
MASUD, PATTERSON, SCHUTTER, PETERS & VARY, P.C.

ATTORNEYS AND COUNSELORS
SPECIALIZING IN LABOR AND EMPLOYMENT LAW

NEWSLETTER

August, 2008

Volume XII, Issue 2

Reminder: Both the State and Federal Minimum Wage Rates Have Increased.

On July 1, 2008, Michigan's minimum wage increased to \$7.40 per hour. Even with this new minimum wage rate, businesses can still meet minimum wage requirements for individuals under 18 years of age by paying 85% of the adult minimum wage (\$6.29 per hour). For tipped employees, Michigan employers must pay an hourly base wage of \$2.65 per hour and must ensure that the employee's receive at least \$7.40 per hour between wages and tips combined.

The federal minimum wage also increased on July 24, 2008 to \$6.55 per hour. It will increase again on July 24, 2009 to \$7.25 an hour.

New Federal Law Prohibits Genetic Testing of Employees, Prohibits Discrimination on the Basis of Genetic Testing, and Imposes New Record-Keeping Requirements on Employers.

On May 21, 2008, President Bush signed into law the Genetic Information Nondiscrimination Act of 2008 ("GINA"). This Act prohibits employers from discriminating against applicants and employees based on genetic tests or genetic information. The new law also prohibits health insurers from restricting enrollment and premium adjustments for

health insurance on the basis of genetic information or genetic services. The Equal Employment Opportunity Commission ("EEOC") is required to adopt implementing regulations by May 2009, and GINA becomes effective in November 2009.

As enacted, GINA prohibits employers with more than 15 employees from discriminating against an employee with respect to hiring, termination of employment, compensation, or any other term or condition of employment, "because of genetic information with respect to the employee." Under the new law, "genetic information" is defined as: (1) an individual's own genetic tests; (2) the genetic tests of family members; and (3) the manifestation of a disease or disorder in family members. A "genetic test" under GINA is generally defined to mean "an analysis of human DNA, RNA, chromosomes, proteins, or metabolites that detects genotype, mutations, or chromosomal changes."

The prohibition and sanctions in GINA are modeled on existing federal anti-discrimination laws prohibiting intentional discrimination on the basis of gender, race and age and the like. Unlike many other federal laws, GINA expressly excludes claims based on a "disparate impact" theory. In a disparate impact case, intent is not a required element. Rather, a claimant must show that a neutral practice of the employer disproportionately and adversely affects a protected group of which the claimant is a member.

**“Making Labor and Employment Law
Work for Employers”**

GINA also prohibits employers from requesting an employee's genetic information, requiring employees to undergo genetic testing or purchasing an employee's genetic information. This prohibition includes some limited exceptions that shield employer liability including, but not limited to: (1) where employers inadvertently request or require family medical history of employees or their family members; (2) where employers request or require family medical history from employees to comply with the certification requirements of the FMLA or similar state laws; (3) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace; and (4) where the employer conducts DNA analysis for law enforcement purposes. Note, however, that while the law new law provides an exception for information collected in the context of FMLA leave, there is no comparable exception for genetic information obtained during the interactive process required by the Americans with Disabilities Act, when an employee requests and accommodation because of a disability.

Finally, GINA requires that employers who come into the possession of genetic information on their employees maintain such information in a separate file - apart from the employee's standard medical file - and to treat the material therein as a confidential medical record.

As a result of this newly enacted law, a prudent employer will want to revise existing policies and/or handbooks. Please contact us for assistance.

New EEOC Rule Allows Coordination of Retiree Health Benefits Without Violating the Age Discrimination in Employment Act.

On December 26, 2007, the EEOC issued a final rule in the Federal Register that allows employers to reduce or eliminate health care benefits for retirees when they turn 65 and become eligible for Medicare. The new rule permits employers to "coordinate" retiree health benefits with Medicare and other comparable state programs. The final rule also allows employers to reduce or cut-off benefits to the spouse or dependents of retirees who are 65 or older, regardless of whether the benefits for the actual retiree changed.

Should you have any questions regarding this new EEOC rule either in general, or as to how it may impact your particular situation, please do not hesitate to contact us.

Governor Granholm Issues Executive Order Regarding Employee Misclassification

In February 2008, Governor Jennifer Granholm issued Executive Order 2008-1, establishing an Interagency Task Force on Employee Misclassification which will include representatives of the Michigan Unemployment Agency and the Workers' Disability Compensation Bureau. Its function will be to work with business and labor groups to prevent the misclassification of employees as independent contractors and to evaluate existing enforcement mechanisms relative to such classifications in the Michigan Employment Security Act, the Workers' Disability Compensation Act, the Minimum Wage Act and the State Tax Code. As always, our firm would be pleased to assist you with any questions you may have regarding the proper classification of an individual as an "employee" or "independent contractor."

Public Employers Cannot Provide Health Insurance Benefits to Same Sex Domestic Partners

In National Pride at Work, Inc. v. Governor of Michigan, the Michigan Supreme Court recently addressed whether the "marriage amendment" (Const. 1963, art 1, § 25) prohibits public employers from providing health insurance benefits to their employees qualified as same-sex domestic partners. The Court, in ruling that a same-sex marriage prevents governments and universities in Michigan from providing health insurance to the partners of gay workers, held the "marriage amendment," which states "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose," prohibits public employers from providing health insurance benefits to their employees' qualified same-sex partners. The 5-2 decision affects up to 20 universities, community colleges, school districts and governments in Michigan.

Sixth Circuit Recognizes Claim for Associational Retaliation

In Thompson v. North American Stainless, the Sixth Circuit Court of Appeals, in reversing the trial court's ruling in favor of North American Stainless, ruled that Title VII of the Civil Rights Act prohibits employers from retaliating against family members or other individuals closely associated with employees directly involved in protected activity. In this case, the plaintiff employee worked as an engineer for North American Stainless. His fiancée, also an employee of North American Stainless, filed a charge with the EEOC alleging gender-based discrimination. Approximately three weeks later, Thompson was terminated. Although North American Stainless contended that plaintiff was terminated for performance-based reasons, plaintiff subsequently filed suit, asserting that he was terminated in retaliation for his fiancée's EEOC charge.

The Court observed that retaliation against a spouse or close associate will deter an employee from engaging in protected activity just as much as if the employee were himself retaliated against. The Court determined that Title VII prohibits employers from taking retaliatory action against employees who are not directly involved in protected activity, but who are so closely related to, or associated with, those involved in protected activity, that it is clear that the protected activity motivated the employer's actions. According to the Court, such conduct would undermine the purposes of Title VII.

LAW FIRM UPDATES AND CLIENT SUCCESSES

Defendant Employer Exonerated a Trial

A multi-national employer with a Saginaw County office was exonerated after a week long trial in the Saginaw County Circuit Court before Judge

Robert L. Kaczmarek. Richard Vary was lead defense counsel and Brian Swanson provided assistance with a detailed cross-examination of Plaintiff's economic expert from the University of Michigan. The case was tried on Plaintiff's allegations of gender harassment and discrimination and retaliation under the Michigan Elliott-Larsen Civil Rights Act and the Family and Medical Leave Act. Before trial, our firm was successful in obtaining partial summary disposition that dismissed Plaintiff's other claims under the Michigan Sales Commission Act, promissory estoppels, tortious interference with a business relationship. Plaintiff had claimed she was entitled to damages over \$1 million dollars. On behalf of the Defendant, the firm is pursuing collection of defense costs, including out-of-state witness fees as a result of having to defend this non-meritorious case.

Masud, Patterson, Schutter, Peters & Vary Puts on "Your Day in Court, a Mock Trial" Seminar for VSHRM

On May 13, 2008, attorneys Elizabeth Peters, Richard Vary and Kraig Schutter presented a seminar for the Valley Society of Human Resource Mangers (VSHRM) describing the litigation process and discussing how a lawsuit alleging sexual harassment and intentional infliction of emotional distress against an employer might proceed, especially if the case went to trial. In this interactive presentation, seminar participants received a brief summary of the litigation process, observed witness preparation, participated in a mock deposition and pre-trial hearing, and actually took part in the trial as witnesses and jurors. Seminar participants then deliberated to make a final judgment for or against the plaintiff. It was a fun and informative day for all involved. If you are interested in having our firm conduct a labor and employment law seminar for your company, please contact our firm.