is some predictability to the process. . . . Our overall experience supports us proceeding with this route. In fact I wouldn't want to do it any other way.”

Paul B. Nix, Vice President and General Counsel, Lanier Worldwide
What’s Bad about It?

- Sometimes costly litigation over what issues are arbitrable
- Expense of arbitrator's services
- No or limited discovery rights; court action required to enforce subpoenas
- No procedure for summary judgment
- Concern that arbitrators "split the baby"
- Lack of appeal rights
What Insiders Say

Con:
"Our company ended up investing more than a year's worth of time and substantial legal fees simply to enforce in court our right not to have to go to court."

Jonathan B. Wilson, General Counsel, Interland, Inc.
Federal and State Arbitration Acts

- Federal Arbitration Act ("FAA")
- Uniform Arbitration Act ("UAA")
Arbitration is Creature of Contract

• Threshold question: Is there an enforceable agreement to arbitrate?
• Agreement to arbitrate must be enforceable in light of applicable state law of contracts generally
Scope of Arbitration Clause

What issues are arbitrable?

- Language of contract determines
- Who decides
- Presumption in favor of arbitration
Language of Arbitration Agreement Is Critical

Example A:

Arbitration. All disputes arising out of this Agreement shall be resolved by binding arbitration.
Language of Arbitration Agreement Is Critical

Example B:

**Arbitration**: All claims or matters arising out of or relating to this Agreement, or its breach, or to the parties' relationship or dealings, will be arbitrable in City, State, conducted under the Employment Arbitration Rules of the American Arbitration Association in effect at the time of the arbitration. The parties agree this arbitration agreement is governed by the provisions of the Federal Arbitration Act. The arbitrator, not a court, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of this Agreement, including any claim that this Agreement is void or voidable.
Terms to Consider

- Make clear that all disputes arising from parties' relationship are to go to arbitration
- Specify that arbitrator is to determine arbitrability
- State that FAA applies
- Identify AAA employment rules as controlling
Terms to Consider

• Whether parties may seek injunctive relief in court or within the arbitration process
• Whether arbitrator will be requested to award attorneys' fees and costs, and how those to be allocated
• Where appeal will be filed
Ways to Reduce Costs

• Mediate before arbitration hearing
• Impose mandatory scheduling conference and scheduling order
• Place limits on discovery
• Consider dispositive motions
• Impose evidentiary hearing duration restrictions
• Curb the appealability of an award

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