

Labor & Employment Law UPDATE

*Practical and preventive information for managing
your workplace*

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COBRA Premium Subsidy Extension

On December 19, 2009, the Department of Defense Appropriations Act of 2010 (the Act) was signed into law. Included within the Act is an extension of the 65 percent COBRA premium subsidy for eligible individuals that was originally passed into law as part of the American Recovery and Reinvestment Act of 2009. Although further guidance is expected to be issued by the Department of Labor or Internal Revenue Service, the following are key components of the Act concerning your group health plan(s):

1. The Act provides that the COBRA premium subsidy period for "Assistance Eligible Individuals" is extended from 9 months to 15 months.
2. The period for which an individual must have experienced a qualifying event to become an "Assistance Eligible Individual" and receive the COBRA premium subsidy is extended from December 31, 2009, to February 28, 2010.
3. The Act provides that a new notice must be provided to any individual that became an "Assistance Eligible

Individual" or experiences a qualifying event on or after October 31, 2009, informing the individual of the new provisions of the Act. This notice must be provided within 60 days of the Act's enactment date (February 19, 2010).

Adam L. Cockerill

Genetic Information Nondiscrimination Act (GINA) Effective November 21, 2009

On November 21, 2009, the Genetic Information Nondiscrimination Act (GINA) took effect. GINA prohibits employers of 15 or more employees from collecting genetic information related to

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applicants or employees and from using such information in employment decision-making. In addition, any type of genetic testing of employees or applicants is prohibited.

Genetic Information

GINA broadly defines “genetic information” to mean information about: (a) such individual’s genetic tests, (b) the genetic tests of family members of such individual, and (c) the manifestation of a disease or disorder in family members of such individual.

It also includes information regarding any request for or participation in genetic services, testing, or research. “Family member,” in the foregoing definition, is extremely broad and includes dependents, children, and any “other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative.” This will include, but is not limited to, parents, siblings, grandchildren, grandparents, great and great-great grandparents, cousins, nephews, and nieces. GINA also includes genetic information of an individual’s or family members’ embryo or fetus.

GINA expressly excludes information about an individual’s sex or age from this definition, as well as routine blood work, such as blood counts or cholesterol tests. The EEOC also notes six narrow circumstances that would not violate GINA, including:

1. inadvertently acquiring information, “such as in situations where a manager or supervisor overhears someone talking about a family member’s illness”;
2. obtaining genetic information during a voluntary wellness program (meeting specific requirements);
3. attaining such information as part of the FMLA leave certification process “where an employee is asking for leave

- to care for a family member with a serious health condition”;
4. inadvertently learning the information through a publicly available document;
5. gathering the information through a voluntary program monitoring the effects of toxic substances in the workplace; and
6. obtaining genetic information through law enforcement for purposes of DNA markers.

Procedures

GINA’s remedies and procedures are equivalent to those of Title VII, the federal non-discrimination law. It provides for compensatory and punitive damages and will be enforced by the EEOC. GINA proscribes harassment or discrimination in any employment decision – including hiring, training, firing, and the terms and conditions of employment – because of genetic information. The EEOC will be issuing a final rule providing guidance on the application and enforcement of GINA, but has not done so to date. Like Title VII, GINA also prohibits employers from retaliating against an employee for opposing or complaining of an unlawful employment practice based on genetic information.

Confidentiality

Subject to very narrow exceptions, employers must also treat genetic information confidentially, just as it would a confidential medical record under the ADA’s procedures. If it was lawfully obtained, employers may keep genetic information in the employee’s same medical file containing ADA-governed information.

Compliance

Compliance with GINA should begin immediately, and employers can take the following steps:

GINA proscribes harassment or discrimination in any employment decision – including hiring, training, firing, and the terms and conditions of employment – because of genetic information.

- Ensure that any genetic information is kept in the employee's separate medical information file and kept confidential with limited access.
- Update workplace posters to include the EEOC's revised anti-discrimination version that refers to GINA.
- Revise handbooks to include appropriate references to GINA and prohibiting discrimination or harassment based on genetic information.
- Train managers on GINA's requirements.
- Ensure that genetic information is not requested during the application or fitness for duty process.

Heidi A. Gutttau-Fox

destroying computer programs, or taking information in excess of the user's authority. While not all courts agree on this point, some have held that an employee who has permission to use an employer's computer violates the Computer Abuse Act when he accesses the computer to take information—such as customer lists—to use in a future competitive venture or employment. One court held that because the employee had signed an agreement with the employer that he would not copy, download, or reproduce any document, electronic document, or data for any purpose other than the business of the employer, the employee had acted without authorization when he copied computer records for his future business. It therefore held that he had violated the Computer Abuse Act.

If you make a change to your compensation plan or provide a raise to the employee, that is also a good time to request a signature on an amended non-compete and include that pay increase as consideration.

Employers should include a similar provision in their non-compete agreements both to support a claim under the robust Computer Abuse Act, but also to allow a contractual action against the employee for breach of such a provision. Depending on the law of the particular state, the employer might also be able to use such a breach of the agreement as a basis to withhold commission or other incentive compensation owed to the employer.

Non-Compete Agreements: You Need To Consider These Changes

The change in business year is a good time to revise your non-compete agreements. As you head into the new year, consider the following:

1. **Use of Company Documents.** The Computer Fraud and Abuse Act (Computer Abuse Act) is a federal statute that allows employers to seek damages and injunctive relief for various misuse of computers. This includes introducing a virus,
2. **Continued Employment – Not Sufficient Consideration.** Many employers use continued employment as consideration for an employee signing an initial or amended non-compete agreement. Consideration, which is required in any valid contract, is essentially what the employer gives in exchange for the employee's promise not to compete or solicit business after termination, among other promises the employee makes.

In some states continued employment is adequate consideration to make a non-compete agreement enforceable. In others, it is not. In Nebraska it is not entirely clear whether continued employment is sufficient. Employers should list continued employment as consideration, but also add that the employer is providing employees with access to its customers, confidential information, trade secrets and business infrastructure as consideration for the agreement. Some states have specifically recognized that this is sufficient consideration. If you make a change to your compensation plan or provide a raise to the employee, that is also a good time to request a signature on an amended non-compete and include that pay increase as consideration.

3. **LinkedIn Social Networking Site.**

LinkedIn is the number one social networking site for business. It allows business persons to post a profile and invite connections to other business persons. Users accumulate various “connections,” with whom they can communicate through email or “InMail” through the LinkedIn network. Periodically, they are notified of changes in the profile of the persons to whom they are connected. This means that if a user takes a new job and updates his profile, all of his contacts will automatically receive notice of the new position and employer.

LinkedIn can be a great way to develop a network and pursue new business opportunities. However, this can create problems for employers who do not want employees taking customer lists or misappropriating employer goodwill. If your sales person has set up a LinkedIn account and is connected through LinkedIn to most all of his customer

contacts, the employer has lost a good deal of control over that customer list. This is further complicated if the employer allows employees to keep contacts on Yahoo, GMail, Hotmail or AOL accounts, which an employee can directly load to LinkedIn. A software application then determines who in the contacts has a LinkedIn site and joins them to the user’s connected persons. LinkedIn does not store the contact list but only identifies who has a LinkedIn profile.

In order to address this concern, employers have limited options:

a. Ban Use. If you do not want employees using LinkedIn, you can bar the use in most states, through your social networking policy. Each user of LinkedIn represents that the use of LinkedIn does not violate the law, any contractual agreements, or fiduciary responsibilities. Accordingly, if you have a provision in your noncompete agreement that forecloses the use of LinkedIn, the employee has breached the LinkedIn terms of use. As the employer, you could contact LinkedIn and advise it of the violation if you learn of it. Presumably, LinkedIn would terminate the profile. The obvious limitation is that once a former employee updates the profile, customers will know immediately of the change in contact information. A request to change at that point, may have little effect.

b. Restrict Use. Another option is to allow the employee to use the LinkedIn site but within the noncompete agreement bar the employee from updating his or

If your sales person has set up a LinkedIn account and is connected through LinkedIn to most all of his customer contacts, the employer has lost a good deal of control over that customer list.

her profile with new employer information or using the network for competitive purposes. You could further require that the employee close the account upon termination. The better approach would be to also require that the employee supply the employer with the current password so that the employer can close the profile prior to termination or to merge it to another profile. While the terms of use for LinkedIn allow for only one profile per user, an employee could maintain two and not tell the employer. Presumably, the employer could notify LinkedIn upon discovery and request that it remove the profile.

As with all social networking sites, employers should have specific policies for LinkedIn governing the posting, downloading, and use of company property, particularly proprietary and confidential information.

Christopher R. Hedican

OFCCP Sends Out New Wave of Scheduling Letters

During the week of November 30, 2009, the Office of Federal Contract Compliance Programs (OFCCP) sent out a new round of corporate scheduling announcement letters (CSALs). The CSALs are intended to alert federal contractors that specific

locations may be selected for audit in FY 2010. The OFCCP conducts compliance evaluations and audits of federal contractors to ascertain their compliance with equal opportunity and non-discrimination requirements.

The scheduling letters will be sent to facilities that have either self-identified as federal contractors, or have been identified as such by the OFCCP. The OFCCP uses multiple information sources and analytical procedures to identify federal contractor establishments for evaluation. The selection process may include the use of EEO-1 reports; development of threshold requirements, such as establishment size; random sampling; and a mathematical model that ranks federal contractor establishments based on an indicator of potential workplace discrimination.

Unfortunately, just because your company does not receive a CSAL during this wave of letters does not mean you are off the hook for FY 2010. For instance, if only *one* establishment is listed for a compliance evaluation, the company will *not* receive such a letter. Likewise, the OFCCP may also schedule evaluations based on a variety of factors, such as contract award notices, directed reviews, identification through American Recovery and Reinvestment Act (ARRA) initiatives, or as a result of a conciliation agreement. Facilities selected under any of these factors may not receive CSAL notices. In each of these situations, OFCCP district offices may mail actual scheduling notices, without giving forewarning through a CSAL, to establishments on the list. Unlike with CSALs, which inform the company that an evaluation will be scheduled some time in the future, contractors will have 30 days from the date they receive the scheduling notice to submit an Affirmative Action Plan to the OFCCP for review.

Unfortunately, just because your company does not receive a CSAL during this wave of letters does not mean you are off the hook for FY 2010.

Moreover, while the OFCCP previously limited the number of *new* compliance evaluations that a single federal contractor could receive during a scheduling cycle (typically 12 months) to 25, the new CSALs remove the 25-audit limit.

As in the past, the OFCCP has mailed any CSALs to the “Chief Executive Officer” (or other designated contact person) of each parent company with more than one establishment listed for the scheduling of a compliance evaluation during this cycle.

What Should Covered Employers Do?

1. Be on the alert for these letters to ensure timely response. The OFCCP typically addresses the letters to the President’s or CEO’s office; however, the letter will not include the name of the President or CEO. If you receive a letter, act immediately and start taking steps to ensure full compliance.
2. Don’t be complacent. If you do not receive a letter, remember that the OFCCP may still conduct a surprise audit, or alternatively, may send you a letter during the next wave of letters. To avoid this situation, covered employers should stay current with their AAP and related recordkeeping obligations.

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