

**SMITH & DOWNEY, P.A.**  
**EMPLOYMENT LAW UPDATE**

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[Note that this Outline is only a very general discussion of some issues in the law, and is not intended as legal advice for any particular situation.]

**I. HOW TO MINIMIZE THE RISK OF LAWSUITS WHEN DOWNSIZING**

With the possible exception of laws dealing with the dissolution of marriages and child custody, no issue provokes a more dramatic emotional response than the laws impacting the termination of an employment relationship. In many instances, employees plan for their entire lives to someday have the precise position that is now being taken from them as the result of a reduction in force. In addition to the immediate impact of a salary loss, a downsized employee frequently feels personally “wronged” by the termination, and will often seek to remedy this perceived wrong by filing charges in various governmental agencies and/or filing a lawsuit. Since most reductions in force are motivated by an employer’s desire to save money by eliminating wage obligations, employers must be very careful to avoid “robbing Peter to pay Paul”, i.e., trading one monetary burden (the payment of wages) for another (the defense and/or settlement of lawsuits). Below is a list of laws that must be considered by all employers preparing to reduce the size of their workforce. Strict compliance with each statute is a crucial condition precedent to a successful reduction in force.

1. Employment Contracts. If an employee selected for downsizing has an employment contract, the employer must be prepared to abide by the termination provisions of that contract.
  - a. Most employees are employed on an “at-will” basis. Employers should double check their handbooks to ensure that appropriate “at-will” disclaimers are displayed prominently in personnel-related documents.
2. Collective Bargaining Agreements. Employers with collective bargaining agreements must comply with all notification and preference obligations set forth in these agreements. In addition, employers are typically required to engage in effects bargaining with respect to termination decisions.
3. Discrimination Laws. The first thing that a Plaintiff’s lawyer will review when evaluating an involuntary termination is whether the termination decision was in any way influenced by an employee’s protected classification(s). This is a complex evaluation process that should be completed by the employer prior to any termination.
  - b. Examine Demographics. Employers should consult with legal counsel to determine whether the group selected for termination reflects any disparate impact on any protected group. In all instances, employers should examine the impact upon employees by race, national origin, gender and age. On a case-by-case basis, employers should also pay attention to all other protected classifications (e.g., disability, sexual orientation, religion, veteran status, etc.)

- (i) If the overall group selected for downsizing generally reflects the demographics of the workforce, then the employer should nevertheless evaluate a review of each individual being terminated to ensure that his/her individual selection is not marred by any possible discrimination.
    - (ii) If the group selected for downsizing does not reflect the demographics of the workforce, then the employer must undertake an exhaustive “audit” of the entire selection process for the projected downsizing.
    - (iii) Employers with Affirmative Action Plans must undertake a more complex utilization analysis to ensure that the downsizing process does not interfere with their affirmative action goals.
  - c. Examine Past EEO History. Employment decisions do not occur in a vacuum. When downsizing, employers must review any recent EEO history to ascertain how this history might reflect upon their current downsizing efforts.
  - d. Reverse Discrimination. In spite of the need to examine closely diversity issues when downsizing, employers must beware of selecting a non-protected employee for termination solely because he/she is not in a protected class. Any such decision should be discussed with an employment attorney before implementation.
4. Examine Performance Reviews. It is well established that employers who carefully and regularly conduct performance reviews optimize their ability to reduce their workforce in a way that results in the discharge of the least valuable employees. On the other hand, employers who fail to document performance problems lose credibility when discharging an employee for reasons for which there is an absence of a paper trail demonstrating the problem at issue. No downsizing decision should be made without a thorough review of performance reviews and/or documents of any nature that reflect disciplinary problems.
- (i) Employers are safest when basing downsizing decisions on quantifiable factors.
  - (ii) Employers are most vulnerable when basing a downsizing decision on intangibles.
5. Retaliation Lawsuits. Are any of the employees selected for downsizing individuals who have complained about issues that are protected by law? If so, any such protected activity must be taken into consideration when examining the lawfulness of the decision to terminate such an employee.
6. Fair Labor Standards Act (“FLSA”). No employment law is more difficult to grasp than the Fair Labor Standards Act (“FLSA”). It is quite common for employers to improperly label a non-exempt employee as “exempt”. When this mistake is made with respect to an employee who is being downsized, then
7. Examine Benefit Plans. Employers should determine all benefits available to an employee upon termination. Employers should be especially mindful of any benefits that would vest shortly after the termination of an employee, and be prepared to demonstrate that the selection of an employee for termination was not motivated by a desire to deprive that employee of an employee benefit.
8. Handbook and Written Policies. Employers should review its Handbook and any written policy to identify any policies that might compromise their ability to downsize.

9. Leave Status. Employers should make certain that they have complied with all applicable leave laws (e.g., FMLA) and policies when terminating an employee on a leave of absence.

10. The Worker Adjustment and Retraining Notification Act (WARN). The Worker Adjustment and Retraining Notification Act (WARN) requires most employers with 100 or more employees to provide notification 60 calendar days in advance of plant closings and mass layoffs.

- a. Who is Covered. The Worker Adjustment and Retraining Notification Act (WARN) generally covers employers with 100 or more employees, not counting those who have worked less than six months in the last 12 months and those who work an average of less than 20 hours a week. Regular federal, state, and local government entities that provide public services are not covered. Employees entitled to notice under WARN include managers and supervisors as well as hourly and salaried workers
- b. Who is Entitled to Notice. Employees entitled to notice under WARN include managers and supervisors, as well as hourly and salaried workers. WARN requires that notice also be given to employees' representatives, the local chief elected official, and the state dislocated worker unit.
- c. Plant Closing. A covered plant closing occurs when a facility or operating unit is shut down for more than six months and 50 or more employees lose their jobs, or when 50 or more employees lose their jobs during any 30-day period at a single site of employment.
- d. Mass Layoff. A covered mass layoff occurs when a layoff of six months or longer affects either 500 or more workers or at least 33 percent of the employer's workforce when the layoff affects between 50 and 499 workers. The number of affected workers is the total number laid off during a 30-day (or in some cases 90-day) period.
- e. Exceptions. WARN does not apply to closure of temporary facilities, or the completion of an activity when the workers were hired only for the duration of that activity. WARN also provides for less than 60 days notice when the layoffs resulted from closure of a faltering company, unforeseeable business circumstances, or a natural disaster.
- f. Penalties/Sanctions. An employer who violates the WARN provisions is liable to each employee for an amount equal to back pay and benefits for the period of the violation, up to 60 days. This may be reduced by the period of any notice that was given, and any voluntary payments that the employer made to the employee. An employer who fails to provide the required notice to the unit of local government is subject to a civil penalty not to exceed \$500 for each day of violation. The employer may avoid this penalty by satisfying the liability to each employee within three weeks after the closing or layoff.

11. Older Workers Benefit Protection Act ("OWBPA"). An employer may ask an employee to waive his/her rights or claims under the Age Discrimination in Employment Act either in the settlement of an ADEA administrative or court claim or in connection with an exit incentive program or other employment termination program. However, the ADEA, as amended by OWBPA, sets out specific minimum standards that must be met in order for a waiver to be considered knowing and voluntary and, therefore, valid. Among other requirements, a valid ADEA waiver must:

- a. be in writing and be understandable;

- b. specifically refer to ADEA rights or claims;
- c. not waive rights or claims that may arise in the future;
- d. be in exchange for valuable consideration;
- e. advise the individual in writing to consult an attorney before signing the waiver; and
- f. provide the individual at least 21 days to consider the agreement and at least seven days to revoke the agreement after signing it.
- g. If an employer requests an ADEA waiver in connection with an exit incentive program or other employment termination program, the employer must provide the individual at least 45 days to consider the agreement (along with the seven day revocation period), and must also inform the individual in writing in a manner calculated to be understood by the average individual eligible to participate, as to:
  - (i) any class, unit, or group of individuals covered by such program, any eligibility factors for such program, and any time limits applicable to such program; and
  - (ii) the job titles and ages of all individuals eligible or selected for the program, and the ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program.

## II. LILLY LEDBETTER FAIR PAY ACT

### 1. Ledbetter v. Goodyear Tire & Rubber Co.

- a. Ledbetter worked for Goodyear in Alabama from 1979 until accepting early retirement in 1998
- b. During her employment, Ledbetter's salary was determined annually based on her supervisor's ranking of her performance
- c. Ledbetter's performance reviews placed her near the bottom of the rankings, and consequently she received small salary increases
- d. During her last two years of employment, she was in a job slated for layoff and, consistent with company policy, did not receive any raises
- e. By the time of her retirement, her small annual raises resulted in a large gap between her compensation and that of her male coworkers
- f. Ledbetter filed a charge with EEOC in 1998 alleging that she was discriminated against on account of her sex because she received lower pay than her male coworkers
- g. She filed suit in November 1999, the case went to a jury, and she was awarded \$223,776 in back pay, \$4,662 for mental anguish, and over \$3.2 million in punitive damages.
- h. The trial court reduced the award to \$360,000
- i. Goodyear appealed, 11<sup>th</sup> Circuit concluded that Ledbetter's pay was the result of long-past decisions that she could not challenge as they were outside of Title VII's charge filing time period
- j. Supreme Court affirmed, holding that a pay-setting decision, like a termination or demotion, is a "discrete act" forming the basis of a Title VII claim and thus triggering the 180-day period to file a charge
- k. The Court rejected the argument that the issuance of each paycheck based on an allegedly discriminatory pay decision made outside of the statutory charging period resulted in a continuing violation of Title VII
- l. In her dissent, Justice Ginsburg argued that the unlawful practice was the current payment of a salary infected by gender based discrimination, even if the infection occurred long before the plaintiff filed a charge
- m. Justice Ginsburg invited the Court to correct Court's reading of the Title VII limitations period, and Congress responded

2. The Lilly Ledbetter Fair Pay Act

- a. Amends Title VII, the ADA, The Rehabilitation Act of 1973, and the ADEA to provide that the charge-filing periods (300 days in most states and 180 days in states that do not have a fair employment agency) would commence when:
  - (i) A discriminatory compensation decision or other practice is adopted;
  - (ii) An individual becomes subject to the decision or practice; or
  - (iii) An individual is affected by an application of a discriminatory compensation decision or practice (including each time wages, benefits, or other compensation is paid)
- b. The law is a direct response to the *Ledbetter* decision
- c. The statute of limitations restarts each time an employee receives a paycheck based on a discriminatory compensation decision.
- d. Significantly, the new law also provides that an unlawful employment practice occurs when “a person” is affected by discriminatory pay decision or other practice
- e. We could see pay discrimination charges filed by, among others, spouses of deceased workers
- f. It will be interesting to track how the EEOC and Courts will interpret this language
- g. The law is retroactive to May 28, 2007, the day before the *Ledbetter* decision

3. How to respond

- a. This is a broadening of the protections afforded by Title VII, and employers should review and revise their policies and practices to minimize the risk of liability
- b. Look at your compensation practices
  - (i) Do you maintain documentation to support compensation decisions?
  - (ii) Are your compensation decisions made using specific, performance-based criteria?
- c. Develop specific criteria for compensation decisions
  - (i) Must be objective and measurable
  - (ii) Apply them consistently, uniformly

- d. Review compensation decisions
    - (i) Who is making the decisions?
    - (ii) How much discretion are your managers and supervisors given?
    - (iii) You should be reviewing their compensation decisions the same way you review terminations or disciplinary decisions
  - e. Document retention
    - (i) How long do you maintain documentation regarding compensation decisions?
    - (ii) Changes in the law mean that you will have to maintain these records significantly longer
  - f. Training
    - (i) Need to educate supervisors and managers about these policy changes, the significance of the law
  - g. Periodic audits
    - (i) We recommend that you analyze your compensation data to determine if there are any disparities across gender, race, ethnic line
4. The Impact
- a. Lilly Ledbetter campaigned with President Obama and this is the first piece of legislation signed by him
  - b. EEOC will likely make these cases a priority
  - c. The progress that has been made on Fair Pay is something we'll hear during the 2012 campaign
  - d. More litigation
  - e. More government activity
  - f. Employers must be proactive or risk increased litigation costs and liability

### **III. GENETIC INFORMATION NONDISCRIMINATION ACT OF 2008**

#### 1. Overview:

##### a. *Purpose:*

Establish legal protections that will enable and encourage individuals to take advantage of genetic screening, counseling, testing, and new therapies that will result from scientific advances in the field of genetics.

##### b. *Title I – Genetic Nondiscrimination in Health Insurance:*

Prevents health insurers from denying coverage or adjusting premiums based on an individuals' predisposition to a genetic condition. Health insurance provisions take effect May 21, 2009.

GINA Title I applies to group health plans sponsored by private employers, unions and state and local government employers; issuers in group and individual health insurance markets; and issuers of Medicare supplemental (Medigap) insurance.

Generally prohibits discrimination in group premiums based on genetic information and the use of genetic information as a basis for determining eligibility or setting premiums in the individual and Medigap insurance markets, and places limitation on genetic testing and the collection of genetic information in group health plan coverage, the individual insurance market, and the Medigap insurance market.

Title I also provides a clarification with respect to the treatment of genetic information under privacy regulations promulgated pursuant to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

##### c. *Title II – Prohibiting Employment Discrimination on the Basis of Genetic Information:*

Title II of GINA prohibits use of genetic information in the employment context, restricts the deliberate acquisition of genetic information by employers and other entities covered by Title II, and strictly limits such entities from disclosing genetic information. Employment provisions take effect November 21, 2009.

##### i. *Coverage:*

Title II applies to private employers and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint labor-management training programs.

##### ii. *Prohibited Actions:*

Title II of GINA:

1. Prohibits the use of genetic information in making decisions related to any terms, conditions, or privileges of employment,
2. Prohibits covered entities from intentionally acquiring genetic information,
3. Requires confidentiality with respect to genetic information (with limited exceptions), and
4. Prohibits retaliation.

iii. *Exceptions:*

No exceptions exist with respect to the *use* of genetic information. However, there are several exceptions with respect to the *acquisition* of genetic information.

The law incorporates by reference many of the familiar definitions, remedies, and procedures from Title VII of the Civil Rights Act of 1964, as amended, and other statutes protecting federal, state, and Congressional employees from discrimination.

2. Proposed EEOC Regulations:

a. *§1635.1 – Purpose:*

“The purpose of this part is to implement Title II of the Genetic Information Non-Discrimination Act of 2008, 42 U.S.C. 2000ff, *et. seq.* Title II of GINA prohibits use of genetic information in employment decision-making, restricts deliberate acquisition of genetic information, requires that genetic information be maintained as a confidential medical record, and places strict limits on disclosure of genetic information. The law provides remedies for individuals whose genetic information is acquired, used, or disclosed in violation of its protections.”

b. *§1635.2 – Definitions – General:*

(a) *Commission* means the Equal Employment Opportunity Commission, as established by section 705 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4.

(b) *Covered Entity* means an employer, employing office, employment agency, labor organization, or joint labor-management committee.

(c) *Employee* means an individual employed by a covered entity, as well as an applicant for employment and a former employee. An employee, including an applicant for employment and a former employee, is:

(1) As defined by section 701 of the Civil Rights Act of 1964, 42 U.S.C. 2000e, an individual employed by a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year and any agent of such a person;

(2) As defined by section 304(a) of the Government Employee Rights Act, 42 U.S.C. 2000e-16c(a), a person chosen or appointed by an individual elected to public office by a State or political subdivision of a State to serve as part of the personal staff of the elected official, to serve the elected official on a policymaking level, or to serve the elected official as the immediate advisor on the exercise of the elected official's constitutional or legal powers.

(3) As defined by section 101 of the Congressional Accountability Act, 2 U.S.C. 1301, any employee of the House of Representatives, the Senate, the Capitol Guide Service, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, or the Office of Technology Assessment;

(4) As defined by, and subject to the limitations in, section 2(a) of the Presidential and Executive Office Accountability Act, 3 U.S.C. 411(c), any employee of the executive branch not otherwise covered by section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, section 15 of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 633a, or section 501 of the Rehabilitation Act of 1973, 29 U.S.C. 791, whether appointed by the President or any other appointing authority in the executive branch, including an employee of the Executive Office of the President;

(5) As defined by, and subject to the limitations in, section 717 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16, and regulations of the Equal Employment Opportunity Commission at 29 CFR 1614.103, an employee of a federal executive agency, the United States Postal Service and the Postal Rate Commission, the Tennessee Valley Authority, the National Oceanic and Atmospheric Administration Commissioned Corps, the Government Printing Office, and the Smithsonian Institution; an employee of the federal judicial branch having a position in the competitive service; and an employee of the Library of Congress.

(d) *Employer* means any person that employs an employee defined in § 1635.2(c) of this part, and any agent of such person, except that, as limited by section 701(b)(1) and (2) of the Civil Rights Act of 1964, 42 U.S.C. 2000e(b)(1) and (2), an employer does not include an Indian tribe or a bona fide private club (other than a labor organization) that is exempt from taxation under section 501(c) of the Internal Revenue Code of 1986.

(e) *Employing office* is defined in the Congressional Accountability Act, 2 U.S.C. 1301(9), to mean the personal office of a Member of the House of Representatives or of a Senator; a committee of the House of Representatives or the Senate or a joint committee; any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate; or the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Compliance, and the Office of Technology Assessment.

(f) *Employment agency* is defined in 42 U.S.C. 2000e(c) to mean any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person.

(g) *Joint labor-management committee* is defined as an entity that controls apprenticeship or

other training or retraining programs, including on-the job training programs.

(h) *Labor organization* is defined at 42 U.S.C. 2000e(d) to mean an organization with fifteen or more members engaged in an industry affecting commerce, and any agent of such an organization in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

(i) *Member* includes, with respect to a labor organization, an applicant for membership.

(j) *Person* is defined at 42 U.S.C. 2000e(a) to mean one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(k) *State* is defined at 42 U.S.C. 2000e(i) and includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*).

c. §1635.3 – *Definitions Specific to GINA:*

(a) *Family member* means with respect to any individual

(1) A person who is a dependent of that individual as the result of marriage, birth, adoption, or placement for adoption; or

(2) A first-degree, second-degree, third-degree, or fourth-degree relative of the individual, or of a dependent of the individual as defined in § 1635.3(a)(1).

(i) First-degree relatives include an individual's parents, siblings, children, and half-siblings.

(ii) Second-degree relatives include an individual's grandparents, grandchildren, uncles, aunts, nephews, and nieces.

(iii) Third-degree relatives include an individual's great-grandparents, great grandchildren, great uncles/aunts, and first cousins.

(iv) Fourth-degree relatives include an individual's great-great grandparents, great-great grandchildren, and first cousins once-removed (i.e., the children of the individual's first cousins).

(b) *Family medical history*. Family medical history means information about the manifestation of disease or disorder in family members of the individual.

(c) *Genetic information*.

(1) Genetic information means information about:

- (i) An individual's genetic tests;
- (ii) The genetic tests of that individual's family members;
- (iii) The manifestation of disease or disorder in family members of the individual (family medical history);
- (iv) 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; or
- (v) The genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

(2) Genetic information does not include information about the sex or age of the individual or the sex or age of family members.

(d) *Genetic monitoring* means the periodic examination of employees to evaluate acquired modifications to their genetic material, such as chromosomal damage or evidence of increased occurrence of mutations, caused by the toxic substances they use or are exposed to in performing their jobs, in order to identify, evaluate, and respond to the effects of or control adverse environmental exposures in the workplace.

(e) *Genetic services* means a genetic test; genetic counseling (including obtaining, interpreting, or assessing genetic information); or genetic education.

(f) *Genetic test*—

(1) *In general.* “Genetic test” means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chromosomal changes.

(i) An analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes is not a genetic test.

(ii) A medical examination that tests for the presence of a virus that is not composed of *human* DNA, RNA, chromosomes, proteins, or metabolites is not a genetic test.

(2) *Alcohol and drug testing.*

(i) A test for the presence of alcohol or drugs is not a genetic test.

(ii) A test to determine whether an individual has a genetic predisposition for alcoholism or drug use is a genetic test.

(g) *Manifestation* or *manifested* means, with respect to a disease, disorder, or pathological condition, that an individual has been or could reasonably be diagnosed with the disease, disorder, or pathological condition by a health care professional with appropriate training and

expertise in the field of medicine involved. For purposes of this part, a disease, disorder, or pathological condition is not manifested if the diagnosis is based principally on genetic information or on the results of one or more genetic tests.

d. *§1635.4 – Prohibited practices – in general:*

(a) It is unlawful for an employer to discriminate against an individual on the basis of the genetic information of the individual in regard to hiring, discharge, compensation, terms, conditions, or privileges of employment.

(b) It is unlawful for an employment agency to fail or refuse to refer any individual for employment or otherwise discriminate against any individual because of genetic information of the individual.

(c) It is unlawful for a labor organization to exclude or to expel from the membership of the organization, or otherwise to discriminate against, any member because of genetic information with respect to the member.

(d) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs, including on-the-job training programs to discriminate against any individual because of the individual's genetic information in admission to, or employment in, any program established to provide apprenticeship or other training or retraining.

e. *§ 1635.5 – Limiting, segregating, and classifying:*

(a) A covered entity may not limit, segregate, or classify an individual, or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive the individual of employment opportunities or otherwise affect the status of the individual as an employee, because of genetic information with respect to the individual.

(b) Notwithstanding any language in this part, a cause of action for disparate impact within the meaning of section 703(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(k), is not available under this part.

f. *§ 1635.6 – Causing an employer to discriminate:*

An employment agency, labor organization, or joint labor-management training or apprenticeship program may not cause or attempt to cause an employer, or its agent, to discriminate against an individual in violation of this part, including with respect to the individual's participation in an apprenticeship or other training or retraining program, or with respect to a member's participation in a labor organization.

g. *§ 1635.7 – Retaliation:*

A covered entity may not discriminate against any individual because such individual has opposed any act or practice made unlawful by this title or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or

hearing under this title.

h. *§ 1635.8 – Acquisition of genetic information:*

(a) *General prohibition.* A covered entity may not request, require, or purchase genetic information of an individual, except as specifically provided in paragraph (b) of this section.

(b) *Exceptions.* The general prohibition against requesting, requiring, or purchasing genetic information does not apply:

(1) Where a covered entity inadvertently requests or requires genetic information of the individual or family member of the individual. This exception to the acquisition of genetic information applies in, but is not necessarily limited to, situations where—

(i) A manager, supervisor, union representative, or employment agency personnel learns genetic information about an individual by overhearing a conversation between the individual and others;

(ii) A manager, supervisor, union representative, or employment agency personnel learns genetic information about an individual by receiving it from the individual or third-parties without having solicited or sought the information;

(iii) An individual provides genetic information as part of documentation to support a request for reasonable accommodation under Federal, State, or local law, as long as the covered entity's request for such documentation is lawful;

(iv) An employer requests medical information (other than genetic information) as permitted by Federal, State, or local law from an individual, who responds by providing, among other information, genetic information;

(v) An individual provides genetic information to support a request for leave that is not governed by Federal, State, or local laws requiring leave, as long as the documentation required to support the request otherwise complies with the requirements of the Americans with Disabilities Act and other laws limiting a covered entity's access to medical information; or

(vi) A covered entity learns genetic information about an individual in response to an inquiry about the individual's general health, an inquiry about whether the individual has any current disease, disorder, or pathological condition, or an inquiry about the general health of an individual's family member;

(2) Where a covered entity offers health or genetic services, including such services offered as part of a voluntary wellness program. This exception applies only where—

(i) The individual provides prior knowing, voluntary, and written authorization that

(A) Is written so that the individual from whom the genetic information is being obtained is reasonably likely to understand the form;

(B) Describes the type of genetic information that will be obtained and the general purposes for which it will be used; and

(C) Describes the restrictions on disclosure of genetic information.

(ii) Individually identifiable genetic information is provided only to the individual (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services; and

(iii) Any individually identifiable genetic information provided under paragraph (b)(2) of this section is only available for purposes of such services and is not disclosed to the covered entity except in aggregate terms that do not disclose the identity of specific individuals.

(3) Where the employer requests family medical history to comply with the certification provisions of the Family and Medical Leave Act of 1993 (29 U.S.C. 2601 *et seq.*) or State or local family and medical leave laws.

(4) Where the covered entity acquires genetic information from documents that are commercially and publicly available for review or purchase, including newspapers, magazines, periodicals, or books, or through electronic media, such as information communicated through television, movies, or the Internet, except that a covered entity may not research medical databases or court records, even where such databases may be publicly and commercially available, for the purpose of obtaining genetic information about an individual.

(5) Where the covered entity acquires genetic information for use in the genetic monitoring of the biological effects of toxic substances in the workplace. In order for this exception to apply, the covered entity must provide written notice of the monitoring to the individual. This exception further provides that such monitoring:

(i) Either is required by federal or state law, or conducted only where an individual gives prior knowing, voluntary and written authorization to the monitoring that—

(A) Is written so that the individual from whom the genetic information is being obtained is reasonably likely to understand the form.;

(B) Describes the genetic information that will be obtained;

(C) Describes the restrictions on disclosure of genetic information;

(ii) Ensures that the individual is informed of individual monitoring results;

(iii) Is conducted in compliance with any Federal genetic monitoring

regulations, including any regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 *et seq.*), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*); or State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 *et seq.*); and

(iv) Provides for reporting of the results of the monitoring to the covered entity, excluding any licensed health care professional or board certified genetic counselor involved in the genetic monitoring program, only in aggregate terms that do not disclose the identity of specific individuals.

(6) Where an employer that conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification requests or requires genetic information of its employees, apprentices, or trainees, but only to the extent that the genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination and maintained in a manner consistent with such use.

(c) A covered entity may not use genetic information obtained pursuant to the exceptions in § 1635.8(b) of this part to discriminate, as defined by §§ 1635.4, 1635.5, or 1635.6, and must keep such information confidential as required by § 1635.9.

i. § 1635.9 – Confidentiality:

(a) *Treatment of genetic information.*

(1) A covered entity that possesses genetic information in writing about an employee or member must maintain such information on forms and in medical files (including where the information exists in electronic forms and files) that are separate from personnel files and treat such information as a confidential medical record.

(2) A covered entity may maintain genetic information about an employee or member in the same file in which it maintains confidential medical information subject to section 102(d)(3)(B) of the Americans with Disabilities Act, 42 U.S.C. 12112(d)(3)(B).

(3) Genetic information that a covered entity receives orally need not be reduced to writing, but may not be disclosed, except as permitted by this part.

(4) Genetic information that a covered entity acquires through publicly available sources, as provided by § 1635.8(b)(4) of this part, is not considered confidential genetic information, but may not be used to discriminate against an individual as described in §§ 1635.4, 1635.5, or 1635.6 of this part.

(b) *Limitations on disclosure.* A covered entity that possesses any genetic information, regardless of how the entity obtained the information (except for genetic information acquired through publicly available sources), may not disclose it except:

- (1) To the employee or member (or family member if the family member is receiving the genetic services) about whom the information pertains upon receipt of the employee's or member's written request;
- (2) To an occupational or other health researcher if the research is conducted in compliance with the regulations and protections provided for under 45 CFR part 46;
- (3) In response to an order of a court, except that the covered entity may disclose only the genetic information expressly authorized by such order; and if the court order was secured without the knowledge of the individual to whom the information refers, the covered entity shall inform the individual of the court order and any genetic information that was disclosed pursuant to such order;
- (4) To government officials investigating compliance with this title if the information is relevant to the investigation;
- (5) To the extent that such disclosure is made in support of an employee's compliance with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws; or
- (6) To a Federal, State, or local public health agency only with regard to information about the manifestation of a disease or disorder that concerns a contagious disease that presents an imminent hazard of death or life-threatening illness, provided that the individual whose family member is the subject of the disclosure is notified of such disclosure.

(c) *Relationship to HIPAA Privacy Regulations.* Pursuant to § 1635.11(d) of this part, nothing in this section shall be construed as applying to the use or disclosure of genetic information that is protected health information subject to the regulations issued pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996.

j. § 1635.10 – *Enforcement and Remedies:*

(a) *Powers and procedures:* The following powers and procedures shall apply to allegations that Title II of GINA has been violated:

- (1) The powers and procedures provided to the Commission, the Attorney General, or any person by sections 705 through 707 and 709 through 711 of the Civil Rights Act of 1964, 42 U.S.C. 2000e–4 through 2000e–6 and 2000e–8 through 2000e–10, where the alleged discrimination is against an employee defined in 1635.2(c)(1) of this part or against a member of a labor organization;
- (2) The powers and procedures provided to the Commission and any person by sections 302 and 304 of the Government Employees Rights Act, 42 U.S.C. 2000e–16b and 2000e–16c, and in regulations at 29 CFR part 1603, where the alleged discrimination is against an employee as defined in § 1635.2(c)(2) of this part;
- (3) The powers and procedures provided to the Board of Directors of the Office of Compliance and to any person under the Congressional Accountability Act, 2 U.S.C. 1301 *et seq.* (including the provisions of Title 3 of that act, 2 U.S.C. 1381 *et seq.*),

where the alleged discrimination is against an employee defined in § 1635.2(c)(3) of this part;

(4) The powers and procedures provided in 3 U.S.C. 451 *et seq.*, to the President, the Commission, or any person in connection with an alleged violation of section 3 U.S.C. 411(a)(1), where the alleged discrimination is against an employee defined in § 1635.2(c)(4) of this part;

(5) The powers and procedures provided to the Commission, the Librarian of Congress, and any person by section 717 of the Civil Rights Act, 42 U.S.C. 2000e–16, where the alleged discrimination is against an employee defined in § 1635.2(c)(5) of this part.

(b) *Remedies.* The following remedies are available for violations of GINA sections 202, 203, 204, 205, 206, and 207(f):

(1) Compensatory and punitive damages as provided for, and limited by, 42 U.S.C. 1981a(a)(1) and (b);

(2) Reasonable attorney’s fees, including expert fees, as provided for, and limited by, 42 U.S.C. 1988(b) and (c); and

(3) Injunctive relief, including reinstatement and hiring, back pay, and other equitable remedies as provided for, and limited by, 42 U.S.C. 2000e–5(g).

k. § 1635.11 – *Construction:*

(a) *Relationship to other laws, generally.* This part does not—

(1) Limit the rights or protections of an individual under any other Federal, State, or local law that provides equal or greater protection to an individual than the rights or protections provided for under this part, including the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 *et seq.*), the Rehabilitation Act of 1973 (29 U.S.C. 701 *et seq.*), and State and local laws prohibiting genetic discrimination or discrimination on the basis of disability;

(2) Apply to the Armed Forces Repository of Specimen Samples for the Identification of Remains;

(3) Limit or expand the protections, rights, or obligations of employees or employers under applicable workers’ compensation laws;

(4) Limit the authority of a Federal department or agency to conduct or sponsor occupational or other health research in compliance with the regulations and protections provided for under 45 CFR part 46;

(5) Limit the statutory or regulatory authority of the Occupational Safety and Health Administration or the Mine Safety and Health Administration to promulgate or enforce workplace safety and health laws and regulations; or

(6) Require any specific benefit for an employee or member or a family member of

an employee or member (such as additional coverage for a particular health condition that may have a genetic basis) under any group health plan or health insurance issuer offering group health insurance coverage in connection with a group health plan.

(b) *Relation to certain Federal laws governing health coverage.* Nothing in GINA Title II provides for enforcement of, or penalties for, violation of any requirement or prohibition of a covered entity subject to enforcement for a violation of:

(1) Amendments made by Title I of GINA.

(2) Section 701(a) of the Employee Retirement Income Security Act (29 U.S.C. 1181) (ERISA), section 2701(a) of the Public Health Service Act (42 U.S.C. 300gg(a)), and section 9801(a) of the Internal Revenue Code (26 U.S.C. 9801(a)), as such sections apply with respect to genetic information pursuant to 29 U.S.C. 1181(b)(1)(B), 42 U.S.C. 300gg(b)(1)(B), and 26 U.S.C. 9801(b)(1)(B), respectively, of such sections, which prohibit a group health plan or a health insurance issuer in the group market from imposing a preexisting condition exclusion based solely on genetic information, in the absence of a diagnosis of a condition;

(3) Section 702(a)(1)(F) of ERISA (29 U.S.C. 1182(a)(1)(F)), section 2702(a)(1)(F) of the Public Health Service Act (42 U.S.C. 300gg-1(a)(1)(F)), and section 9802(a)(1)(F) of the Internal Revenue Code (26 U.S.C. 9802(a)(1)(F)), which prohibit a group health plan or a health insurance issuer in the group market from discriminating against individuals in eligibility and continued eligibility for benefits based on genetic information; or

(4) Section 702(b)(1) of ERISA (29 U.S.C. 1182(b)(1)), section 2702(b)(1) of the Public Health Service Act (42 U.S.C. 300gg-1(b)(1)), and section 9802(b)(1) of the Internal Revenue Code (26 U.S.C. 9802(b)(1)), as such sections apply with respect to genetic information as a health status-related factor, which prohibit a group health plan or a health insurance issuer in the group market from discriminating against individuals in premium or contribution rates under the plan or coverage based on genetic information.

(c) *Relationship to authorities under GINA Title I.* GINA Title II does not prohibit any group health plan or health insurance issuer offering group health insurance coverage in connection with a group health plan from engaging in any action that is authorized under any provision of law noted in § 1635.11(b) of this part, including any implementing regulations noted in § 1635.11(b).

(d) *Relationship to HIPAA Privacy Regulations.* This part does not apply to genetic information that is protected health information subject to the regulations issued by the Secretary of Health and Human Services pursuant to section 264(c) of the Health Insurance Portability and Accountability Act of 1996.

1. § 1635.12 – *Medical information that is not genetic information:*

(a) *Medical information about a manifested disease, disorder, or pathological condition.*

(1) A covered entity shall not be considered to be in violation of this part based on the use, acquisition, or disclosure of medical information that is not genetic

information about a manifested disease, disorder, or pathological condition of an employee or member, even if the disease, disorder, or pathological condition has or may have a genetic basis or component.

(2) Notwithstanding paragraph (a)(1) of this section, the acquisition, use, and disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition is subject to applicable limitations under sections 103(d)(1)–(4) of the Americans with Disabilities Act (42 U.S.C. 12112(d)(1)–(4)), and regulations at 29 CFR 1630.13, 1630.14, and 1630.16.

(b) *Genetic information related to a manifested disease, disorder, or pathological condition.* Notwithstanding paragraph (a) of this section, genetic information about a manifested disease, disorder, or pathological condition is subject to the requirements and prohibitions in sections 202 through 206 of GINA and §§ 1635.4 through 1635.7 and 1635.9 of this part.

### 3. Take Home Points:

a. *Effective Date:* November 21, 2009

b. *ADA Policies:* ADA policies will need to be reviewed and revised in light of the new regulations. As noted by the regulations, the best option is to take a proactive approach, indicating on certification forms used in ADA events that no genetic or family medical history information should be provided on the forms.

In addition, if you are a health care provider, it would be wise to issue notices or training to medical professionals in light of these changes.

c. *FMLA Policies:* Review FMLA policies to ensure that the internal policies and certification forms are in compliance with GINA.

d. *Confidential Medical Files:* This is a good reminder to ensure that we are keeping separate, confidential medical files where an employee's medical information is acquired. Ensure that these are kept in a secure location separate from employee files.

#### **IV. EMPLOYEE FREE CHOICE ACT (“EFCA”)**

1. Current Law. Under current law, unions typically do not become the bargaining representative for a bargaining unit unless they have participated in a secret ballot election among the employees. During this period, both the union and management engage in an election campaign, in which both sides are given the opportunity to present their arguments to the targeted employees. If the union wins the majority of votes in the election, it becomes the exclusive bargaining representative for the employees in the bargaining unit. (Under the current model, union representation in the private sector has decline from approximately 25% in the mid-1970’s to the current level of approximately 7%.)

2. Proposed Law – Employee Free Choice Act (“EFCA”): If passed, EFCA will alter dramatically the nature of employer-union relations.

- a. Under EFCA, unions would no longer be compelled to participate in an NLRB-sponsored secret ballot election. Instead, they would become the exclusive bargaining representative by having a majority of the bargaining unit employees sign authorization cards in support of the union. Under this proposal, employees would no longer have the luxury of voting in private but, instead, could be pressured publicly by their coworkers to sign an authorization card.
- b. Under EFCA, employers who fail to reach a collective bargaining agreement with the newly-certified union will be compelled after 120 days (i.e., 90 days of negotiations and 30 days for mediation) to participate in binding arbitration, where a third party arbitrator would decree which employment conditions will govern a workforce during the next two years.
- c. Under EFCA, an employer can be fined up to \$20,000 per violation for a wilful violation of an employee’s rights during an organizing campaign or first contract drive.

3. Status. Earlier this month, the most recent version of EFCA was introduced into Congress. President Obama recently declared to the AFL-CIO executive council meeting that “we will pass the Employee Free Choice Act”.

4. What to do?

- a. Recognize that the campaign for your workforce has already begun. If you wait until the passage of EFCA, you will be too late, as a secret (and binding) authorization card campaign can begin and succeed without you ever having a chance to tell your side of the story.
- b. Evaluate vulnerability to a union campaign
  - (i) Identify areas of worker dissatisfaction
  - (ii) Identify level of training for supervisors
  - (iii) Evaluate any claims of unfairness or inequality in the workforce
  - (iv) Evaluate OSHA compliance and general safety issues
  - (v) Evaluate EEO compliance
  - (vi) Evaluate compensation levels compared to industry standards
- c. Prepare a “public relations” campaign

- (i) Identify ways to paint the Company in the best possible light.
  - (ii) Help employees to feel pride in being associated with your Company
  - (iii) Expand handbooks to include a “feel good” description of the workplace
- c. Train supervisors to be empathetic. Employees who believe that their concerns are being heard are less likely to find a third party to express concerns for them. In addition, supervisors who are trusted will often become sounding boards to employees, thus allowing employers to identify and attend to problem areas before they turn into union organizing campaigns.
- d. Train supervisors with respect to EEO rights. Supervisors who violate discrimination laws increase the risk of union organization.
- e. Prepare and begin a targeted campaign to let your employees know where you stand with respect to union organizing
- f. Train supervisors to recognize and avoid prohibited union avoidance practices: Threats, Interrogations, Promises and Surveillance (“TIPS”).
- g. Take seriously the potential impact of EFCA upon your workforce.