STEVENS & BRAND, L.L.P.

*Counsel* *Guide* *Advocate* *Since 1925*

900 Massachusetts Street
Suite 500 • PO Box 189
Lawrence, KS 66044-0189
(785) 843-0811 phone
(785) 843-0341 fax

# EMPLOYMENT LAW NEWSLETTER

## SUMMER 2011

515 South Kansas
Suite 200
Topeka, KS 66603
(785) 408-8000 phone
(785) 408-8003 fax

By Peter K. Curran and John T. Bullock

This newsletter is intended to call attention to just some of many recent employment law developments. ***It is intended to be informational and does not constitute legal advice concerning any specific situation.***

## ADA AMENDMENTS ACT (ADAAA) FINAL REGULATIONS

On March 25, 2011, the Equal Employment Opportunity Commission (EEOC) released final regulations under the 2008 ADAAA. These regulations, which became effective May 24, 2011, are at significant variance from Proposed Regulations issued in September 2009.

The primary purpose of Congress in enacting ADAAA was to make it easier for people with disabilities to obtain protection under the ADA.

The EEOC states that under ADA as amended, **the primary object of attention should be whether employers have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability.**

The regulations state that a person may qualify for protection as disabled under any one of "three prongs." These are:

(i) having a physical or mental impairment that substantially limits one or more major life activities;

(ii) having a record of such an impairment; or

(iii) being regarded as having such an impairment.

The regulations list certain impairments that "virtually always" will be found to impose a substantial limitation on a major life activity. These are:

(i) deafness;
(ii) blindness;
(iii) intellectual disability;
(iv) partially or completely missing limbs or mobility impairments requiring the use of a wheelchair;
(v) autism;
(vi) cancer;
(vii) cerebral palsy;
(viii) diabetes;
(ix) epilepsy;
(x) HIV;
(xi) multiple sclerosis;
(xii) muscular dystrophy; and
(xiii) major depressive disorder, post-traumatic stress disorder, obsessive-compulsive disorder, and schizophrenia.

EEOC states that as to the above-listed impairments, determination of disability should be simple and straight-forward and should not demand extensive analysis.

A person who has an impairment that qualifies him or her to be disabled (actual disability) is entitled to reasonable accommodation to perform the functions of the job.

A person who has a "record of an impairment" is defined as follows: *An individual has a record of a disability if the individual has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.*

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A person who has a "record of impairment" may be entitled to reasonable accommodation.

A person qualifies as being "regarded as having an impairment" if the individual is subjected to a prohibited action because of an actual or perceived physical or mental impairment, whether or not that impairment substantially limits, or is perceived to substantially limit, a major life activity. Such person qualifies for the following protections: *Prohibited actions include but are not limited to refusal to hire, demotion, placement on involuntary leave, termination, exclusion for failure to meet a qualification standard, harassment, or denial of any other term, condition, or privilege of employment.*

An employer may have a defense to a charge of discrimination by a "person regarded as having an impairment" if the effects of impairment are expected to be transitory and minor.

Determining if a person is qualified for ADA protection may be challenging, especially considering the limitations on an employer being able to make pre-employment and post-employment direct inquiries to an applicant or employee as to any disabilities. This new law accentuates careful compliance with the required interactive reasonable accommodation process. Further, it may often be necessary to consider the interaction of possible employee protections under FMLA, GINA, HIPAA, and the Workers' Compensation Act. For instance, it may now be likely for a person with an impairment that is not a serious health condition under FMLA to be considered disabled under ADA and perhaps be entitled to leave as a reasonable accommodation.

## Genetic Information Discrimination Act (GINA)

Title II of GINA took effect on November 21, 2009, and final regulations under Title II were issued November 8, 2010. Title II of GINA applies to employers of 15 or more employees.

The following is from a summary of Title II of GINA published by the EEOC:

> Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. **Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information.**
>
> Genetic information includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (i.e., family medical history). Family medical history is included in the definition of genetic information because it is often used to determine whether someone has an increased risk of getting a disease, disorder, or condition in the future. Genetic information also includes 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, and 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.

The law forbids discrimination on the basis of genetic information when it comes to any aspect of employment. *An employer may never use genetic information to make an employment decision because genetic information doesn't tell the employer anything about someone's current ability to work.*

Under GINA, it is also illegal to harass a person because of his or her genetic information.

Under GINA, it is illegal to fire, demote, harass, or otherwise "retaliate" against an applicant or employee for filing a charge of discrimination, participating in a discrimination proceeding (such as a discrimination investigation or lawsuit), or otherwise opposing discrimination.

It will usually be unlawful for a covered entity to get genetic information. There are six narrow exceptions to this prohibition:

- Inadvertent acquisitions of genetic information do not violate GINA, such as in situations where a manager or supervisor overhears someone talking about a family member's illness.

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- Genetic information (such as family medical history) may be obtained as part of health or genetic services, including wellness programs, offered by the employer on a voluntary basis, if certain requirements are met.

- Family medical history may be acquired as part of the certification process for FMLA leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member with a serious health condition.

- Genetic information may be acquired through commercially and publicly available documents like newspapers, as long as the employer is not searching those sources with the intent of finding genetic information or accessing sources from which they are likely to acquire genetic information.

- Genetic information may be acquired through a genetic monitoring program that monitors the biological effects of toxic substances in the workplace.

- Acquisition of genetic information of employees by employers who engage in DNA testing for law enforcement purposes as a forensic lab or for purposes of human remains identification is permitted.

- It is also unlawful for a covered entity to disclose genetic information about applicants, employees or members. Covered entities must keep genetic information confidential and in a separate medical file.

- Employers' non-discrimination policies should include non-discrimination under GINA.

Employers who have yet to incorporate GINA into their non-discrimination statements should do so, and educate their management personnel as to the law.

## Social Media Policy

The widespread use of social media has presented employers with problems or potential problems with possible disclosure of employer information and publication of disparaging information about the employer and co-employees. It is now commonly considered that all employers should have a policy dealing with the use of social media in addition to other information technology policies such as computer use.

Social media is generally considered to include social networks such as Facebook, LinkedIn, Twitter and like social networks, personal websites, blogs, wikis, online forums and virtual worlds.

Policies may restrict use of social media on company time, and prohibit disclosure of information about the company and its employees, including posting of photographs of company work sites, events, and personnel. Employees can be required to include certain disclaimers. Policies should provide for disciplinary action for violations. Legal challenges may be expected to arise concerning enforcement of such policies. Special consideration may be necessary with regard to policies of public employers.

## Kansas Supreme Court Recognizes New Employee Retaliation Protection

In a decision rendered May 20, 2011, the Kansas Supreme Court held in *Campbell v. Husky Hogs, LLC*, that an employee discharged one day after filing a wage payment claim had the right to sue the employer for retaliatory discharge as an exception to at-will employment.

Campbell filed a complaint with the Kansas Department of Labor under the Kansas Wage Payment Act (KWPA) alleging he had not been properly paid wages by Husky Hogs. The day after KDOL acknowledged receiving Campbell's claim, Husky fired him. The Court held that any relief Campbell might recover under KWPA would not be adequate compensation for the loss of his job, which he experienced for exercising his right to make a claim under KWPA. Therefore, the Court has now added another class of employees who are protected from retaliatory discharge.

## Retaliation Protection May Extend to Co-Worker

The U.S. Supreme Court ruled January 24, 2011, in *Thompson v. North American Stainless, L.P.*, that retaliation protection may extend to a co-worker.

The case involved two workers who were engaged to be married to each other. One of them filed with EEOC a Title VII discrimination claim. Three weeks later, the employer discharged the other of them. Lower courts had held that statutory retaliation protection did not extend to the discharged employee as he did not file the charge of discrimination. The U.S. Supreme Court reversed the lower court rulings, stating in part:

> We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired. We must also decline to identify a fixed class of relationships for which third-party reprisals are unlawful. We expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize. As we explained in *Burlington*, "the significance of any given act of retaliation will often depend upon the particular circumstances."

Employers should therefore consider any special relationship which may exist between an employee clearly protected from retaliation and another employee against whom the employer desires to take employment action.

## Fair Labor Standard Act (FLSA)

Reports are that the Department of Labor (DOL) and Internal Revenue Service (IRS) are currently intensifying audits of the classification of employees as exempt or non-exempt from overtime pay requirements of FLSA.

Also, the U.S. Supreme Court recently held in *Kasten v. Saint-Gobain Performance Plastics Corp*. that an employee who orally complained about his employer's time clock placement, and was subsequently fired, was protected from retaliatory discharge. FLSA prohibits employers from retaliating against employees who have filed any compliant under FLSA. The Seventh Circuit Court of Appeals had held that to have protection from retaliation, a compliant must be in writing. The Supreme Court reversed, holding that complaints may be oral as well as in writing.

Employers must be vigilant in determining when and what might constitute an FLSA claim.

## New Kansas Workers' Compensation Act

The Legislature, in its just completed 2011 session, enacted the Kansas Workers' Compensation Reform Act, which became effective May 15, 2011. The act provides for:

(i) higher benefit caps;
(ii) bilateral injuries;
(iii) restrictions on compensable injuries;
(iv) exclusions for employee misconduct;
(v) credit for preexisting conditions;
(vi) work disability refined;
(vii) wage loss — a new definition;
(viii) drug testing;
(ix) post-award medical benefits;
(x) and other procedural changes.

## New Form I-9 Rule

A new final rule on verifying eligibility for employment through the Form I-9 process became effective May 16, 2011. The new rule makes changes concerning documents to verify eligibility for employment. A *Handbook for Employers, Instructions for Completing I-9* is available at the U.S. Customs and Immigration Service at **www.uscis.gov**.

### Our attorneys

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|---|---|
| Webster L. Golden | Matthew H. Hoy |
| Peter K. Curran | Leslie M. Miller |
| Winton A. Winter, Jr. | Emily A. Donaldson |
| Evan H. Ice | Rebecca J. Wempe |
| Sherri E. Loveland | Patricia E. Hamilton |
| Molly M. Wood | John T. Bullock |
| Christopher F. Burger | Steve Six |
| Wesley F. Smith | Benjamin M. Wells |
| Bradley R. Finkeldei | Kristin L. Ballobin |

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