DAVIS MALM & D'AGOSTINE P.C.

ATTORNEYS AT LAW

ON THE LEGAL FRONTIER SINCE 1979

Employment Law Client Alert

JUNE 2008

GENETIC INFORMATION NON-DISCRIMINATION ACT

GUIDELINES ISSUED ON INDEPENDENT CONTRACTOR ENFORCEMENT

NEW FEDERAL LAW WILL BAN MISUSE OF GENETIC INFORMATION BY EMPLOYERS

On May 21, President Bush officially signed into law the Genetic Information Non-discrimination Act ("GINA") which is designed to protect the privacy of individuals' genetic information. This legislation imposes new obligations and restrictions on employers that will become effective 18 months after enactment and will affect health insurance providers 12 months after its passage.

The legislation has widespread support and approval. It passed the House by a 414-1 margin and received 95-0 approval in the Senate.

Under this new law, employers, unions and employment agencies will be prohibited from:

Using genetic information in hiring, firing, assignment or promotion decisions; or

- Demanding or even requesting any genetic testing.

Employers who violate the Act can be fined as much as $300,000.

Health insurers will similarly be prohibited by GINA from:

- Using genetic information to set premiums, reduce coverage benefits or determine enrollment eligibility; or
- Demanding or even requesting any genetic testing.

Legal observers have suggested that some provisions of GINA are still open to interpretation and could raise troubling questions and issues for employers, such as:

- Whether statutory limits on collection of medical information will prohibit employers from following certain routine practices, such as recording a request by an employee for family medical leave to care for a parent with a genetically-related disease;
- Whether use of Section 102(d) of the ADA, which permits an employer to require an authorization to release all medical records after an offer of employment, could be construed in some circumstances as an unlawful request for genetic information if it is provided.

Employers should also be aware that many states have their own genetic information statutes, and passage of the federal law may spur more initiatives. The Human Genome Research Institute cites that 31 states have laws regarding the access or misuse of genetic information by employers, and 41 states have genetic information statutes affecting insurers.

The Massachusetts anti-discrimination law includes a broad prohibition against the use of or collection of genetic information in connection with the employment relationship and employment decisions. This law makes it unlawful for an employer to refuse to hire or terminate employment based on genetic information, or to collect, solicit, require, encourage, or induce disclosure of genetic information from any person as a condition of employment.

Under the broad protections of Massachusetts law and that of other states, employers need to be leery of making any request for information that is not narrowly and strictly job-related. Thus, employers may wish to consider whether requests to doctors for any medical information should be crafted to specifically state that "no genetic testing information should be provided in response to this request."

Massachusetts Attorney General Issues Guidelines on Enforcement of Independent Contractor Law

The Fair Labor Division of the Massachusetts Attorney General's Office has recently issued new guidelines to help employers understand how and when the Attorney General enforces the Massachusetts Independent Contractor Law, M.G.L. c. 149, section 148B, which provides severe penalties for the misclassification of employees as independent contractors.

The Division reiterated and emphasized that employers must pass a three-prong test for workers who are classified as independent contractors. Under that test:

- Workers classified as contractors must be "free from control and direction in connection with the performance of the service" that they are contracted to perform;
- The service provided by the contractors must be "outside the usual course of business of the employer-contractor"; and
- The contractor must be "customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed [for hire]."

In its advisory, the AG's Office emphasizes that the independent contractor must be a distinct business or corporate entity that provides services separate from the contracting entity. The AG's Office identified the following "strong indications of misclassification that warrant further investigation" if revealed:

- The lack of any business records pertaining to the service provided by the "contractor";
- The practice of paying the "contractor" in cash, "off the books" or "under the table" with no documents reflecting payment;
- The insufficiency or total lack of any workers compensation coverage for the "contractor";
- The failure to provide 1099 or W-2 statements to the "contractor";
- The provision of equipment, tools and supplies to the "contractor"; and
- The "contractor" fails to pay income taxes or employer contributions to the Division of Unemployment Assistance.

Noting that there is a lack of judicial precedent interpreting Prong Two of the independent contractor test, the AG's Office offered employers a few examples of how the Attorney General views that prong. Two examples follow:

- A drywall company classifies an individual who is installing drywall as an independent contractor. This violates prong two because the individual installing the drywall is performing an essential part of the employer's business.
- An accounting firm hires an individual to move office furniture. Prong two is not applicable here because the moving of furniture is only incidental to the accounting firm's essential business.

If you have any questions about these employment law issues, or if you have need for other employment-related guidance, please contact the author: Gary Feldman at (617)589-3874 or gfeldman@davismalm.com. ◆

Note: This notice is merely a general overview of recent employment law developments provided as a courtesy to our "employment alert" readers. It is not intended to set forth all relevant details and issues arising from the legislation, and it is not tailored to the specific issues related to any given industry or employer. Thus, it should not be relied upon or construed by recipients as legal advice.

Employment Law Group

Laurie Alexander-Krom	(617) 589-3867
Judith Ashton	(617) 589-3873
David M. Cogliano	(617) 589-3812
Gary M. Feldman	(617) 589-3874
David Rapaport	(617) 589-3801

© 2008 Davis, Malm & D'Agostine, P.C. This publication may constitute advertising under the Rules of the Supreme Judicial Court. It should not be considered as a substitute for legal advice on particular fact situations.