SCHWARTZ HANNUM PC
Labor and Employment Lawyers Guiding Management

Labor and Employment Law Update

MARCH 2011

In This Issue

"…we recommend that employers carefully review their current, actual practices to ensure that policies accurately reflect current practices."

Spring Cleaning:

Time To Review And Update Employment Policies

By William E. Hannum III

Every New Year, we remind employers to review employee handbooks and ensure that personnel policies are up-to-date and legally compliant. In this regard, "up-to-date" means that the employee handbook reflects all recent changes in applicable federal, state and local laws, any expansion in the employer's geographic locations (*e.g.*, doing business in a new state), and innovations in the employer's personnel practices. Given the myriad ways in which change can and does occur, we recommend that employers review personnel policies annually. If you haven't reviewed your handbook since January 2010, it is now time for a review.

Radical Revisions In The Law

Given the number of significant changes in employment laws in the past year, the following issues ought to be addressed, at a minimum.

Nursing Mothers Policy. Effective March 23, 2010, the federal Patient Protection and Affordable Care Act amended the Fair Labor Standards Act ("FLSA") to provide certain protections for nursing mothers. In particular, nursing mothers must be provided with a private room and time off to express breast milk for one year following the birth of her child. While the requirements apply to all employers subject to the FLSA, employers with fewer than 50 employees are exempt if compliance would "pose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business." Employers of all sizes should consider including a policy in their handbook to address this new law.

Overtime Policy. On March 24, 2010, the U.S. Department of Labor's Wage and Hour Division issued an Administrative Interpretation ("Interpretation") regarding the administrative exemption under the FLSA. This Interpretation created a distinction between (i) production duties (*i.e.*, doing what the business does), which are no longer exempt under the administrative exemption, and (ii) management duties (*e.g.*, duties related to finance, HR, customer service, and quality control), which continue to be exempt duties under the administrative exemption. Thus, the Interpretation signals a significant change in the Department of Labor's views regarding the administrative exemption from overtime requirements. In addition to this notable Interpretation, there has been significant litigation and enforcement activity related to wage and hour issues over the past year. We recommend that all employers review their policies, practices, and job descriptions regarding FLSA classifications to ensure that classifications are consistent with the evolving law in this important area.

Benefits. On July 8, 2010, the U.S. District Court for the District of Massachusetts held that the definition of "marriage" and "spouse" under Section 3 of the federal Defense of Marriage Act is unconstitutional. The case is currently being appealed to the First Circuit and only applies to the particular plaintiffs in that case. However, the ruling raises the possibility that both public and private employers may soon be required to recognize same-sex spouses for purposes of marriage-based federal employee benefits. Accordingly, employers may want to consider reviewing plan documents and policies relative to marriage-based benefits and the definitions of "spouse" and "marriage."

Personnel Records Policy. On August 6, 2010, the Massachusetts Personnel Records Statute was

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The Anti-Social Network?
The Risks Of Firing Employees Who Complain On Facebook

By Jessica L. Herbster

On February 23, 2011, a Bourne, Massachusetts firefighter was fired for posting controversial comments on his private Facebook page, allegedly bringing discredit to his department. Similarly, an employee of the Philadelphia Eagles was fired after bashing management for a player trade; and a North Carolina waitress was let go for complaining about customers on Facebook. It seems as if these type of stories are popping up all over the place these days and with increasing frequency.

As the use of social media continues to increase, and as employees continue to astound us by posting comments that probably should never have been put in writing, employers are asking, "When can I fire an employee for his online misconduct?"

Recently, the National Labor Relations Board ("NLRB") reminded employers that they should be careful to determine whether the employee might be engaging in "concerted activity" under the National Labor Relations Act ("NLRA") before discharging an employee. That is, employers should first determine whether the employee was discussing wages, hours, and working conditions with co-workers and others, for their mutual aid and protection. Such "concerted activity" of both union and non-union employees is protected under the NLRA.

The NLRB's reminder was prompted by an unfair labor practice complaint filed last October against a Connecticut emergency medical services company, American Medical Response ("AMR"). In that case, the employee in question had requested union assistance in preparing a written response to a customer complaint. When her supervisor denied her request and threatened to discipline her, she openly mocked him on her Facebook page. Her postings sparked supportive comments and additional criticisms about the supervisor from her coworkers. AMR explained in a public statement that "[t]he employee in question was discharged based on multiple, serious complaints about her behavior," and "held accountable for negative personal attacks against a co-worker posted publicly on Facebook."

The NLRB General Counsel, who prosecutes such complaints, alleged that the discharge violated the NLRA because the employee was engaged in protected activity when she posted the comments about her supervisor and responded to further comments from her co-workers. The General Counsel also alleged that AMR maintained overly-broad policies regarding blogging, Internet posting, and communications between employees, and that AMR had illegally denied union representation to the employee. Some excerpts of the allegedly "overly-broad" policies cited in the complaint are as follows:

- "Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors."
- "Rude or discourteous behavior to a client or coworker" [is prohibited].
- "Use of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature" [is prohibited].

Employers have been anxiously awaiting the result of this case to help provide a framework for an employer's policies and practices. For example, is it a violation of the NLRA to prohibit disparaging comments? Unfortunately, those clear answers did not arrive because the parties settled the case on February 7, 2011. However, some guidance can be gleaned from the terms of the settlement, which was publicly announced by the NLRB in a press release dated February 8, 2011. Specifically, the NLRB reports that AMR agreed to revise its policies "to ensure that they do not improperly restrict employees from discussing their wages, hours, and working conditions with co-workers and others while not at work." AMR also agreed that it would not deny employee requests for union representation, discharge employees, or threaten employees with discipline for seeking union representation in the future. A private settlement was reached with the former employee with respect to her allegations related to the termination.

Although employers generally have broad discretion to discharge employees for conduct that may be harmful to the company, employers should always consider whether such conduct may be protected under the law. This task is made more complicated by the increasing use of social media, which creates an indelible water cooler conversation. Accordingly, we encourage employers to:

- Carefully draft their social media policies to define acceptable behavior in and out of the workplace, while remaining mindful of employees' right to engage in "concerted activity";
- Before deciding to take action against an employee for online conduct, determine whether such conduct could be construed as protected activity (whether under the NLRA or other laws); and
- Determine whether there are laws in your state that restrict employers' rights to encroach upon off-duty conduct.

Please call us if you have any questions regarding the AMR case, or if you would like assistance with social media policies or related disciplinary actions.

NLRB Will Seek Quick Relief In Termination Cases

By Brian D. Carlson

The National Labor Relations Board ("NLRB" or "Board") plans to intensify its efforts to secure preliminary court orders reinstating employees in "organizing discharge" cases, in which employees are unlawfully fired for participating in union organizing campaigns.

This announcement was conveyed through the public release of an internal memorandum by Acting General Counsel Lafe E. Solomon at the NLRB, and is another example of the agency's recent pro-union slant.

Legal Framework

Under Section 10(j) of the National Labor Relations Act ("NLRA"), whenever a party files an unfair labor practice ("ULP") charge, the Board may decide, after investigating the charge, to initiate a proceeding in federal court seeking immediate injunctive relief against the party alleged to have committed the ULP. If the court concludes that the charge is well-founded and that the party filing it will suffer irreparable harm without immediate relief, the court may issue a preliminary injunction granting such relief until the charge has been fully litigated. In "organizing discharge" cases, reinstatement is typically the core relief sought.

The NLRA has always provided that employees unlawfully discharged for engaging in union activity are entitled to reinstatement with back pay. In his memorandum, however, Acting GC Solomon noted that the Board's usual processes – which can take several years from filing to final adjudication – are often inadequate, as a practical matter, to remedy such violations, because an employer's discharge of a union activist often stops organizing activity in its tracks by deterring other employees from supporting unionization. Additionally, by the time of an eventual reinstatement order, the employee is often unavailable for, or uninterested in, reinstatement.

Board's Increased Focus On "Organizing Discharge" Cases

This concern is certainly not new, and Acting GC Solomon notes in his memorandum that the Board has developed "a variety of very effective strategies" for addressing "organizing discharge" cases, including investigating such charges as promptly as possible and, when they are determined to be meritorious, seeking injunctive relief or pressing employers to settle such charges and quickly reinstate employees.

Now, however, Acting GC Solomon states that his goal is "to give all unlawful discharges in organizing cases priority action and a speedy remedy." His memorandum indicates that, in furtherance of this effort, the NLRB will intensify its efforts to obtain preliminary injunctive relief in appropriate "organizing discharge" cases "to assure that the passage of time does not undercut our ability to provide effective remedies in these cases." These efforts are to include:

- Attempting to secure all of the parties' evidence in "organizing discharge" cases within 28 days of the filing of such charges;
- Deciding whether to seek Section 10(j) relief within seven weeks after the filing of such charges;
- Having Acting GC Solomon "personally review" all such cases; and
- Requesting injunctive relief even where a union has abandoned its organizing efforts or a discharged employee has disclaimed any interest in reinstatement.

"In light of the Board's heightened emphasis on seeking injunctive relief in "organizing discharge" cases, an employer should act with renewed caution before terminating an employee who has been involved in recent union organizing activities."

Notably, after serving in this temporary role since June 21, 2010, Acting GC Solomon was nominated on January 5, 2011, to be the Board's General Counsel. While the Senate has not yet taken action on this nomination, it seems almost certain that any successful nominee, whether Mr. Solomon or otherwise, will continue the Board's recent pro-labor tack – including, presumably, the procedures for potential Section 10(j) cases outlined in Acting GC Solomon's memorandum.

Recommendations For Employers

In light of the Board's heightened emphasis on seeking injunctive relief in "organizing discharge" cases, an employer should act with renewed caution before terminating an employee who has been involved in recent union organizing activities. While an employee's participation in such activities certainly does not immunize him or her from being disciplined for appropriate reasons, Acting GC Solomon's memorandum makes clear that if the Board deems an employee's termination suspicious, it will not hesitate to seek Section 10(j) relief.

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NLRB Will Seek Quick Relief In Termination Cases

Such cases can result in significant expense and negative publicity for businesses, so employers should consider such termination decisions carefully, and take every appropriate step to ensure that employees are not unlawfully terminated (or otherwise retaliated against) for engaging in protected union activities.

For instance, an employer that is aware of recent or ongoing organizing activity among its workforce might arrange for all proposed disciplinary actions to be reviewed by a high-level employee (such as an HR executive) with no direct involvement in the events at issue, in order to ensure that such decisions are not perceived as being influenced by anti-union animus. In addition, whenever an employee who is known to have been involved in organizing activities is slated for discipline, an employer would be wise to consult labor counsel before implementing the discipline.

Additionally, Acting GC Solomon's memorandum underscores the need for employers to take active steps aimed at averting possible union organizing campaigns in their workplaces. Such measures include:

- Maintaining workplace policies that make organizing activity more difficult, including appropriate no-solicitation, no-distribution, no-access and e-mail policies;
- Training managers in how to respond to organizing activity in a lawful and effective manner;
- Training managers in how to manage effectively, since discontentment with such issues often motivates employees to seek to organize;
- Ensuring that an employer has effective programs for rewarding positive job performance and addressing employee concerns, as discontentment with these issues also can motivate employees to seek to organize; and
- When appropriate, communicating to employees an employer's reasons for believing that it is in employees' best interests to remain union-free.

If you have any questions about these issues or would like our assistance with any labor-law matters, please do not hesitate to contact us.

Schwartz Hannum PC's Spring 2011 Seminars For Independent Schools:

Introductory And Advanced Programs

One-Day Introduction To Human Resources For Business Office Staff
April 25th (8:30 a.m. to 5:00 p.m.)

Critical Risk Management: Best Practices For Minimizing School Liability
(Advanced Program)
April 12th (9:00 a.m. to 11:30 a.m.)

Bullying: Are You Truly Prepared For The Next Incident On Your Campus? Will You Know Exactly What To Do?
(Advanced Program)
May 9th (9:00 a.m. to 12:00 p.m.)

Each of these seminars will be offered at the Firm's Andover office. Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, Kathie Duffy, at **kduffy@shpclaw.com** or **(978) 623-0900**, for detailed information on these seminars.

Schools Need To Plan Now To Be "Camp Compliant" By Summer

By Paul Dubois

Independent schools that operate summer camps are gearing up to tackle the numerous obligations that lie dormant all winter, awaiting the spring thaw. Now is the time to ensure that summer camps are compliant with all applicable laws and best practices.

So, to help schools avoid the risks of not being ready, here is our "To Do List" for the spring, to get you ready for the summer camp season.

Summer Camp Compliance Documents

Schools often neglect summer camp compliance documents, rendering their summer camps the "poor" step-children within the academic family. Obviously, camps can create liability, however, and therefore camps merit risk management just as much as schools do. We urge all schools to review camp documents in 2011, and to ensure that their summer camps utilize best practices and risk management tools.

Accordingly, we recommend that schools update camp compliance documents and forms, including, but not limited to, the camp's version of the following:

- Employment Application*
- Offer Letter
- Employee Handbook
- Parent Handbook
- Camp Registration Forms
- Authorizations To Administer Medication To Camper
- Camper Injury Reports
- Medical Logs

* As noted in the Firm's recent e-alert on the topic of employment applications, these applications should be updated for recent changes in the law. See *http://shpclaw.com/news/eAlertsDetail.php?id=734.*

Comprehensive Enrollment Agreements

Another vitally important document for schools to update in connection with their summer camps is the summer camp enrollment agreement. The summer camp enrollment agreement generally conveys information to a camper's guardians about the camp's total costs, tuition and fee payment schedules, and the possibility of a refund if a camper withdraws from camp mid-summer.

A comprehensive enrollment agreement also provides an opportunity to include the school's reservation of its right to terminate the attendance of a camper for unacceptable behavior or conduct or the failure to timely make scheduled payments, as well as to address other issues of significant importance to the camper and his or her parents. Code of conduct issues, bullying and other such topics may be addressed, for instance.

Liability Waivers

Schools with summer camps that offer "extreme sports" such as horseback riding, rock climbing, riflery/archery, etc., should include in their compliance documents a liability waiver. A liability waiver advises guardians that there are risks associated with certain activities offered by the camp, and obtains permission from a camper's guardians for the camper to participate in the risky activities.

Obtaining Criminal And Sex Offender Record Information

Schools operating summer camps should adhere to the state-specific criminal record check requirements for anyone who will have unmonitored access to campers, including current and prospective employees, parents and volunteers. We also urge schools to consider conducting appropriate background checks beyond those required by applicable law – and to ensure that such checks comply with applicable state and federal law.

In Massachusetts, for example, each summer camp must access Criminal Offender Record Information ("CORI") through the Department of Criminal Justice Information Services for every employee, parent, volunteer or otherwise successful applicant of the camp who may have direct and unmonitored contact with children, including any individual who regularly provides camp-related transportation to children.

We also strongly recommend that summer camps check whether every current employee, parent, volunteer or otherwise successful applicant of the camp is classified as a sex offender through the appropriate state agency. In Massachusetts, the Sex Offender Registry Board ("SORB") is the state agency responsible for categorizing and tracking convicted sex offenders and classifying each offender. Sex Offender Record Information ("SORI") is available to the public if the offender has a duty to register and the offender has been "finally classified" by the SORB as a Level 2 or Level 3 offender.

Schwartz Hannum's Education Practice provides comprehensive guidance to the full spectrum of educational institutions, including many nationally renowned independent schools, colleges and universities in New England and throughout the United States. Please see our website at http://shpclaw.com /services/schools.php for more information.

The Firm's attorneys have extensive experience assisting schools and summer camps with all of the issues addressed above, as well as the myriad issues that arise each day for school and summer camp administrators.

Employers Must Act To Comply With Genetic Information Nondiscrimination Regulations

By Frances S. P. Barbieri

The Equal Employment Opportunity Commission's final regulations on the Genetic Information Nondiscrimination Act ("GINA") require employers to take specific and immediate steps to prevent discrimination on the basis of genetic information.

In particular, employers with 15 or more employees must ensure that their Equal Employment Opportunity ("EEO") policies include genetic information as a protected category. Additionally, such employers must refrain from requesting, requiring or purchasing genetic information concerning their employees.

Fortunately, the final regulations help to delineate what is permissible and impermissible under the statute – and provide certain "safe harbors" for employers. We encourage employers to review and revise their applicable policies, practices and forms so as to avail themselves of these protections and thereby minimize their potential liability under this complex new law.

"GINA prohibits employment discrimination based on genetic information in a manner similar to how other federal statutes prohibit employment discrimination based on other protected characteristics…"

What Is Genetic Information?

Because GINA creates new obligations for employers relative to the genetic information of employees, and in some cases, the family members of employees, it is critical for employers to understand what "genetic information" is. Genetic information is defined as:

(1) an employee's genetic tests;

(2) the genetic tests of an employee's family members (defined as dependents related to the employee through marriage, birth, adoption, or placement for adoption);

(3) family medical history (including information about any disease or disorder of family members, not just inheritable diseases);

(4) an employee's request for, or receipt of, genetic services, or an employee's (or an employee's family member's) participation in clinical research that includes genetic services; and

(5) genetic information of a fetus or embryo of an employee or member of an employee's family.

GINA Prohibits Employment Discrimination Based On Genetic Information

GINA prohibits employment discrimination based on genetic information in a manner similar to how other federal statutes prohibit employment discrimination based on other protected characteristics (*e.g.*, race, national origin, religion and gender). In this regard, GINA prohibits employers from:

- Discriminating against employees on the basis of genetic information in regard to hiring, discharge, compensation, terms, conditions, or privileges of employment;
- Retaliating against employees who complain about the acquisition, use, or disclosure of genetic information;
- Limiting, segregating, or classifying employees based on genetic conditions (however, employers may limit or restrict an employee's job duties based on genetic information if the employer is required to do so by a law or regulation mandating genetic monitoring, such as regulations administered by the Occupational Safety and Health Administration); and
- Harassing employees based on genetic information.

GINA, however, does *not* create a cause of action on a disparate impact theory. Thus, employees who assert GINA claims must show that they were treated differently because of their genetic information. They cannot base their claims on the theory that the employer's policies or practices, while facially neutral, caused a disproportionate impact on employees with certain genetic characteristics.

GINA Prohibits Employers From Requesting, Requiring Or Purchasing Genetic Information

With certain important exceptions (discussed below), GINA also prohibits employers from requesting, requiring or purchasing an employee's genetic information. The prohibition on "requesting" genetic information merits particular attention, as "requesting" is defined broadly to include conduct other than making a formal request.

The final regulations clarify that "requesting" includes conducting internet searches likely to result in obtaining genetic information; actively listening to third-party conversations in order to obtain genetic information; searching a person's personal effects in order to obtain genetic information; and requesting information about an individual's current health status in a way that is likely to result in the employer obtaining genetic information.

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Employers Must Act To Comply With Genetic Information Nondiscrimination Regulations

Employers should carefully review their present policies and practices to ensure that their supervisors, managers and human-resources personnel avoid conduct that may arguably fall into GINA's broad definition of "requesting." Corresponding training sessions are also recommended.

Exceptions And Safe Harbors To The GINA Prohibitions

Fortunately, GINA contains six exceptions to the prohibitions against requesting, requiring or purchasing employees' genetic information, as well as certain corresponding safe harbors, as set forth below.

1. It is not a violation of GINA if an employer inadvertently obtains genetic information, as illustrated in the following examples:
   - It is not a violation of GINA when an employer obtains genetic information by accident, such as when a manager asks an employee "how are you," and the employee's response includes family medical history (*e.g.*, "not so good, because I just learned that my mother has breast cancer").
   - It is not a violation of GINA when an employer receives genetic information as part of: (1) a request for accommodation under the Americans with Disabilities Act ("ADA"); (2) a request for leave under the Family and Medical Leave Act ("FMLA"), state or local family and medical leave law, or a voluntary family and medical leave policy; and (3) a return to work certification under the FMLA, state or local family and medical leave law, or a voluntary family and medical leave policy, *provided that the employer directs the employee not to include family medical history or other genetic information in making such requests or providing such documentation (see model safe-harbor language below)*.
   - It is not a violation of GINA when an employer receives genetic information in response to a request for medical information from the employee, or pursuant to a physical examination of the employee, *provided that the employer directs the employee and/or the medical provider not to provide genetic information in responding to the request or reporting the results of the examination (see model safe-harbor language below)*.
   - *Model Safe-Harbor Language:* As noted, the final regulations provide model safe-harbor language that employers should include on any request for medical information and on any form that might otherwise elicit medical information (such as a form provided to employees for purposes of requesting a reasonable accommodation under the ADA). The safe-harbor language is as follows:

     The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this 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 individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.
2. It is not a violation of GINA when an employer requests family medical history in connection with an employee's request for leave *to care for a sick family member* as part of the certification provisions of the FMLA, state or local family and medical leave laws, or a voluntary family and medical leave policy. Thus, an employer may continue to request a medical certification showing that the employee's family member has a "serious health condition" or "serious injury or illness," without violating GINA, even though the employer will necessarily receive "family medical history."
3. It is not a violation of GINA when an employer obtains genetic information in connection with the administration of qualifying health or genetic services, such as a voluntary wellness program, provided that the employer institutes certain safeguards. In this regard, an employer may *request* genetic information, including family medical history, as part of a qualifying health or wellness program, but may *not require* an employee to disclose such information. As to this point, the final regulations provide the following guidance:
   - An employer may use a questionnaire or assessment that includes questions regarding family medical history or other genetic information, but (a) the employer must inform the employee, in easily understandable language, that he or she may provide genetic information but is not required to disclose that information in order to participate in the program and receive any related incentives from the employer; (b) the employer must obtain a voluntary, written authorization from the employee, prior to the employee providing the genetic information, that describes the genetic information requested, the purpose for which it will be used, and the restrictions on disclosure of genetic information; and (c) the genetic information

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Employers Must Act To Comply With Genetic Information Nondiscrimination Regulations

should be disclosed only to a "licensed health care professional or board certified genetic counselor involved in providing such [qualifying health or wellness] services."

- Similarly, any genetic information obtained by a provider pursuant to a voluntary wellness program *should not be shared* with the employer, except in the aggregate.

4. It is not a violation of GINA when an employer acquires genetic information from documents that are commercially and publicly available, including print and internet publications, provided that an employer may not specifically research medical or court databases for the purposes of obtaining an employee's genetic information. Notably, the final regulations differentiate between publicly available documents (which may simply require the input of a username and password) and documents that cannot be accessed without permission from a specific individual or membership in a particular group. For example, an article on WSJ.com is considered to be publicly available, even if access requires the input of a username and password, but a document available only to the members of a trade association is not considered to be publicly available.
5. It is not a violation of GINA when an employer acquires genetic information for use in the genetic monitoring of the biological effects of toxic substances in the workplace, provided that the employer complies with certain monitoring restrictions.
6. It is not a violation of GINA when an employer requires genetic information from its employees, apprentices, or trainees for quality control of DNA analysis for law enforcement purposes.

Please note that any genetic information that an employer lawfully obtains must be maintained as a confidential medical record, separate from personnel files.

Recommendations For Employers

We recommend that employers revise policies, practices, and related employee forms to ensure compliance with GINA. Generally, employers should:

- Revise EEO policies to inform employees that discrimination and harassment based on genetic information is prohibited;
- Include genetic information discrimination in training seminars about discrimination and harassment;
- Ensure that precautions are taken when requesting family medical history or other genetic information as part of a voluntary wellness program, including making the required disclosures and obtaining the required authorizations;
- Revise forms requesting or likely to elicit medical information (such as forms concerning requests for accommodations, family and medical leaves, and pre-employment or annual physical examinations) to include the safe-harbor language contained in the final regulations; and

GINA, however, does not create a cause of action on a disparate impact theory. Thus, employees who assert GINA claims must show that they were treated differently because of their genetic information.

- Provide training to human resources professionals and other employees who could inadvertently request genetic information.

As always, please contact the Firm if you have questions or if we can assist in helping your organization achieve compliance.

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Spring Cleaning: Time To Review And Update Employment Policies

amended to include two new provisions. The first amendment requires employers to notify an employee within 10 days of placing in the employee's personnel record any information to the extent that the information is, has been used or may be used to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action. The second provision limits the number of times an employer must provide an employee with access to his or her file. While neither of these amendments necessarily compels a revision to an employee handbook, employers should review their current policy, practices and training to ensure that personnel files are maintained in compliance with the law.

CORI Policy. On August 6, 2010, Massachusetts Governor Deval Patrick signed into law Chapter 256 of the Acts of 2010, "An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release" ("CORI Reform"). Effective November 4, 2010, the Act prevents most employers from seeking disclosure of job applicants' criminal record information at the initial application stage. Beginning in 2012, CORI Reform will impose numerous additional obligations on employers that rely on criminal history records to make employment decisions. In particular, CORI Reform will require a CORI policy for employers that will annually conduct 5 or more criminal background checks. Employers should review current practices with respect to criminal background checks and update their relevant policies.

EEO And Anti-Harassment Policies. The federal Genetic Information Nondiscrimination Act ("GINA") became effective on November 21, 2009, and the U.S. Equal Employment Opportunity Commission issued corresponding regulations on November 9, 2010. Employers should review their equal employment opportunity, anti-harassment, and related policies to ensure compliance with GINA and the recently promulgated regulations. (For detailed information on GINA compliance, see page 6 of this Update.)

Policy Against Texting While Driving. Effective October 1, 2010, texting while driving became illegal in Massachusetts. Many other states (including California, Connecticut, New Jersey, New York, and Washington) and the District of Columbia have likewise banned the use of handheld cell phones while driving. Other states, such as Maine, have banned "distracted driving." Employers should consider implementing a policy to ensure compliance with such laws, while perhaps also outlining the employer's philosophy about this issue, with respect to company cars and driving during work hours.

Anti-Bullying Policy? Employers may want to consider adopting a general anti-bullying program, including anti-bullying policies and plans, and anti-bullying training. While there are no laws that expressly prohibit bullying in the workplace (other than in schools), such laws have been in the works, have come close to being passed, and are likely to be passed in the future. Further, an anti-bullying program may improve productivity, reduce the risk of litigation and reduce employee turnover. For example, bullying is frequently cited as a high-risk factor in triggering employment litigation.

Whistleblower Policy. Whistleblower and retaliation cases are still on the rise. If they have not done so already, employers should consider implementing a policy that specifically addresses internal reporting procedures and that prohibits retaliation for raising such concerns.

Electronic Communications And Social Media Policy. Employees' online activities continue to impact the workplace. Employers should review their electronic communications and social media policies and practices to ensure that such policies address employees' blogs and online profiles, while not violating employees' privacy rights and the right to engage in concerted activity.

Multi-State Employers

Furthermore, we recommend that multi-state employers review personnel policies to consider the laws of all states in which they operate. In particular, multi-state employers ought to focus on any states into which they have *recently* expanded, to ensure that written policies comport with state law. Many states have at least a few unique laws that are dramatically different than the standard laws in other states. Thus, preparing a multi-state employee handbook and managers' guide requires thorough research and careful analysis to ensure that any inconsistencies in state law are properly addressed and resolved in the handbook.

Policy Vs. Practice

Finally, we recommend that employers carefully review their current, *actual* practices to ensure that policies accurately reflect current practices. This is an area in which employers frequently get themselves into trouble. Unfortunately, many employers do not discover this problem until they are already in litigation, and learn that the policy and the practice are inconsistent. At best, the result is the embarrassment of looking sloppy to a judge or arbitrator. At worst, the employer may lose a significant legal claim predicated on breach of contract, employment discrimination or some other applicable theory. Thus, it is critical that employers ensure that their policies are consistent with their actual practices.

We encourage employers to work with experienced labor and employment counsel at least once each year to update their employee handbook, and/or managers' guide, to ensure compliance with all applicable changes in federal, state and local laws and to ensure that the policies accurately reflect current practices. Please do not hesitate to contact any of us at Schwartz Hannum PC with questions.

A version of this article previously appeared in the January 2011 edition of New England In-House. *Will gratefully acknowledges* New England In-House *for its support in publishing this article. Will also gratefully acknowledges the efforts of Suzanne W. King and Jessica L. Herbster, who assisted in drafting this article.*

Schwartz Hannum PC's Spring 2011 Seminars

Employment Law Boot Camp
(Two-Day Seminar – Offered Twice This Spring!)
April 13th (8:30 a.m. to 4:30 p.m.) and April 14th (8:30 a.m. to 5:00 p.m.)
May 4th (8:30 a.m. to 4:30 p.m.) and May 5th (8:30 a.m. to 5:00 p.m.)

Labor Relations Boot Camp
April 28th (8:30 a.m. to 4:30 p.m.)

Conducting An I-9 Audit: Tips, Traps And Best Practices
May 3rd (9:00 a.m. to 11:30 a.m.)
June 2nd (9:00 a.m. to 11:30 a.m.)

Advanced Employment Law Boot Camp
May 19th (8:30 a.m. to 4:30 p.m.)

Facebook, MySpace, YouTube And Other Social Media: Friend Or Foe In The Workplace?
May 26th (9:00 a.m. to 12:00 p.m.)

The Nuts And Bolts Of Compliance With The Amended Family And Medical Leave Act
June 7th (9:00 a.m. to 12:00 p.m.)

Please see the Firm's website at **www.shpclaw.com** or contact the Firm's Seminar Coordinator, Kathie Duffy, at **kduffy@shpclaw.com** or **(978) 623-0900**, for detailed information on these seminars.

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