



NOVEMBER/DECEMBER 2009

PILCHAK COHEN & TICE, P.C.

THE EMPLOYERS LAWYERS

WORKPLACE CHRONICLE

Inside this issue:

The Genetic Information Nondiscrimination Act (GINA) Becomes Law	1
Court Of Appeals OK's Mixed Motive FMLA Claims	2
New FMLA Requirements for Military Leaves	3

Recent Victories for Our Clients

By asserting the statute of limitations and a little known federal case that denies overtime compensation where an employee secretly works and logs overtime and then presents a claim for back wages, PC&T was able to resolve a \$60,000 California overtime claim for less than 5% of the demand.



THE GENETIC INFORMATION NONDISCRIMINATION ACT (GINA) BECOMES LAW

By Daniel G. Cohen

On November 21, 2009, the Genetic Information Nondiscrimination Act (GINA) took effect. GINA imposes new nondiscrimination requirements on employers as well as group health plans and health insurers. GINA prohibits employers from discriminating against applicants, employees and former employees on the basis of their genetic information. For group health plans sponsored by employers, GINA generally prohibits discrimination in group premiums based on genetic information and places limitations on genetic testing and the collection of genetic information in group health plan coverage. The health coverage (Title I) provisions are generally effective January 1, 2010 for calendar year plans.

Although the EEOC has not implemented its final regulations, it has issued proposed regulations, which are available at <http://edocket.access.gpo.gov/2009/E9-4221.htm>. This article will focus on the employment provisions (Title II) of GINA. GINA does all of the following: (a) prohibits employers from discriminating against applicants, employees and former employees on the basis of their genetic information; (b) broadly restricts employers from acquiring the genetic information of an applicant, employee or former employee or the genetic information of that individual's family member; (c) mandates confidentiality for genetic information that is lawfully acquired; (d) strictly limits disclosure of lawfully acquired genetic information; and (e) prohibits retaliation against an individual who complains about unlawful activities under GINA.

GINA includes terms not found in any other employment discrimination statute enforced by the EEOC.

•**Family Member** is defined as a dependent of the individual as the term is defined under ERISA.

The EEOC has determined that dependents are persons who are or become related to an individual through marriage, birth, adoption, or placement for adoption. GINA includes as family members persons related to an individual from the first to the fourth degree. This includes the individual's children, siblings, and parents (1st degree) and extends to the individual's great-great grandparents and first cousins once removed (the children of a first cousin) (4th degree) and all persons in between.

•**Family Medical History**, although not defined by the statute, is to be understood as the term is used by medical professionals when treating or examining patients. The EEOC defines the term as information about the manifestation of disease or disorder in family members of the individual.

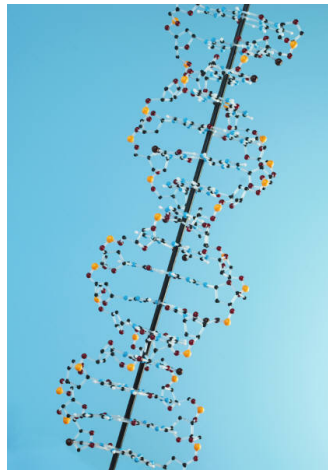
•**Genetic Information** is defined as information from genetic tests, the genetic tests of family members, family medical history and genetic information of a fetus carried by an individual or an individual's family member as well as a lawfully held embryo. The term also includes information about

an individual's or family member's request for or receipt of genetic services, which includes genetic tests, counseling and education.

•**Genetic Monitoring** is the "periodic examination of employees to evaluate acquired modifications to their genetic material...caused by the toxic substances they use or are exposed to in performing their jobs"

•**Genetic Test** is defined as an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotypes, mutations, or chro-

(See "GINA Cont." on page 2)



Pilchak Cohen & Tice, P.C.
3062 E. Walton Blvd.
Auburn Hills, MI 48326
Phone: 248.409.1900
Fax: 248.409.1999
Email: pct@mi-worklaw.com

FIND US ON THE WEB AT
www.mi-worklaw.com



FORMS & POLICIES AVAILABLE ON THE PC&T WEBSITE:

- Benefits and Detriments of Arbitration of Statutory Claims vs. Traditional Litigation
- Consent and Authorization to Release Employment Information
- Employment Application
- Fair Credit Reporting Act Forms
- Garnishee Disclosure Form
- HIPAA Authorization for Disclosure / Use of Personal Health Information
- I-9 Forms
- Policy—Wage Deductions
- Relief of Charge
- Sample CCW Memo
- Sample Certification for Users of Consumer Report
- Severance Agreement and Release of Claims
- Severance Agreement and Release of Claims (In Compliance With Older Worker Benefit Protection Act)
- Social Security Privacy Policy
- WH Forms (under FMLA guidelines) 380-E, 380-F, 381, 382, 384, 385
- Workplace Violence—Risk Factor Checklist

(Continued from page 1)

GINA Cont.

mosomal changes. An example is a test to determine whether an individual carries the genetic variant evidencing a predisposition to breast cancer. Perhaps more important is what does not qualify as a genetic test. A test for the presence of a virus that is not composed of human DNA, RNA, chromosomes, proteins, or metabolites is not a genetic test. Nor is a test for drug or alcohol use. The EEOC also believes that tests for infectious and communicable diseases that may be transmitted through food handling are not genetic tests.

Prohibited Practices—GINA prohibits employers from discriminating against individuals on the basis of their genetic information, which as stated above, includes the genetic information of the individual's family member. Like Title VII, GINA prohibits discrimination in hiring, promotion and demotion, discipline, discharge, compensation, and the terms, conditions, and privileges of employment. GINA also prohibits the limitation, segregation or classification of an employee because of genetic information. For example, an employer could not reassign someone whom it learned had a family history of heart disease from a job it believed would be too stressful and might lead to heart-related problems. GINA also prohibits retaliation like the other federal discrimination statutes.

COURT OF APPEALS OK'S MIXED MOTIVE FMLA CLAIMS

By: Paul D. Kramer

In our July 2009 edition of the *Workplace Chronicle*, we informed you that the United States Supreme Court ruled in *Gross v. FBL Services* that the Age Discrimination in Employment Act does not permit mixed-motive claims (i.e. claims where adverse employment action is based on both lawful and unlawful factors). The Sixth Circuit Court of Appeals, however, in contrast to this ruling, recently held in *Hunter v. Valley View Local Schools*, No. 08-4109, 2009 U.S. App. LEXIX 1941 (6th Cir.) that mixed-motive claims can be brought under the Family and Medical Leave Act ("FMLA").

In *Hunter*, Eunice Hunter ("Hunter") was employed by Valley View Local Schools ("Valley View") as a custodian. She suffered

Acquisition of Genetic Information—GINA prohibits employers from requesting, requiring or purchasing genetic information. This means that an employer may not require or request genetic information in connection with a fitness for duty evaluation, as part of the ADA interactive process or in connection with an employee's FMLA certification process. Moreover, since GINA protects job applicants, this means that conditioning a job offer on a post offer medical examination that inquires about family history would violate the law.

The exceptions, however, almost swallow the rule. An employer does not violate GINA if it inadvertently requests or requires the information. There are several examples of inadvertent requests. First, an employer may lawfully acquire genetic information through informal conversations in the workplace (e.g. a conversation in which one employee tells another that her father has Alzheimer's Disease) or when asking an employee a general health question like: "How are you?" or "How's your son feeling today?" Employers may lawfully acquire genetic information where the individual voluntarily provides the information in response to an otherwise lawful medical inquiry (e.g. part of a lawful request for medical information in response to a request for an ADA accommodation). Second, an employee can authorize the release of genetic information as part of a voluntary wellness program. Third, an employer may request family medical history to comply

(See "GINA" on page 4)

from assorted physical ailments requiring her to take numerous FMLA leaves over a four year period. After Hunter returned from FMLA leave in 2005 with new permanent work restrictions, the School Superintendent informed her that she was being "placed on unpaid medical leave not to exceed one (1) year based on your doctor's restrictions limiting your ability to perform your job and excessive absenteeism for the past four (4) years." Hunter then sued Valley View alleging that her forced leave was in retaliation for exercising her FMLA rights.

During discovery, the Superintendent testified that "Hunter's use of FMLA leave was one of two reasons why she placed Hunter on invol-

(See "Mixed Motive Cont." on page 3)

(Continued from page 2)

Mixed Motive Cont.

untary leave.” Although the trial court found this testimony to be direct evidence of FMLA retaliation, it nevertheless dismissed the lawsuit on the ground that Valley View would have placed Hunter on FMLA leave regardless due to her permanent medical restrictions which made her unable to perform the functions of her job.

The Sixth Circuit reversed the dismissal and held that the FMLA authorizes claims where the adverse employment action is motivated by both the employee’s use of FMLA leave and permissible factors. In reaching this conclusion, the Court focused on the FMLA’s



implementing regulations which explicitly forbid employers from considering an employee’s FMLA leave as “a negative factor” when making an employment decision. 29 C.F. R. §825.220(c). The phrase “a negative factor,” according to the Sixth Circuit, envisions that an employment decision resting partially on permissible factors may be unlawful if the employee’s FMLA leave was considered in taking the adverse action. To avoid liability under the FMLA when an adverse employment action is based on both lawful and unlawful grounds, an employer must be able to show that it would have taken the same action against the employee notwithstanding the impermissible motive.

In deciding this case, the Sixth Circuit ruled that the Superintendent’s testimony raised an issue of fact whether Valley View would have made the same decision regarding Hunter even if she had not taken any FMLA leave and therefore precluded summary judgment. The lesson to learn from *Hunter v Valley View Local Schools* is that employers should never base an adverse em-

ployment decision on an employee’s FMLA leave, even though permissible reasons also justify the action. One wonders why the employer felt compelled to criticize the employee’s FMLA protected absences, when it appears to have had an iron-clad reason for placing Hunter on leave: Her inability to perform her duties.

Once the employer makes an admission that it based a decision in part upon forbidden criteria, the employer must prove it would have taken the same action against the employee despite the improper motive to avoid liability. Unfortunately, this makes for a much more difficult defense as the jury’s decision may well be made before it hears the employer’s explanation. Employers should know that in today’s difficult economy where disgruntled former employees are likely to pursue any conceivable basis for a lawsuit, citation of protected FMLA leave for a decision provides evidence of an improper motive and greatly enhances the risk of a successful FMLA claim.



NEW FMLA REQUIREMENTS FOR MILITARY LEAVES

By Robert C. Tice

Most of you will recall that in November, 2008, the Department of Labor re-wrote its original FMLA Regulations. These new Regulations became effective in January, 2009 and added two new circumstances in which employees could take time off work. Both circumstances relate to military service and became known as “qualifying exigency” and military “caregiver” leaves.

For nearly a year now, we came to understand that “qualifying exigencies” only applied to reservists and national guardsmen who were called to active federal duty. Thus, when an employee’s spouse, parent or child was called to active duty, the employee could take up to 12 weeks off in a single 12 month period for military and related events, childcare and school activities, financial and legal arrangements, counseling, rest and recuperation, and post-deployment activities. The qualifying exigency leave could not be used by families of the regular armed service. Moreover, employees, who are the spouse, son, daughter, parent, or next of kin (closest blood relative) of a covered service

member, could also take up to 26 weeks of family and medical leave during a single 12 month period to care for the service member. Covered service members were those who were current members of the armed forces who became injured or ill in the line of duty.



The National Defense Authorization Act signed into law by President Obama has just expanded these two forms of Family and Medical Leave.

Qualifying exigency leave is now available to the families of members of the regular components of the armed forces as well as families of reservists called to active duty.

Caregiver leave is now available to care for certain veterans (e.g. those discharged for reasons other than dishonorable) in addition to current members of the armed forces and leave to care for an injured service member is expanded to cover existing or pre-existing conditions that were aggravated in the line of duty, rather than just injuries or illnesses that were first incurred in the line of duty.

The Department of Labor will revise its required FMLA notice regulation accordingly. Employers should look for the revised notice and post it conspicuously along with its other required employment postings. Employers should also review their current FMLA policies to make sure they are broad enough to capture these revisions.



(Continued from page 2)

GINA Cont.

with the certification provisions of the FMLA. This appears limited to FMLA requests to care for a family member and should not be confused with FMLA requests for family medical history in connection with the serious health condition of the employee. Fourth, genetic information that is commercially and publicly available can be acquired by an employer, but an employer may not research medical databases or court records. Accordingly, this exception seems to be limited to the occasion where there is an article in the newspaper or on line about one of your employees. The fifth exception occurs when an employer acquires genetic information in connection with workplace monitoring of toxic substances upon prior notice to the individual. The final exception is limited to DNA analysis for law enforcement.

Confidentiality—Regardless of how the genetic information is acquired, an employer must maintain the information separate from personnel records. This is not any different than the requirement that medical records be

maintained separately from personnel records under the ADA. In fact, the EEOC suggests that genetic information should be maintained in the employee’s same medical records file.

Disclosure of Genetic Information—GINA also limits the circumstances in which genetic information may lawfully be disclosed to others regardless of how it was acquired. First, an employer may disclose the information to the employee or family member about whom the information pertains upon written request. Second, an employer may disclose genetic information to an occupational or other health researcher if the research is conducted in compliance with 45 CFR Part 46. Third, an employer may lawfully disclose the information pursuant to a court order. This is not to say that an employer may lawfully disclose genetic information in response to a discovery request. There must be a specific court order. Fourth, an employer may provide the information to a government official investigating compliance with GINA. Next, an employer may lawfully disclose the information in connection with the FMLA certification process. This is designed to facilitate the FMLA second opinion and tie breaker proc-

ess. Finally, an employer may disclose genetic information to public health agencies in connection with contagious diseases that present imminent hazard or death or life-threatening illness. GINA does state that with respect to disclosure, employers are to follow the requirements of the HIPAA privacy regulations.

As we await the EEOC’s Final Regulations, employers should nevertheless act right now. The new EEO nondiscrimination poster is available from the EEOC. It should be posted conspicuously in your facilities. You should familiarize yourself with the new terms and obligations and train your management team accordingly. Double up your efforts to segregate medical information from personnel records and make sure the information is secured. EEO policies should be updated. Also, employers should consult with their insurance agents about their group health care plans and whether summary plan descriptions are adequate. Finally, employers are well advised to make sure their industrial clinics and others that conduct post offer medical exams and fitness for duty evaluations have revised their forms to exclude family history questions. ❖