VEDDERPRICE®

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# Labor and Employment Law

## For Better or for Worse, in Sickness and in Health:

### Seventh Circuit Disapproves of Termination Due to Spouse's High Medical Costs

**VP Keys**

**Employers cannot treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform his job duties while caring for a relative or other individual with a disability.**

**Basing employment decisions on the medical condition of a spouse or family member exposes an employer to ADA association discrimination claims.**

In an effort to control health care costs, many employers are more closely monitoring (and in some cases, managing) claims made by employees and their family members. Doing so is not without risk, as one employer, Proctor Hospital, discovered when clinical manager Phyllis Dewitt filed a lawsuit against it under the ADA. Dewitt alleged that the hospital violated the ADA in its attempt to control costs relating to treatment her husband was receiving for prostate cancer. (*Dewitt v. Proctor Hosp.*, 7th Cir., No. 07-1957, 2/27/08). The Seventh Circuit Court of Appeals opinion, reversing the district court's decision for the hospital, provides a helpful roadmap of do's and don'ts to employers seeking to manage health care costs.

#### *ADA Protections and EEOC Initiatives*

In addition to prohibiting discrimination against a qualified employee because the employee is disabled or regarded as disabled or has a record of disability, the ADA makes it unlawful for employer to "deny equal jobs or benefits to, or otherwise discriminate against," a worker based on his or her association with an individual with a disability. 29 U.S.C. § 1630.8. Under this provision, an employer may not treat a worker less favorably based on stereotypical assumptions about the worker's ability to perform job duties satisfactorily while providing care to a relative or other individual with a disability. For example, in last year's *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities* (May 2007), the EEOC noted that an employer may not refuse to hire a job applicant whose wife has a disability because the employer assumes that the applicant would use frequent leave or arrive late due to his caregiving responsibilities.

An EEOC Enforcement Guidance often signals an area that will receive increased scrutiny and more aggressive

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investigations. The EEOC maintains that association claims have increased by 400 percent in the past decade, and employers should expect that trend to continue in light of the new focus on such issues.

## Dewitt v. Proctor Hospital—*Bad Timing Makes Bad Facts*

Dewitt worked at Proctor Hospital as a clinical manager supervising nurses and staff members. She availed herself of the hospital's health insurance plan, which provided Dewitt and her husband partially self-insured health care coverage up to the "stop-loss" mark of $250,000 annually, with any excess falling under a separate policy. Proctor monitored the costs of the self-insured portion of its medical plan through quarterly "stop-loss reports" on all employees whose recent medical claims exceeded $25,000.

Diagnosed with prostate cancer, Dewitt's husband, Anthony, began undergoing costly medical procedures in 2003, and the Dewitts' quarterly medical expenses exceeded the $25,000 threshold. As a result, the hospital started receiving stop-loss reports for Dewitt and, over the next three years, medical claims for her husband grew $71,684 in 2003, to $177,826 in 2004, with another $67,281 for the first eight months of 2005.

In September 2004, Dewitt's supervisor, Mary Jane Davis, confronted Dewitt about those rising costs, telling her that a committee was reviewing her husband's expenses as unusually high, asking about the treatment he was receiving, and suggesting that he consider less expensive hospice care. Davis approached Dewitt again about her husband's treatment in February 2005. In May 2005,

> An employment decision based solely on medical costs does not constitute "disability" discrimination under the ADA

Davis organized a meeting of Proctor's clinical managers and advised them that Proctor faced financial difficulties that would require "creative" cost cuts. Three months later, on August 3, 2005, Proctor fired Dewitt and designated her, without explanation, "ineligible to be rehired in the future." Dewitt's husband died a year later.

Dewitt sued her employer for "association discrimination" in violation of the ADA, alleging that Proctor fired her to avoid having to pay for the substantial self-insured medical costs it incurred because of her husband. A federal district court granted summary judgment to Proctor on Dewitt's claim. The Seventh Circuit reversed. Specifically, the Seventh Circuit found that Dewitt presented "direct evidence" of discrimination because Proctor fired her five months after Davis's last conversation with her about her husband's medical costs, and three months after Proctor warned employees about "creative" cost-cutting measures.

"That the powers-that-be at Proctor were interested specifically in the high cost of Anthony's medical treatment is obvious," Judge Terence T. Evans said. "Davis, Dewitt's supervisor (and the person who ultimately fired her), pulled Dewitt aside twice in five months to inquire about Anthony's condition. These conversations indicate that Davis was very interested in limiting Anthony's claims," he wrote. "A reasonable juror could conclude that Proctor, which faced a financial struggle of indeterminate length, was concerned that Anthony—a multi-year cancer veteran—might linger on indefinitely."

### *Disability Still Required*

Judge Richard A. Posner concurred in a separate opinion, arguing that an employment decision based solely on medical costs does not constitute "disability" discrimination under the ADA. Specifically, he said, "[I]f the disability plays no role in the employer's decision—if he would discriminate against any employee whose spouse or dependent ran up a big medical bill—then there is no disability discrimination. It's as if the defendant had simply placed a cap on the medical expenses, for whatever cause incurred, that it would reimburse an employee for." In short, Judge Posner was saying that only medical costs resulting from a statutory "disability" cannot be

*For Better or Worse continued from page 2*

considered. However, as a practical matter, many or most catastrophic or chronic illnesses would qualify as statutory disabilities or be perceived as disabilities.

If you have any questions, please contact **Jennifer L. Milos** (312-609-7872), **Aaron R. Gelb** (312-609-7844) or any other Vedder Price attorney with whom you have worked. ■

Jennifer L. Milos

Aaron R. Gelb

## Wellness Programs Present Compliance Challenges and Cost-saving Opportunities

Faced with the skyrocketing health care costs described above, many employers are taking a preventive approach by offering wellness programs designed to promote good health and positive lifestyle choices. Wellness programs are often tied to financial incentives in the form of lower insurance premiums or financial awards or gifts. Employers find these programs attractive because of the potential for reductions in medical claims and health plan utilization, which can decrease overall health care costs. Improvements in employee health also can positively affect employee productivity and attendance. Employees usually are receptive to wellness programs and appreciate the employer's positive approach to employee health and morale.

However, wellness programs present significant issues under federal and state law. Therefore, employers should carefully consider the design and administration of the program, as well as the relationship with vendors, prior to implementation.

### *Common Structure and Design*

Employers have experimented with a variety of wellness programs and initiatives, and vendors continue to provide creative options to encourage employee wellness and thereby reduce overall employer health care costs. Early examples included employee assistance programs, designed to offer assistance to employees dealing with drug and alcohol problems, as well as situational stress. Over the years, wellness initiatives have expanded to include:

- health risk assessments (including, for example, blood pressure measurements and cholesterol tests)
- smoking cessation programs
- health fairs
- on-site fitness facilities
- subsidized health club and fitness programs
- weight management programs
- blood pressure and cholesterol control programs
- health coaching

Often employers structure wellness plans as a feature of their group health plan, administered through a third-party administrator or an insurance company. Other wellness programs are not treated as part of the employer's group health plan, which, as noted below, can have significant legal implications. And all of these various types of wellness programs raise the following legal issues.

## Editor's Note

**Welcome to the June 2008 Vedder Price *Labor and Employment Law* newsletter! Change abounds. As many of you know, our name changed on January 1, 2008 from Vedder, Price, Kaufman & Kammholz, P.C. to Vedder Price P.C. Another change is that I am the new editor of our *Labor and Employment Law* newsletter. We want to provide the most helpful, user-friendly newsletter possible, so please send me an e-mail at agelb@vedderprice.com (or call me at 312-609-7844) with any comments or suggestions. I look forward to hearing from you.**

**Aaron Gelb**

*Wellness Programs Present Compliance Challenges continued from page 3*

**HIPAA**

Some wellness programs are structured as a component of the employer's group health plan, which may trigger HIPAA's nondiscrimination rules. HIPAA prohibits group health plans from using a health factor as a basis for discrimination with regard to eligibility or premium contributions. However, an employer is not prohibited from establishing discounts or rebates in return for adherence to programs of health promotion and disease prevention if certain specific requirements are met. In December 2006, final regulations were issued which interpret HIPAA's nondiscrimination rules and create an exception for wellness programs from those rules if certain requirements are met:

- The total reward for the plan's wellness programs must generally not exceed 20 percent of the total cost of employee-only coverage.
- The program must be reasonably designated to promote health or prevent disease.
- The program must give individuals eligible to participate the opportunity to quality for the reward at least once per year.
- The program must be available to similarly situated participants—which means that an individual who cannot obtain the reward because the health standard is unreasonably difficult due to a medical condition or because it is medically inadvisable to satisfy it must be permitted to satisfy a reasonable alternative health standard.
- The group health plan must provide notice that individual accommodations are available to those who cannot meet the health standards because of a medical condition or for whom achievement of the standard is medically inadvisable.

If the program is subject to the nondiscrimination rules, compliance with the final regulations may ensure that the plan is exempted, but the EEOC has specifically stated that compliance with HIPAA does not ensure compliance with the ADA and other federal anti-discrimination laws.

Depending on the design of the program, HIPAA's nondiscrimination rules may not be triggered at all. For example, some wellness programs reward employees for simply participating in educational or other programs offered to all employees without regard to a specific health factor. Other wellness programs give employee rewards unrelated to health plan contributions or eligibility, such as gift certificates, raffle tickets or cash. Because these programs do not base eligibility or premium reductions on a health factor, HIPAA's nondiscrimination rules may not apply.

Aside from HIPAA's nondiscrimination rules, the implementation of a wellness plan may trigger HIPAA's privacy rules, especially if the plan conducts health risk assessments or otherwise monitors employee health. If the program is subject to these rules, the plan must have policies in place protecting the information and business associate agreements with vendors who provide services to the plan. The HIPAA privacy rules also prohibit employers from using protected health information for employment-related reasons.

> According to the EEOC, an employer may conduct medical examinations and activities that are part of a *voluntary* wellness and health screening program

**ADA**

A wellness program must comply with the ADA. The ADA does not prohibit an employer from administering a wellness program aimed toward disease prevention and healthy lifestyle choices. However, the ADA does prohibit employers from denying participation or benefits based on a disability and requires reasonable accommodation to an employee with a known disability to allow them to participate. Thus, an employer may have to engage in the interactive process with employees who may otherwise have difficulty accessing a particular wellness program.

*Wellness Programs Present Compliance Challenges continued from page 4*

A key component of many wellness programs is a health risk assessment that can be used to create targeted programs for individuals with high health risks. In general, the ADA prohibits employers from requiring medical examinations unless they are job-related and consistent with business necessity. However, according to the EEOC, an employer may conduct medical examinations and activities that are part of a *voluntary* wellness and health screening program. Recently, some employers have experimented with the implementation of *mandatory* wellness programs, which may run afoul of the ADA's *voluntary* requirement. The EEOC has stated that a program is *voluntary* if the employer neither requires participation nor penalizes employees who do not participate, but this is the extent of the EEOC's guidance on this issue. The EEOC has not taken a regulatory position regarding whether a wellness program that provides financial incentives for participation in health risk assessments could be deemed involuntary. This is significant because the ADA restrictions on medical examinations and inquiries apply to all employees, not just those with disabilities.

Wellness programs that include health risk assessments (or otherwise collect health information as a component of your wellness program) should be reviewed with legal counsel to determine whether the program will be considered voluntary under the ADA. Furthermore, medical records acquired as part of the wellness program should be kept confidential and separate from personnel records.

**NLRA**

The National Labor Relations Act may require that an employer operating in a unionized environment bargain with the union prior to implementing a wellness program. The NLRA requires an employer to bargain with the union regarding wages, hours and other terms and conditions of employment. The implementation of a new benefit is a mandatory subject, even though it is intended to be positive or voluntary. Large unionized employers with high health care costs were some of the first to experiment with wellness programs, and several early attempts were met by arbitration demands by the union. As a result, unionized employers should determine whether the collective bargaining agreement gives the employer the right to implement wellness benefits, and, if not, the employer may be required to bargain with the union.

**ERISA**

A separate, stand-alone program may be required to comply with ERISA's reporting and disclosure requirements. ERISA broadly covers "employee welfare benefit plans," which are defined to include any program established or maintained by an employer providing medical care to participants. While some programs simply promote a healthy lifestyle, many conduct health risk assessments and make specific recommendations to participants or engage in disease management programs. These activities could be considered medical care. The Department of Labor has specifically indicated that wellness plans providing medical care may be subject to ERISA. Although the courts have not directly addressed the issue, several courts have held that employee assistance programs can be ERISA plans, thus foreshadowing the possibility that a stand-alone wellness program could be considered a separate ERISA plan and thus subject to reporting obligations.

The Department of Labor has specifically indicated that wellness plans providing medical care may be subject to ERISA

**State Lifestyle Laws**

Several state statutes protect employees from discrimination based on lawful activities. For example, Illinois protects employees from discrimination based on the use of lawful products (including smoking) during nonwork time. Other states, such as California and Colorado, protect an employee's right to engage in lawful activities away from work. These statutes may form the basis for challenges to wellness

*Wellness Programs Present Compliance Challenges continued from page 5*

plans by arguing that program incentives discriminate in terms and conditions of employment based on protected activity.

State lifestyle statutes could also be implicated when an employee chooses not to participate in a wellness program and later suffers an adverse employment action. Like other types of discrimination claims, a potential plaintiff may argue that the real reason for the adverse employment action was based on protected activity and the employer's desire to rid itself of employees who contribute to high healthcare costs.

**Practical Considerations**

A recent *Chicago Tribune* article highlighted the challenge in maintaining the integrity of wellness programs. According to the article, Whirlpool offered a tobacco-free health insurance discount. After allegedly stating that they would not use tobacco on enrollment forms supplied by the employer, a group of 39 production employees at the Evansville, Indiana plant repeatedly were seen standing outside of the facility smoking. After discovering this, Whirlpool suspended the 39 employees pending an investigation.

Employers continue to administer wellness programs in largely uncharted legal waters, making consultation with legal counsel advisable prior to implementation. In establishing the program, the relationship with the vendor and resulting contract should be reviewed to ensure that the employer's rights are protected and that all necessary compliance measures have been taken.

Vedder Price has helped employers, consulting companies, and other vendors create and implement a broad range of wellness programs and initiatives. If you have any questions, please contact **Thomas G. Hancuch** (312-609-7824), **Patrick W. Spangler** (312-609-7797), or any other Vedder Price attorney with whom you have worked. ■

Thomas G. Hancuch

Patrick W. Spangler

## Tightening the Screws on Construction Contractors in Illinois: New Law Presumes Individuals Are Employees, Not Independent Contractors

**VP Keys**

**New Illinois law presumes construction workers are employees, not independent contractors.**

**Act applies to traditional construction contractors as well as employers in a variety of related fields, including remodeling, maintenance and landscaping.**

The Employee Classification Act, effective since January 1, 2008, is intended to redress the misclassification of construction industry employees as independent contractors. Backed by organized labor, this law is intended to lead to expanded collection of employee taxes and prevent certain employers from avoiding responsibility for workers' compensation and medical insurance coverage. In addition to casting a wide net that likely will cover employers not previously viewed as part of the construction industry, the Act places the burden on the employer to prove independent contractor status.

### *Broad Definitions Mean Greater Coverage*

The Employee Classification Act defines "construction contractor" to include any entity involved in a variety of construction-related activities, including construction, repair, remodeling, maintenance or landscaping of any building or structure. Thus, it likely will affect many Illinois employers not traditionally considered a "construction contractor."

The Act presumes that construction workers are employees unless the contractor can show that: (1) the individual has been and will continue to be free from control or direction over the performance of the service for the contractor, both under the individual's contract of service and in fact; (2) the service performed by the individual is outside the usual course of services performed by the

*Tightening the Screws on Construction continued from page 6*

contractor; and (3) the individual is engaged in an independently established trade, occupation, profession or business, or the

> The Employee Classification Act defines "construction contractor" to include any entity involved in a variety of construction-related activities. It likely will affect many Illinois employers not traditionally considered a "construction contractor"

individual is deemed a legitimate sole proprietor or partnership.

### *Complaint Process and Remedies/Penalties*

An individual who believes he has been misclassified can file a complaint with the Illinois Department of Labor, which is charged with investigating the complaint. The Department may issue a "cease and desist" order, collect unpaid compensation and assess civil penalties. A worker need not file a complaint with the Department, but can file a civil suit to recover lost wages, compensatory damages and attorneys' fees. A company found to have committed "willful" violations may face punitive damages and other penalties up to double the statutory amount. Offenders who commit two or more violations within a five-year period can be refused state contracts for four years after the date of the last violation.

The Illinois Workers' Compensation Commission, Department of Labor and Department of Revenue will share information regarding covered employers and will be obligated to check an entity's compliance with their own laws upon notice from the Department of Labor of a violation of the Employee Classification Act. The Illinois Department of Labor, which will administer the Act, has issued a series of proposed rules, including substantial record-keeping requirements for a five-year period.

While it remains to be seen how aggressively the Department of Labor will enforce the new law, companies involved in any construction-related industry should review how they classify their workers and subcontractors to ensure compliance with the new law.

If you have questions about the new law, please call **Sara J. Kagay** (312-609-7538) or any other Vedder Price attorney with whom you have worked. ■

Sara J. Kagay

## Armed and at Work in Florida:

Guns at work

### VP Keys

**Most Florida employers must allow employees to bring permitted guns to work if they are kept in a locked car.**

**Employer groups have filed lawsuits seeking to enjoin law.**

**Employers will not be able to ask employees if they have gun in car, cannot condition employment on employee not having permit and cannot discipline an employee who exhibits a gun on company premises for "defensive purposes."**

Most employers embrace the concept of Bring Your Child to Work Days. The State of Florida recently enacted a law which permits employees to Bring Your Gun to Work Everyday. Employers in the Sunshine State now face a host of challenges and enhanced potential for tort liability.

The Preservation & Protection of the Right to Keep & Bear Arms in Motor Vehicles Act of 2008 takes effect on July 1, 2008. With few exemptions, it will allow employees and visitors to bring firearms to work as long as they have a state-issued concealed firearms permit and the firearm is kept in a locked car.

*Armed and at Work in Florida continued from page 7*

The Florida Retail Federation and the Florida Chamber of Commerce have filed suit in federal court challenging the new law. The lawsuit claims that the law conflicts with the Occupational Safety and Health Act (OSHA), which requires employers to provide a working environment free from hazards likely to cause serious harm. The suit also asserts that the law unconstitutionally violates private property rights. There has been no ruling as of the publication date.

### *The New Law's Requirements*

Under the law, employers may not:

- Prohibit an employee or visitor from keeping a lawfully possessed firearm in a locked car on the employer's parking lot if they have lawful reason to be there.
- Inquire whether there is a firearm in the employee or visitor's car or search his or her car for firearms.
- Condition employment upon: (1) the fact that employees or applicants hold a firearm's permit, or (2) require employees or applicants to abide by an agreement that prohibits them from keeping firearms in their locked car at the workplace.
- Discriminate or terminate an employee (or expel a visitor) who exhibits a firearm on company property (not just the parking lot) for lawful defensive purposes.

The bill does not prohibit an employer from banning guns in employer-owned vehicles, even when parked in the company parking lot.

Schools, jails, nuclear-power plants, workplaces involving national defense, aerospace, or homeland security, and workplaces that work with combustible or explosive materials regulated under state or federal law, are exempt. Employers face damages, including injunctive relief, civil penalties of up to $10,000, employee personal costs and losses, and attorneys' fees.

> With few exemptions, it will allow employees and visitors to bring firearms to work as long as they have a state-issued concealed firearms permit and the firearm is kept in a locked car

### *Impact on Florida Employers*

At a time where employers rightfully are sensitive to workplace violence, Florida follows Kentucky, Minnesota, Mississippi and Oklahoma with the most expansive guns-at-work law yet. The Oklahoma law is on appeal after being struck down for violating the OSHA requirement to provide a safe workplace.

Florida employers must balance this new employee right with their obligation to provide a safe workplace. Florida employers should: review their workplace weapons policy to make sure that it complies with the new law; address employee concerns about safety with appropriate training and security; and develop and test a violence response plan.

Vedder Price has helped many employers create and implement a broad range of employment policies, including policies regarding weapons in the workplace. If you have any questions, please contact **Angela P. Obloy** (312-609-7541), **Timothy J. Tommaso** (312-609-7688) or any other Vedder Price attorney with whom you have worked. ■

Angela P. Obloy

Timothy J. Tommaso

# New Jersey "Baby WARN" Act Threatens Adult-sized Penalties

## VP Keys

**NJ enacts state "WARN Act" requiring 60 days' notice of larger job losses associated with RIF, transfers of operations or facility shutdowns.**

**NJ Act does not include exceptions for unforeseeable circumstances or sale of business.**

**Damages available under the Act can be greater than federal WARN.**

On December 20, 2007, Governor Corzine signed into law the Millville Dallas Airmotive Plant Job Loss Notification Act ("Millville Dallas Act") (named after a large facility that closed in 2004 leaving hundreds without jobs). This is New Jersey's version of the federal WARN Act, and resembles federal law in many respects. Like the federal WARN Act, the Millville Dallas Act covers employers of 100 or more employees and requires at least 60 days' notice prior to a mass reduction in force (affecting 500 or more full-time employees; or as few as 50 full-time employees if the number represents one-third or more of the workforce); a transfer of operations resulting in termination of at least 50 full-time employees within a 30-day period (temporary or permanent, within New Jersey or outside the state); or a cessation of operations resulting in termination of at least 50 full-time employees within a 30-day period (temporary or permanent).

For purposes of the Millville Dallas Act, a facility is not an "establishment" unless the entity has operated it for more than three years (thereby excluding temporary construction sites). If a termination of operations is due to fire, flood, natural disaster, national emergency, act of war, civil disorder or industrial sabotage, the notice requirement does not apply (curiously, these exceptions do not expressly apply to transfers of operations or reductions in force due to the same causes). Unlike the federal WARN Act, there is no exception in the Millville Dallas Act for unforeseeable business circumstances. Nor is there any exclusion when the sale of a business underlies the transfer or termination of operations or layoffs.

The required notice must be given to affected employees, collective bargaining units, the Commissioner of Labor and the chief elected official of the municipality where the closing or layoff is to occur. Such notice must include:

- the number of employees whose positions will be terminated and the date on which the contemplated action (transfer, termination or layoffs) will occur;
- the reason(s) for the contemplated action;
- a statement containing specific information with respect to any employment available to employees at other establishments operated by the same employer;
- a statement of employee rights with respect to wages, severance pay and other benefits;
- disclosure of the amount of severance pay payable as penalty for failure to meet the 60-day notice requirement;
- a statement of employee rights to receive information, referral and counseling from the Department of Labor and Workforce Development response team.

The Millville Dallas Act carries significantly steeper penalties for noncompliance than its federal counterpart. Where the WARN Act requires payment of one day of back pay to each affected employee for each day of violation (each day short of 60 days' notice), the Millville Dallas Act requires the payment of *one week's severance pay* (in addition to any severance pay to which each employee is otherwise entitled) to each affected employee for each year of service for any employer that provides less than the 60 days' required notice. In other words, if an employer gives 59 days' notice or less, that employer would be liable for the full severance pay penalty.

*New Jersey "Baby WARN" Act continued from page 9*

Because the Millville Dallas Act is considerably less detailed than the federal WARN Act, employers may face uncertainty when trying to comply with the New Jersey Act. Where there is no material difference between the state and federal laws it is likely that the Millville Dallas Act will be interpreted in accord with the federal law.

If you have any questions, please contact **Charlie Caranicas** (212-407-7712) or any other Vedder Price attorney with whom you have worked. ■

Charles S. Caranicas

## New Jersey "Paid" Leave About to Become Law

Joining California and Washington, New Jersey is now the third state requiring that employers provide paid family leave rights to employees. On May 2, 2008, Governor Corzine signed a law that will give employees needing leave to care for a newborn infant or an ailing relative up to six weeks of paid leave. Employees will be entitled to receive two-thirds of their salary—up to $524 per week—during the paid leave period. The law will take effect on January 1, 2009.

## Introducing GINA:

### Protection for Individuals with Genetic Predisposition to Disease

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act (GINA), a law that prohibits discrimination in employment (Title II) and insurance (Title I) decisions against individuals who may be genetically predisposed to certain diseases.

Barring employment discrimination (Title II), GINA prohibits employers from using genetic information or status to classify an employee in a way that affects employment or promotion opportunities. Nor can employers request or require genetic information about an employee (or family member), except in limited circumstances such as complying with certification requirements of the FMLA or state leave laws.

Like the ADA, GINA requires employers to maintain an employee's genetic information in separate files and treat it as a confidential medical record.

The enforcement provisions and remedies for a violation of Title II of the Act are the same as those available under Title VII of the Civil Rights Act of 1964. There is no disparate impact cause of action under GINA, but the law establishes a commission that will advise Congress on creating one.

GINA also prohibits (Title I) employer-sponsored group health plans from basing eligibility or premium determinations on genetic information; nor can they request, require or buy genetic information before an individual enrolls in a plan. GINA extends the same medical privacy and confidentiality rules outlined in the Health Insurance Portability and Accountability Act and the Social Security Act to the use or disclosure of genetic information.

The enforcement provisions in Title I expand existing penalties under ERISA. The Act authorizes the Department of Labor to sue for equitable relief and participants or beneficiaries may seek injunctive relief in certain circumstances.

If you have any questions please contact **Jennifer L. Milos** (312/609-7872) or any other Vedder Price attorney with whom you have worked. ■

## Q&A: Spotlight on USERRA

The Uniformed Services Employment and Reemployment Rights Act provides job restoration and other rights to service members. USERRA applies to employers with as few as one employee. Here are some questions we have received:

**Q** An employee who recently returned from leave has inquired about the status of his 401(k) account. What obligations do we have?

**A** Employers are not required, nor are employees entitled, to make contributions to a

*Q&A: Spotlight on USERRA continued from page 10*

401(k) plan while performing military service. Upon reemployment, an employee has up to three times the period of the military service (but not more than five years) to make up missed contributions. Similarly, pension entitlements do not mature until the individual is reemployed following service.

**Q** An employee on leave for 18 months will be returning shortly. Are we complying with USERRA if we return him to the position he left?

**A** Not necessarily. First, it is important to remember that, barring exceptional circumstances such as a RIF that eliminated the individual's position, the employee has an absolute right to reinstatement. If a temporary replacement was hired, you must either reassign or terminate that person and reinstate the service member to his original position. You cannot give them a merely comparable position if that position involves different job duties or puts them in a less advantageous situation as far as promotion opportunities and the like. However, the inquiry does not end there. USERRA applies the "escalator principle" in an effort to determine the position, pay and benefits the service member would have attained if he had not been absent for service. In some cases, the employee may be entitled to a promotion or pay increase upon return. Every situation is unique. In some cases, you must provide the employee with a window of time for him to complete the necessary training or coursework required for the promotion.

**Q** We have an employee who volunteered for additional military training. Is that person protected by USERRA?

**A** Yes. USERRA covers all categories of military training and service, including duty performed on a voluntary or involuntary basis, in time of peace or war. USERRA protects members of the National Guard, reserve military personnel and persons serving in the active components of the Armed Forces. Certain members of the National Disaster Medical System are covered by USERRA.

**Q** Can we require an employee to substitute paid leave for military leave?

**A** No. USERRA forbids an employer from requiring an employee to use his vacation, annual, or similar leave during such period of military service. The employee is permitted, but not required, to request that military service be required by the employer as paid vacation, annual or similar leave.

All employers, but especially large employers that may have numerous employees in active military service, should review their policies and ensure that managers and human resources staff understand USERRA. Training key managers and human resources is a best practice that will better prepare them to spot issues when they arise and properly handle them. The cost of a mistake can be high. Recently, American Airlines reached a tentative settlement with the U.S. Department of Justice to pay $345,772 to resolve a USERRA class action alleging improper restrictions on the ability of company pilots who missed time due to military commitments to earn vacation and sick leave benefits.

If you have any questions, please contact **Aaron R. Gelb** (312-609-7844) or any other Vedder Price attorney with whom you have worked. ■

## UPCOMING Seminars and Webinars

**Labor and Employment Practice Area**

Construction Without Conflict®: Project Labor Agreements—Chicago, Illinois
06/18/2008

This program will focus on project labor agreements (the umbrella labor contract in place for the length of the project) at 100% union sites.

Please join Ted Tierney, a shareholder in the firm's Labor and Employment Law Group, and Karen Layng, Chair of the firm's Litigation Practice Area and its Construction Law Group, for a review of the central issues relating to these agreements.

Vedder Price Conference Center
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To register, see www.vedderprice.com or call David Croker at 312-609-7869.

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