

# Labor & Employment Law UPDATE

*Practical and preventive information for managing  
your workplace*

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Allison D. Balus, Editor

## *Health and Welfare Plan Update*

Many recent, significant statutory and regulatory changes have been promulgated that may impact your employee health and welfare plans. Specifically, changes may be required to your plans providing health benefits and any cafeteria or flexible benefit plans under the Internal Revenue Code, Michelle's Law, the Heroes Earnings Assistance and Relief Tax Act (HEART Act), the Genetic Information Nondiscrimination Act (GINA), and the Mental Health Parity and Addiction Equity Act (MHPAEA). A highlight of some of the required changes to your plans follows:

### **Self-Reporting of Excise Taxes**

The Internal Revenue Code has long imposed excise taxes for failing to comply with COBRA, HIPAA, and certain other federal mandates applicable to group health plans. Historically, the IRS has not assessed such excise taxes as part of an audit, and until now, there has never been a requirement for employers to self-report and pay the excise taxes. Beginning in 2010, however, employers will be required to report and pay these excise taxes.

### **Michelle's Law**

Effective January 1, 2010, Michelle's Law will prohibit group health plans and health insurers from terminating coverage

of dependent students who are on a medically necessary leave of absence from post-secondary education. The new law will require group health plans and health insurers to maintain existing coverage for up to one year for a seriously ill or injured student who takes a medical leave of absence from school. The law also requires group health plans to describe the right to continued coverage in any plan notices regarding certification of student status for plan coverage.

### **HEART Act**

The HEART Act provides employees on military leave with expanded rights and protections under employer-sponsored pension and welfare plans. Under the HEART Act, for any plan year beginning after June 17, 2008, an employer may allow a participant in a health flexible spending arrangement who is called to active military duty for more than 179 days to receive a distribution of his or her unused account balance. This provides an exception to the so-called "use-it-or-lose-it" rule, which generally states that the portion of a participant's account that is not used for medical expenses incurred during a plan year (or during a grace period immediately thereafter) is forfeited.

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[http://www.bairdholm.com/  
updates-newsletters.html#f2](http://www.bairdholm.com/updates-newsletters.html#f2)

## GINA

GINA prohibits group health plans from discriminating against individuals on the basis of genetic information. Generally, GINA will prohibit group health plans and health insurance issuers from: (1) requesting, requiring, or purchasing genetic information (including family medical history) prior to or in connection with enrollment, or at any time for underwriting purposes, (2) increasing the group premium or contribution amounts based on genetic information, or (3) requesting or requiring an individual or family member to undergo a genetic test. This includes requesting family medical information under any wellness program or health reimbursement arrangement.

## Mental Health and Substance Abuse Benefits

Under the MHPAEA, group health plans may not impose more rigorous financial requirements or stricter treatment limitations on mental health and substance abuse benefits than the group health plan would on medical benefits. The MHPAEA does not require employers to provide mental health or substance abuse benefits. Rather, if an employer provides mental health or substance abuse benefits, the benefits must be equivalent in terms of financial requirements and treatment limitations as the medical benefits offered under the plan.

With the effective date of these regulations already in effect or looming around the corner, it would be prudent at this time to examine your health and welfare plan documents, summary plan descriptions and administration practices to ensure compliance with the numerous regulation changes.

**Adam L. Cockerill**

# *New EEO Poster Required by November 21st*

The law requires an employer to post notices describing the federal laws prohibiting job discrimination based on race, color, sex, national origin, religion, age, equal pay, disability, and genetic information. The Equal Employment Opportunity Commission (EEOC) recently revised its “Equal Employment Opportunity is the Law” poster.

The new version reflects current federal employment discrimination law (including the Americans with Disabilities Act Amendments Act of 2008). It was also revised to add information about the Genetic Information Nondiscrimination Act of 2008 (GINA), which is effective November 21, 2009, and other updates from the Department of Labor.

There are several ways for employers to comply with the law:

1. Print a supplement poster produced by the EEOC and post it alongside the EEOC’s September 2002 “EEO is the Law” poster or the Office of Federal Contract Compliance Program’s August 2008 “EEO is the Law” poster. The supplement poster can be found at [http://www.eeoc.gov/employers/upload/eeoc\\_gina\\_supplement.pdf](http://www.eeoc.gov/employers/upload/eeoc_gina_supplement.pdf)
2. Print and post the EEOC’s November 2009 version of the “EEO is the Law” poster. The new poster can be found at [http://www.eeoc.gov/employers/upload/eeoc\\_self\\_print\\_poster.pdf](http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf)
3. Order a new poster through the EEOC’s web site at <http://www1.eeoc.gov/employers/poster.cfm>

*With the effective date of these regulations already in effect or looming around the corner, it would be prudent at this time to examine your health and welfare plan documents, summary plan descriptions and administration practices to ensure compliance with the numerous regulation changes.*

4. Order more than 10 copies of the poster by contacting:

U.S. Equal Employment Opportunity  
Commission Clearinghouse  
PO Box 541  
Annapolis Junction, MD 20701

Fax: (301) 206-9789  
or call: 1-800-669-3362 (voice)  
1-800-800-3302 (TTY)

According to the EEOC, the new poster will also be available in Spanish, Chinese, and Arabic before the GINA statute becomes effective on November 21, 2009.

In light of effective date of the GINA statute, employers should also consider revising their equal employment policies to prohibit discrimination on the basis of genetic information.

**R.J. (Randy) Stevenson**

## *Plaintiff Who Was Told She “Dressed Like An Old Lady” Presented A Submissible Case of Age Discrimination*

In *Baker v. Silver Oak Senior Living Mgmt. Co.*, the Eighth Circuit held that a

53-year-old plaintiff’s claims of age discrimination and retaliation should go to a jury, reversing a grant of summary judgment for the employer. Plaintiff Kathy Baker was hired in 2003 as director of Silver Oak, an assisted living center. In 2004, Baker’s supervisor rated her as “excellent” in every category on her performance review and described her as “knowledgeable,” “dependable,” and a “leader.” A few months later, a new supervisor, Carolyn Thomas, came in and things changed. Thomas told Baker that she “dressed like an old lady,” teased her about walking slowly and having poor hearing, and told her that everyone needed to “keep up” with the CEO, Eric Lindsey, and the Vice President, who were in their early 30s. Thomas also asked Baker several times to terminate and discipline older employees, but Baker refused. Baker was later terminated herself, allegedly for failing to call into work on a daily basis while out on medical leave, although the reasons for her termination evolved over time. Silver Oak briefly replaced Baker with a 30-year-old and then hired a 22-year-old as director. Baker filed a charge of discrimination and then sued Silver Oak for age discrimination and retaliation.

As to Baker’s discrimination claim, the Eighth Circuit began by noting that under the U.S. Supreme Court’s 2009 decision in *Gross v. FBL Financial Services, Inc.*, a plaintiff must prove that age was the “but-for” cause of the employer’s adverse decision. Despite this stringent standard, the court concluded that Baker presented a submissible case of age discrimination for several reasons. First, the court noted conduct by CEO Lindsey and supervisor Thomas “evinced a preference for the employment of younger workers.” In particular, Lindsey had stated that Silver Oak was “missing the boat by not hiring more younger, vibrant people” and that employees “should start looking over applications better and try to consider hiring younger people.” Similarly, Thomas had directed Baker to fire certain workers in their 50s and 60s so that she could hire

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“younger workers” who would be “better workers, have more energy, be more enthusiastic and stimulate the residents.”

Second, the court observed that although other comments were “open to interpretation,” when viewed in the context of the previous statements, they “clearly reflect a discriminatory attitude against older workers.” For example, the court noted Thomas’ comments that Baker “dressed like an old lady” and needed to “keep up” and Lindsey’s comment that he wanted to get rid of the “dead wood” at Silver Oak.

Third, the court opined that shortly after Baker refused directions by Thomas to discipline older employees, she was placed on probation, allegedly for unrelated reasons. However, Thomas had commented that one of the employees was “too old and slow” and “getting old and losing her skills,” and that another employee was “a drain on the facility since she was slow due to her age” and was not doing “a very good job due to her age.” During the probation, Thomas had also asked Baker twice if she intended to resign.

Finally, the court found that Silver Oak “gave shifting explanations as to why Baker was terminated.” Thomas stated that Baker was terminated for failing to call in daily while on medical leave. Lindsey added three other reasons. Thomas later added another reason. The Vice President added yet another reason. Finally, on appeal Silver Oak introduced two new reasons. The court declared, “Not every supplement to an employer’s initial statement of reasons [for termination] gives rise to an inference of pretext, but substantial variations raise suspicion.”

As to Baker’s retaliation claim, the court determined that there was sufficient evidence for a jury to find that Baker engaged in protected activity. The court noted that Baker protested to Thomas that it was wrong to terminate older employees and that “you cannot get rid of employees

just because they are old.” As such, Baker clearly opposed conduct that she believed to be unlawful age discrimination.

*Baker* reminds us that although we are now approaching 2010, it is still important to train executives, managers, supervisors, and other decision-makers at all levels about unlawful discrimination in the workplace. The persistent comments about age, particularly by supervisor Thomas and CEO Lindsey, opened Silver Oak up to liability even under the “but-for” standard in *Gross*. Particularly on an employer’s motion for summary judgment, where the facts are viewed in the light most favorable to the plaintiff, these types of comments harm the employer’s defense. As the Eighth Circuit observed, such comments become “evidence from which a jury could find that . . . management . . . harbored a discriminatory attitude toward older employees and desired to displace them in favor of a younger workforce.” The case also highlights the importance of being honest and thorough when it comes to communicating to terminated employees the reason(s) for their termination.

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