

Fall 2008

# Employment Law Update

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## Here Comes GINA!

No, GINA is not an early-season hurricane (as might be expected in Hampton Roads). GINA is the Genetic Information Nondiscrimination Act of 2008, and employers should be prepared to comply with this new addition to the list of federal anti-discrimination requirements soon. GINA adds a new “protected category” to the well-known Title VII categories of race, color, sex, and the like. Beginning November 21, 2009, GINA makes it an unlawful employment practice to fire, refuse to hire, or discriminate in the terms of employment against, any employee “because of genetic information with respect to the employee.” Employees who feel they have been discriminated against, or harassed, based on their “genetic information” will have the same options — including filing administrative charges of discrimination and federal lawsuits — as they now have for perceived discrimination or harassment based, for example, on sex.

Commentary on GINA has described it as everything from a “solution in search of a problem” to “a victory for every single one of us.” The truth probably lies somewhere in the middle. The key to this new law is the definition of the protected class and the term “genetic information.” Genetic information includes an employee’s genetic tests and the genetic tests of the employee’s family members. Realistically, this law should prompt little change in the way local employers do business because most companies do not typically require genetic testing of their employees. Also, Virginia is one of more than thirty states which already have state-level protections against discrimination based on genetic information. But remember that any documents that might possibly reflect genetic testing of an employee or employee’s family that are legitimately in the employer’s possession should be segregated and kept in a separate, confidential file — not in the personnel file! Treat any documents of that type in the same careful way you would documents relating to a “disability” to be accommodated under the ADA or a serious medical condition under the Family and Medical Leave Act.

### Best Employment Practices Alert

Most employers distribute written harassment and discrimination policies, and have employee handbooks, that specifically state that the employer will not permit harassment or discrimination “based on sex, race, color, religion, national origin, age, or disability.” If your policy or handbook has similar language, consider changing it before GINA’s effective date in November 2009 to add “genetic information” to the laundry list of protected classifications. Don’t be caught short: an effective policy or handbook should, at a minimum, prohibit harassment or discrimination “on any other basis prohibited by law.” If you need help in this regard, the Employment Law Team at Kaufman & Canoles has extensive experience in updating and reviewing employee handbooks and policies.

## Noncompetition Agreements Continue to Take a Beating in Virginia

A covenant not to compete contained in an employment agreement can be a valuable tool to protect a company's good will and customer relationships, but these agreements must be very carefully drafted to be enforceable. Because they can restrict competition and the ability of a former employee to earn a livelihood, courts will carefully scrutinize these agreements before enforcing them. Several recent decisions continue to emphasize the need for tight drafting, narrow coverage, and frequent review of the operative language in covenants not to compete.

For example, in one recent state court decision in Chesterfield County, *Knowles v. New Age Digital, Inc.*, the Court threw out a noncompetition agreement that prohibited a former employee from participating in a competing business "within the Commonwealth of Virginia." Although the former employer was a Virginia corporation based in Virginia, it failed to show that it serviced the "entire" Commonwealth, making the entire agreement unenforceable as a matter of law. That Court also invalidated the covenant on a separate ground: that prohibiting a former employee from competing against any aspect of the former employee's business went too far: the agreement was void because it was not limited to "just the particular activity in which he was actually engaged." The basic lesson to be drawn from this and other recent cases is that the more tightly-drawn the agreement is — the more it limits itself to the specific and articulable business interests of the employer — the more likely the Court will be to enforce it.

### Best Employment Practices Alert

The law on enforceability of agreements limiting a former employee's competition with his employer continues to evolve in Virginia, sometimes in unpredictable ways. Contracts that may have passed muster five or ten years ago may be open to significant question under new decisional authority. A prudent employer who chooses to rely on non-competition, client non-solicitation, or even employee non-solicitation, agreements would be well served by having the language of those agreements reviewed on a regular basis — perhaps even every two years or so. In addition to legal developments, the company's business may change and that may have a significant impact on the nature of the "legitimate competitive interest" a former employer needs to show to have any chance of enforcing such an agreement under Virginia law.

## EEOC Chair to Speak at K&C "Silver" Seminar



Naomi C. Earp  
Chair, EEOC

For 25 years, the Kaufman & Canoles Employment Law Team has been updating employers through the annual Employment Law Update Seminar. Representatives of state and federal agencies have helped provide attendees of this program with a valuable perspective to help employer compliance efforts. To highlight this trend and commemorate the 25<sup>th</sup> Annual Employment Law Update, the National Chair of the U.S. Equal Employment Opportunity Commission (EEOC), Naomi Earp, has agreed to participate as a special luncheon speaker. The premiere showing of this silver anniversary Update will be held on November 18, 2008 at the Chesapeake Conference Center.

Ms. Earp, a native of Newport News, Virginia has spearheaded the EEOC's E-RACE initiative through which the Commission has increased its outreach to human resource professionals and employer groups to address race and color discrimination in the workplace. Her views on current and future EEOC policies and direction should be of utmost interest to local employers.

In addition to Ms. Earp, this year's program will feature new information and materials presented by some of our best-received speakers. We hope you will be able to join us for this special silver anniversary program. For more information or to register, please visit our website at [www.kaufmanandcanoles.com](http://www.kaufmanandcanoles.com) or call (757) 624-3232.

## Congress Passes Changes to ADA

On September 17, 2008, the House approved the new Americans with Disabilities Amendments Act by a substantial margin. The amendments, which reflect a compromise reached by employer/business groups and the disability rights community, was unanimously passed by the Senate on September 11, 2008. President Bush is expected to sign the legislation.

Since it was enacted in 1990, the ADA's impact on the workplace has been lessened by various Court decisions. For example, the U.S. Supreme Court has interpreted the ADA to exclude workers who are able to mitigate their impairments (such as by wearing a hearing aid or taking medication). Proponents claim the ADA Amendment Act will reverse such court decisions and "restore the original Congressional intent" of the ADA.

While Congress has been contemplating changes to the ADA for several years, the ADA Amendment Act will become law soon. These changes will likely have a dramatic impact on the workplace – considering the number of employees who may be considered disabled under the law – and employers should be reviewing their disability related policies now so they will be ready when these changes become law.

## 2007's Most Outrageous Employment Case

The verdict is in: The most outrageous case for 2007 was the "Penis Pump Judge." This case involved a former Oklahoma trial judge who was fired and jailed for exposing himself at least 15 times and using a device known as a "penis pump" while presiding over jury trials.

The judge claimed the penis pump was given to him as a joke by a fishing buddy. He admitted that he absentmindedly touched the pump on occasion, but denied actually using the device – on or off the bench. The evidence, including witnesses and DNA recovered from under the bench, told a different story.

But the story did not stop there. Courtroom employees aware of this conduct subsequently filed a "hostile work environment" claim against the judge and the state of Oklahoma. The judge's behavior was found to be "incredibly offensive, vulgar and crude," but the court still dismissed the lawsuit, concluding that there was no evidence that the judge's actions were based on the employees' sex.

Employee misconduct and inexplicable court rulings continue to amaze and astound year after year, but the fact that this was a sitting judge coupled with the conclusion that his conduct had nothing to do with sex made this the hands down winner for the most outrageous employment case of 2007!

## 25<sup>th</sup> Employment Law Update

### How Sweet It Is . . .

*Celebrating 25 years of  
Employment Solutions*



On November 18th, the K&C Employment Law Team will host the first showing of the 25<sup>th</sup> Employment Law Update: How Sweet It Is . . ., at the Chesapeake Conference Center. In celebration of our silver anniversary, this one-day seminar will feature new information and materials on our most popular topics to be presented by some of our best-received speakers.

Attendees will select from their choice of several of our most popular educational workshops. Topics include: Effective Interviewing and Hiring; Wage-Hour Compliance; Legal Risks in Layoffs and Restructuring; Handling Unemployment Claims; and more. The day will also feature three chances to take a "Turn for Treasure" along with special guest speakers who should both educate and entertain attendees.

For more information, visit our website at [www.kaufmanandcanoles.com](http://www.kaufmanandcanoles.com) or contact Kerry Martinolich at (757) 624-3232.

This program has been approved for 6 credit hours toward PHR and SPHR recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI homepage at [www.hrci.org](http://www.hrci.org).

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