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EMPLOYMENT LAW ALERT

November 2010

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- Employment At Will, Breach of Contract and Termination for Cause
- Employee Policy Manuals
- Family and Medical Leave
- Wage and Hour Requirements
- Employee vs. Independent Contractor
- Executive Employment Agreements and Severance Packages
- Comprehensive Litigation Services

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Final Regulations Published for Genetic Information Non-Discrimination Act

By: Jeffrey M. Schlossberg

As described in RMF's May 2008 Employment Alert, the Genetic Information Nondiscrimination Act (GINA) was passed in May 2008 and became effective on November 21, 2009. GINA makes it unlawful for an employer to discriminate against an individual based on genetic information. GINA also prohibits employers from requesting or requiring genetic information except in limited circumstances such as in medical certifications under the Family and Medical Leave Act (FMLA), or as provided under the Americans With Disabilities Act and similar state laws.

Under final regulations published earlier this month by the Equal Employment Opportunity Commission, the limited exception for FMLA or ADA compliance now appears to only be applicable if employers affirmatively notify the individual and/or health care provider of GINA's limitations on requests for genetic information. The regulations state that receipt of genetic information will be acceptable if the following statement is provided to the individual and/or health care provider:

> GINA prohibits employers and other entities. . . from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an

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individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

The final regulations go into effect January 10, 2011. In the interim, employers should update their FMLA medical certifications for an employee's own serious health condition. If an employer uses the form provided by the Department of Labor, the safe harbor language quoted above should be incorporated into a cover letter or as an addendum. The language also should be used when requesting medical information to determine if a reasonable accommodation is available.

NLRB Claims Facebook-Related Termination Improper

According to the National Labor Relations Board (NLRB), an employer's termination of an employee who posted negative remarks about her supervisor on her Facebook page is in violation of the federal National Labor Relations Act. The employee's initial comments drew supportive responses from co-workers that resulted in the employee posting additional negative comments. According to the NLRB, the employee's postings were protected concerted activity. The company contends that the offensive comments are not protected. Federal law prohibits interference with employees' exercise of their right to engage in concerted protected activity such as discussing wages and other terms and conditions of employment among co-workers.

Employers must be mindful to proceed with caution when considering discipline of an employee for expressing criticism about the company or its policies. In addition, for those employers that have a social media policy, it should be reviewed to be sure it does not curtail an employee's protected speech. Finally, employers should keep in mind that the National Labor Relations Act extends to both unionized and non-unionized workforces when it comes to protected employee speech.

If we can be of assistance on these or any employment law issues, please do not hesitate to contact us.

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