



## COMMISSION'S PROPOSED RULES IMPLEMENTING GENETIC ACT OF 2008

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As part of the Genetic Information Non-Discrimination Act of 2008 ("GINA")<sup>1</sup>, which goes into effect November 21, 2009, the U.S. Equal Employment Opportunity Commission ("EEOC") has issued proposed rules for the enforcement of the new legislation. The proposed rules were open for public comment until May 1, 2009, when they were to be officially enacted as 29 C.F.R. Part 1635.

### Background

Congress enacted GINA to prevent discrimination against job applicants, current and former employees, labor union members, apprentices, and trainees on the basis of genetic information. As outlined in the Act, experts predict we will see tremendous strides in the field of genomic medicine; and GINA is meant to encourage participation by individuals in genetic testing, research, and education without the fear of discrimination in their health insurance coverage or employment status.

Title I of GINA addresses the use of genetic information in health insurance, amending the Employee Retirement Income Security Act of 1977 ("ERISA"), the Public Health Service Act, and the Social Security Act. Title II of GINA then prohibits covered organizations – employers, labor organizations, employment agencies, and training programs – from making employment decisions on the basis of genetic information of an individual or that individual's family members. Further, Title II includes prohibitions relating to the intentional or deliberate acquisition of genetic information and strict confidentiality requirements for any genetic information which is acquired.

The purpose of the EEOC proposed rules is to provide best practices for the covered organizations in implementing Title II of GINA, as well as enforcement and remedies for alleged discrimination. Below are just a few of the highlights from the proposed rules.

### EEOC Proposed Rules

The proposed rules include guidelines in the interpretation of new definitions – that is, definitions used in GINA but in no other employment discrimination statutes. Those definitions include "family members," "family medical history," "genetic information," "genetic services," "genetic tests," and "dependent" as limited to its application in GINA. In addition, the proposed rules include a definition of "manifestation," which was not included in GINA.



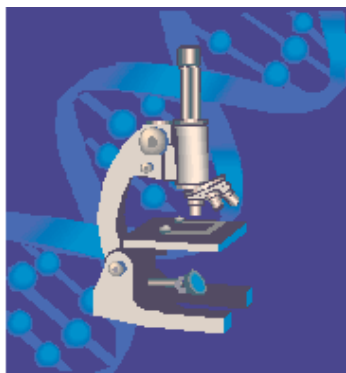
<sup>1</sup>42 U.S.C. 2000ff.

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Further, where GINA does not specifically discuss the information that flows between the covered organizations, the proposed rules have suggested such organizations may violate GINA both directly, as a covered organization, and indirectly, as an agent of another. Since GINA incorporates Title VII of the Civil Rights Act of 1964's definition of "employer," the proposed rules address the ability of one organization to cause the other to engage in discrimination. For example, if the employer asks the employment agency to gather certain information concerning job applicants, that agency would be liable under GINA both directly, as an agency is a covered organization, and as the employer's agent, as defined in Title VII<sup>2</sup>.

In terms of "retaliation," the proposed rules suggest Congress intended GINA to adopt the standard dictated by the U.S. Supreme Court<sup>3</sup> in 2006, which held retaliation due to a charge of discrimination would include conduct, "whether related to employment or not, that a reasonable person would have found 'materially adverse,' meaning that the action 'well might have dissuaded a reasonable worker from making or supporting a charge of discrimination.'"<sup>4</sup>

The proposed rules next address the sensitive issue of acquiring an individual's genetic information or that of his or her family members. There can be no doubt covered organizations are explicitly prohibited from seeking such information. That said, GINA also provides five to six exceptions to the prohibition, depending upon the type of covered organization. The Congressionally-dubbed "water cooler" exception noted by GINA acknowledges that covered organizations may inadvertently overhear certain genetic information in



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casual conversation. Where GINA's language addresses "family medical history," the proposed rules expand GINA's exception to "any genetic information" inadvertently acquired. The rules also provide several examples of situations in which the water cooler exception may apply, other than overheard conversations.

Lastly, the proposed rules speak to the potential conflict between the application of Americans with Disabilities Act of 1990 ("ADA") and GINA, such as in a required post-job-offer medical examination. It is important to ensure any medical inquiries made by covered organizations are modified so as to comply with both the requirements of GINA and the ADA. The proposed rules suggest GINA directly changes the employer's ability to obtain medical information, as is currently allowed under ADA. The proposed rule, however, will still allow the inquiry, so long as the inquiry is made for a lawful purpose under directly-related employment laws. For example, an employer's medical or disability-related questionnaire which requested genetic information concerning the job applicant and the applicant's family members, which may have been lawful under ADA before GINA, will only remain lawful as to the job applicant so long as that information is used for a lawful purpose under ADA or other employment laws. The inquiry into the applicant's family members' genetic history would no longer serve a lawful purpose and would, therefore, be in violation of GINA.

### Next Steps

Covered organizations should take the time between now and November 21, 2009, when GINA will take effect, to review its employment policies, procedures, and requirements to ensure they comply with the closely-related laws of GINA, Title VII, the ADA, and any other federal, state, or local laws.

*Jodee McCallum*

<sup>2</sup>29 C.F.R. 1635.6 (February 26, 2009), *proposed rule*.

<sup>3</sup>*Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006).

<sup>4</sup>29 C.F.R. 1635.7 (February 26, 2009), *proposed rule*.

## RETALIATION AGAINST PARTICIPANTS IN AN INTERNAL INVESTIGATION PROHIBITED BY TITLE VII

Title VII of the 1964 Civil Rights Act protects employees from discrimination, including harassment based on either sex or race, and also protects employees from retaliation for opposing unlawful discrimination. The anti-retaliation provision of Title VII states it is unlawful “for an employer to discriminate against any . . . employee[ ]” who “has opposed any practice made . . . an unlawful employment practice by this subchapter.” 42 U.S.C. § 2000e-3(a). This provision has become known as the “opposition clause.” In *Crawford v. Metro. Gov’t of Nashville and Davidson County, Tennessee*, 555 U.S. \_\_\_\_\_ (2009), the Supreme Court considered whether this anti-retaliation provision in Title VII protects a worker from dismissal because of the worker’s cooperation with an employer’s internal investigation. The Court held it does.

In this case, Metro terminated Crawford, a thirty-year employee, after she participated in an internal sexual harassment investigation. Although Crawford had never before reported any sexual harassment, she told the investigator the accused employee had engaged in sexually inappropriate conduct towards her and co-workers. After finalizing its investigation, Metro did not take any action against the accused employee but terminated Crawford for embezzlement. Metro also terminated the two accusers. Following her termination, Crawford filed a Charge with the EEOC against Metro, alleging her termination was retaliation for reporting sexually inappropriate actions.

The trial court granted summary judgment to Metro, reasoning that simply answering questions in an investigation was not the “opposition” contemplated by Title VII. The Sixth Circuit affirmed, holding Title VII’s opposition clause “demands active, consistent ‘opposing’ activities to warrant . . . protection against retaliation.”

The Supreme Court reversed, holding Crawford’s statements during the investigation were protected by

Title VII’s opposition clause. According to Justice Souter, writing for the Court, opposition does not require “active, consistent” resistance, but can be satisfied by mere disclosure of the offending behavior to a supervisor. As Justice Souter stated, “a person can ‘oppose’ by responding to someone else’s question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.”

The Court also addressed Metro’s contention that lowering the bar for retaliation claims would make it less likely that employers would investigate possible discrimination claims, stating Metro’s argument was “unconvincing” in light of the Court’s decisions in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. Boca Raton*, 524 U.S. 775 (1998). These cases subject an employer to vicarious liability “to a victimized employee for an actionable hostile environment created by a supervisor with . . . authority over the employee.” The employer’s defense to this vicarious liability arises from its exercise of reasonable care to “prevent and correct promptly” any discriminatory conduct, even if the “plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Thus, even in light of *Crawford*, employers still have compelling reasons to discover and prevent discriminatory activity in the workplace, in order to avoid the imputed liability.

In a separate concurring opinion, Justice Alito cautioned that “the Court’s holding does not and should not extend beyond employees who testify in internal investigations or engage in analogous purposive behavior.” According to Justice Alito, *Crawford* should not be read to protect an employee who simply chooses to remain silent or who does nothing more than engage in water cooler conversations that are later reported to the employer. Thus, it appears, at least at this time, that *Crawford* will not lend much strength to “silent opposition” claims.

Catherine Faubion



## STAFF REDUCTIONS: AVOIDING RISKS AND POTENTIAL PITFALLS

As the economy continues to struggle, many employers are faced with the unenviable task of reducing and downsizing staff levels. This exercise is not without its own risk and potential liability for an employer. Part of the challenge is to manage the human aspect of a staff reduction while considering the legal aspects and minimizing your potential legal exposure to employee claims with the Equal Employment Opportunity Commission (EEOC), or under the Texas Commission on Human Rights Act, and any subsequent litigation.

A multitude of legal issues can arise during a planned layoff or downsizing. Among the considerations in a reduction in force are how to prevent the layoff from becoming the impetus for discrimination claims, whether race, age, gender, or religious discrimination; retaliation claims; allegations of violation of Fair Labor Standards Act (FLSA) wage and overtime issues; sexual harassment claims; or alleged violations of the disability and family medical leave laws. I lay out this laundry list, because any of these issues may become an issue as the employee faces the threat of a job loss.



As a former administrator for a large state agency, I directed the development of the strategy and approach for a staff reduction. This article includes my perspective as a former human resources director, the chief operating officer responsible for directing and managing a staff reduction, and as a lawyer.

### Reduce the Risk of Discrimination and Other Lawsuits

Each decision about a reduction should be based upon clear objective standards for the reduction while weighing the risk that each employee presents for future claims and litigation. The success or failure of a plan, in terms of reducing the likelihood of successful litigation against the employer, will depend upon how well-planned and coordinated are the steps leading up to the layoff, and also how consistent and clear communications are between management and staff.

No layoff plan should begin without consulting legal counsel, because, once an employer determines a layoff

is needed, every subsequent step needs to be conducted as if you were anticipating litigation. Employers should consult with legal counsel and keep them involved throughout the process to help identify potential trouble spots or significant risk points in the planning and decision-making process.

If there is a claim after the layoff, it will be much easier to defend the employee selection if it is based on objective criteria rather than subjective decisions, which are more difficult to explain and justify in defending an action. In addition, recent court decisions have made the employer's burden even greater in defending against certain claims. A recent example involved an employer defending a disparate impact claim under the Age Discrimination in Employment Act (ADEA) after a layoff. The case involved an employer who laid off 31 employees, and 30 were age 40 or older. The workers sued, claiming the layoffs had a disparate impact on older workers in violation of the ADEA. The employer claimed it based its layoff decision on reasonable factors other than age, which is an affirmative defense under the ADEA. The U.S. Supreme Court in *Meacham v. Knolls Atomic Power Laboratory*, 554 S.Ct. 1 (2008), ruled that the employer had the burden to prove that non-age factors used in the decision for a layoff were reasonable and reversed the lower courts which had ruled in favor of the employer.

Although this decision was in the context of an age discrimination case, this case and others strongly suggest that the criteria and decisions surrounding the employees selected for a layoff are critical if subsequently subject to review.

### Older Workers Benefit Protection Act (OWBPA)

Under certain circumstances, you may have to comply with another federal law aimed at protecting workers over 40. If you are providing a severance and the employee has to sign a release, releasing the employer from any age discrimination claims under the ADEA, the release has to reference the ADEA and advise the employee to consult an attorney before signing. The employee has to be given 21 days to consider the release and up to seven days to revoke the release after execution.

There are additional OWBPA requirements for group layoffs, which are defined as an exit program for

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two or more employees. The release must include a 45-day review period, and the release must contain a list of all employees in the affected departments, their ages, and whether they were laid off. The seven-day revocation also applies.

### Disability and Leave Situations

Identify ADA or FMLA situations to ensure the layoff decisions are objective and not seen as unduly impacting or targeting employees on ADA or FMLA. This will help in guarding against a claim that the layoff is a pretext for discrimination against an ADA-qualified employee or an employee on family medical leave. Any such situations should be carefully reviewed with legal counsel.

This is increasingly important given the recent amendments to the ADA which reduce the standard of proof for the employee to show disability discrimination and the expansion of conditions considered to be "major life activities." The amendments took effect January 1, 2009, and are seen as construing the definition of disability to broaden the coverage of individuals who might not have previously qualified as disabled under the ADA. Although the amendments do not discuss layoffs, they may play a role in any claim brought under the ADA alleging the layoff was used to discriminate against persons who would now fit within the broader interpretation of disability.

### Review All Personnel Files and Documentation for Affected Employees

Once an employer has identified the potential employees for a layoff, managers of the affected employees should work with human resources to review all disciplinary, performance, or other documentation related to the employee. This will help to reduce the likelihood of any surprise issues being raised once the employee is notified of the layoff. For example, if the employee recently reported allegations of harassment, mismanagement, or otherwise engaged in "protected activity," the layoff notice to the employee may become an impetus to a harassment claim or a retaliation claim.

If managers maintain any file on employees, make sure these are reviewed as well. Sometimes managers may maintain a file separate from human resources outlining work performance, pending assignments, or

discussions with an employee. Human Resources should be sure to ask for these and share them with counsel.

This is not to suggest that the discovery of information like this should change an employer's decision about the employee chosen for layoff, but it at least ensures that this factor is discussed with legal counsel and you are prepared to deal with any subsequent claim.



### Communications During the Layoff Process

A critical component during a layoff situation is effective communication between management and human resources in order to ensure consistency in the verbal or written messages to staff. Disjointed communication or conflicting messages about the layoff or why certain employees are laid off or functions are eliminated can be disruptive and undermine the objective reasons for the layoff.

Consistent and clear communication also helps to ensure managers are aware of what is happening and, to the extent permissible, able to answer staff's questions. If notice is given to the affected staff which, as will be discussed below, is sometimes required by law, managers should be aware of what will be said and should be advised of what should and should not be said. Ideally, employees should receive a consistent message from upper management and their direct managers. Human Resources, working with legal counsel, should give guidance and, if need be, have talking points or information for managers to use if they need to answer questions. Obviously, there will be some questions which should be referred to human resources, such as questions about benefits, severance packages, and COBRA. Generally, managers should be told, when in doubt or unsure about how to answer a question, all questions should be referred to Human Resources.

Have legal counsel review notice documents and any mass communications to all staff about the layoff or communications to the affected staff during the period

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prior to a layoff. Remember, each word in any document, memorandum, or email may end up as evidence in civil litigation or an EEOC action.

You should also remind managers that the content of their emails regarding the layoff should be consistent with the information being shared with staff. This is not the time for email gossip or comments about the affected employees. These emails may become part of any legal action, and damaging information is often found in emails between employees.

### Other Considerations

A layoff should also not be viewed as an opportunity to “clean up” or get rid of problem employees. If the employee is not within the criteria developed for the layoff decision, inclusion of such an employee may unnecessarily expose the layoff plan to allegations that there were no clear criteria and open the door to other potentially-costly claims.

There is also often a concern that, once notice of a layoff is given, it may increase the potential for workers' compensation claims or other actions by affected employees. In my experience, this has not happened; but employers, nevertheless, need to be aware of and monitor for workers' compensation claims or other employment-related assertions which arise after a notice of a layoff. This does not necessarily mean any such claim should be viewed with suspicion, unless the facts and circumstances indicate otherwise.

### Federal Worker Adjustment and Retraining Notification (WARN) Act

If you are a larger employer planning a layoff, you need to determine whether the Worker Adjustment and Retraining Notification (WARN) Act will apply. The WARN Act covers private, for-profit, and nonprofit employers with 100 or more employees. Federal, State, and local government entities are not covered. Although some states have their own version of the WARN Act, which may or may not follow the federal law, Texas does not have a state version.

Your initial question is whether you have enough employees to be subject to the WARN Act. Generally, in determining the number of employees, the WARN Act does not count employees who have worked less than 6 months in the last 12 months, nor does it count employees who work an average of less than 20 hours a week.

Also, in the case of the sale of a business, if there are resulting layoffs or plant closing, the WARN Act may apply. If the layoff or plant closing occurs before the sale, the selling employer must comply with the WARN Act. Conversely, if the layoff or plant closing occurs after the sale, the buyer employer must comply with the WARN Act.

Under the WARN Act, a mass layoff is one which affects 500 or more employees at any one site within a 30-day period; or, if affecting 50-499 employees, the WARN Act applies if the total number of affected employees represents 33% of the workforce at the site. If there is a plant closing, the employer must give notice if an employment site will be shut down and the shutdown will result in an employment loss for 50 or more employees during any 30-day period. In addition, even if employment losses do not meet the requirements of a plant closing or mass layoff, an employer may still be required to give notice in certain instances involving job losses within any 90-day period.

Certain circumstances may mitigate against counting an employee or employees for purposes of determining WARN Act application. For example, in certain circumstances, if workers are offered a transfer to another location, these workers would not count towards calculating whether the WARN Act threshold has been met.

Covered employers are required to give 60 days written notice before a layoff or a plant closing. There are three exceptions to the 60-day notice requirement before a closing or layoff:

- If the closing or layoff is the result of a natural disaster such as a flood, earthquake, drought, or storm.

... each word in any document, memorandum, or email may end up as evidence in civil litigation or an EEOC action.

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- If the closing or layoff is the result of unforeseeable business circumstances which were not reasonably foreseeable at the time notice would otherwise have been required; and
- In the case of a plant closing, if the business can



be considered to be a “faltering company.” This is where a company has sought new capital or business in order to stay open and where giving notice would ruin the opportunity to get the new capital or business.

The unforeseen business circumstance and faltering company exceptions have been narrowly construed. Employers should note that, if they provide less than 60 days advance notice of a closing or layoff and rely upon one of these three exceptions, the employer bears the burden of proof that they meet the conditions for the exception. Even if the exceptions apply, an employer also must give as much notice as is practicable. The notices must include a brief statement of the reason for reducing the notice period in addition to the items required in notices.

The content of the notices varies depending upon whether the affected employees are union or non-union. Generally, the notice has to indicate whether the planned action is temporary or permanent, the anticipated date when the layoff or plant closing will occur, and information on who to contact. For a union situation, the notice would also include information on the job titles of the affected positions and number of employees in each. The employer also must give notice

to the Local Workforce Development Board and the local chief elected official.

Violation of the WARN Act subjects an employer to liability to each aggrieved employee for an amount including back pay and benefits for the period of violation, up to 60 days. Liability may be reduced by wages the employer paid to the employee during the alleged violation. Also, subject to certain remedial action by the employer, an employer may be subject to a civil penalty of \$500 per day, if the employer fails to provide notice to the local unemployment office and attorney fees.

Note, however, the WARN Act cannot be used to prevent a plant closing or layoff.

### Summary

Whatever the criteria is for selection of the affected employees, it has to be applied consistently; otherwise, you risk exposing yourself to various discrimination claims. The criteria should also be clearly documented to act as evidence in future claims.

Manage the communication to staff and management about the layoff as well as, to the extent possible, communication among staff about the layoff.

Your communication should be treated as if it will be used as evidence in a review before the EEOC, state Civil Rights Division, or a court.

If you are subject to the WARN Act, review its requirements closely to ensure you meet them. If you are not subject to the WARN Act, you are not required to give notice, unless your personnel policies indicate otherwise. If your policies do require notice, you should closely adhere to them in conducting a layoff.

Most importantly, consult with and involve legal counsel at the beginning of and throughout the layoff decision-making and implementation process. If managed properly, the layoff process can be done in such a way as to avoid unnecessary litigation and potentially costly penalties and court judgments.

*Albert Betts, Jr.*

*Most importantly, consult with and involve legal counsel at the beginning of and throughout the layoff decision-making and implementation process.*

## FIFTH CIRCUIT IMPOSES LIMITATIONS ON THE USE OF OFFERS OF JUDGMENT IN FLSA COLLECTIVE ACTIONS

Offers of judgment are a tool that employers frequently use in difficult-to-settle employment cases where a plaintiff's personal feelings regarding the employer, the managers involved, or the situation can sometimes make it more challenging than normal to resolve the claim. In federal court, the offer of judgment rule, Federal Rule of Civil Procedure 68, provides that a defendant may make an official Rule 68 "offer of judgment" to the plaintiff if it meets certain requirements. If the plaintiff then rejects or ignores the offer and a judgment is ultimately entered for the plaintiff that is "not more favorable than the unaccepted offer," the plaintiff becomes liable for the costs the defendant incurred in litigating the action after the offer was made. This can result in a significant shifting of defense costs to the employee in the event he or she continues to have unreasonable expectations about the value of the case, as determined at trial by a jury of the employee's peers.

As the Sixth Circuit Court of Appeals has previously stated, "Rule 68 encourages early settlements by increasing the risks to claimants of continuing to litigate once the defending party has made a settlement offer." However, in December 2008, the Fifth Circuit created a limited situation in which offers of judgment may not be used in federal court cases. In *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913 (5th Cir. 2008), the Fifth



Circuit was faced with a Fair Labor Standards Act ("FLSA") opt-in collective action, wherein employee Courtney Sandoz alleged that the way in which Cingular paid its part-time employees for excess time violated the minimum wage provisions of the FLSA. In

essence, Sandoz argued that Cingular's method of accounting resulted in her being paid less than the minimum wage for the hours she worked in certain weeks. Cingular immediately removed the case to federal court and served Sandoz with an offer of judgment for \$1,000 plus her reasonable attorneys' fees. She failed to accept the offer within 10 days, meaning that it was automatically rejected. Cingular subsequently filed a motion to dismiss for lack of subject matter jurisdiction, arguing that the rejected offer of judgment fully satisfied her

claims and that her claims were deemed moot. The court denied the motion and held that Cingular's argument that the plaintiff had been made whole could not divest the court of subject matter jurisdiction in the collective action, because other plaintiffs potentially had claims to be made. Cingular sought to appeal the ruling before the remainder of the case proceeded, and the district court granted Cingular the ability to do so. Sandoz filed a motion to certify her collective action before the appeal was taken.

On appeal, the Fifth Circuit first looked at the mootness issue and considered whether an employer should be able to "pick off" a named plaintiff's FLSA claims before the plaintiff has a chance to certify the collective action. The court preliminarily determined that a plaintiff in an FLSA case represents only him- or herself until similarly-situated employees opt in, meaning that the plaintiff's claims would be mooted by an offer of judgment that fully satisfied the individual's claims. Nevertheless, the court agreed with Sandoz's argument that allowing a defendant to moot a collective action in this manner would violate the policies behind the FLSA, because a plaintiff would never be able to certify a collective action. The court concluded that the "relation back" doctrine provides a mechanism to avoid this anomaly and ensures that plaintiffs can reach the certification stage. Under the doctrine, the plaintiff's motion to certify the class "relates back" to the time the class complaint was filed and is said to have been filed as of the same date. Thus, a settlement offer made to an individual plaintiff early in the litigation will normally not be sufficient to cover all of the potential opt-in plaintiffs' claims. An offer of judgment would be available, however, where the court denies the motion to certify, or possibly when the plaintiff delays significantly in filing his or her motion to certify. Ultimately, the court remanded the case to the district court for a determination as to whether Sandoz's 13-month delay in filing her motion to certify the collective action was reasonable. In the future, this will be the battle employees face if they fail to move to certify the class promptly after filing suit.

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