

# RUDMAN & WINCHELL, LLC

*Counselors at Law*

*The Graham Building  
84 Harlow Street  
Bangor, Maine 04401  
(207) 947-4501  
www.rudman-winchell.com*

---

## THE EMPLOYER'S QUARTERLY

Summer 2008

---

### **Federal Contract Alert: Proposed FAR Rule Change Will Require Contractors and Subcontractors to Verify Employee Work Authorization Through Government E-Verify System**

*by  
Leigh McCarthy*

On June 6, 2008, President George W. Bush issued an Executive Order instructing Federal departments and agencies that enter into contracts to require, as a condition of each contract, that the contractor agree to use a designated governmental electronic employment verification system to confirm the authorization of workers to be employed in the U.S.

The Executive Order also requires the Department of Defense, the Administrator of General Services, and the Administrator of NASA to amend the Federal Acquisition Regulation (FAR) to implement the responsibilities imposed by the Order.

On June 9, 2008, the Secretary of the Department of Homeland Security designated the E-Verify System administered by the U.S. Citizenship and Immigration Services (USCIS) as the employment eligibility system that must be used for Federal contracts. E-Verify is an internet-based system. The employer enters an employee's Form I-9 information, which is then checked against Social Security Administration and USCIS databases. If authorization to work in the U.S. is not confirmed by the E-Verify System, the employer must follow a prescribed procedure to resolve the matter, which may result in termination of the employee or risk to the employer of Federal penalties.

*Also in this issue....*

<i>New Federal Legislation: GINA</i> .....	2
<i>GINA Meets ERISA</i> .....	4
<i>Supreme Court Ends Term with Age Cases</i> .....	5
<i>Did you Know?</i> .....	6
<i>ERISA Just Got Messier</i> .....	6
<i>US Supreme Court Narrows Equal Protection in Employment Case</i> .....	7
<i>Annual Seminar Notice</i> .....	8

On June 12, 2008, DOD, GSA, and NASA issued a Proposed Rule to amend the FAR. The Proposed Rule is printed in the Federal Register at Volume 73, Number 114, Pages 33374-33381. It can be accessed online at <http://www.gpoaccess.gov/fr/>.

The Proposed Rule will insert an obligatory clause into all Federal prime contracts (except those that fall within the micro-purchase exception or the COTS exception) obliging the contractor to use E-Verify to check the work authorization of (1) all of the contractor's new hires, whether or not they will be working in performance of the Federal contract, and (2) all of the contractor's employees that are "directly engaged" in performance of work under the Federal contract, whether new hires or already employed (except for those hired before November 6, 1986). The Proposed Rule also includes a "flow down" provision that requires the insertion of the employment authorization verification clause into all subcontracts for construction and all other subcontracts for more than \$3,000 in services.

The employment authorization verification clause will be required in all designated Federal contracts and subcontracts awarded after the effective date of the FAR amendment.

Each contractor and subcontractor subject to the new contract clause will be required to enroll in the E-Verify System within 30 days of the contract award date and to continue using E-Verify for the life of the contract. E-verify verification will be required for employment in the 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands.

Application of the Proposed Rule raises complex real world issues, for example, whether a company CFO is "directly engaged" in performance of a contract and subject to the employment verification requirement, or how an employer can be required to verify work authorization for existing employees in

contradiction of the Memorandum of Understanding that has been used heretofore by USCIS to enroll employers in the E-Verify System. Beyond that, there are questions as to whether the E-Verify System itself, which has been troubled by implementation problems of its own and has achieved limited employer participation, will be able to absorb the flood of new contractor and subcontractor employers that will be compelled to enroll in order to obtain government contracts.

Anyone with an interest in the implementation and consequences of the Proposed Rule amending the FAR may comment by sending written comments on or before August 11, 2008, to FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503 and a copy to the General Services Administration, FAR Secretariat (VPR), 1800 F Street NW, Room 4035, Washington, DC 20405.

---

## **New Federal Legislation: Genetic Information Nondiscrimination Act (GINA)**

*by  
Anne-Marie L. Storey*

On May 21, 2008, President Bush signed the Genetic Information Nondiscrimination Act of 2008 (GINA) into law. This law prohibits discrimination on the basis of genetic information in employment and health insurance, among other things. The broad intent of the law is to protect individuals who are genetically predisposed to certain illnesses and those with latent conditions that are revealed through genetic testing.

In employment, GINA amends Title VII of the Civil Rights Act of 1964 to add genetic information as a protected category for applicants and employees. This law will take effect on November 21, 2009. The Maine

Human Rights Act currently has an anti-discrimination provision concerning genetic information. GINA specifies in greater detail the rights afforded employees and applicants, and the limitations placed on employers.

**Federal GINA.** Because GINA is part of Title VII, it will only apply to employers with 15 or more employees. Generally, GINA does four things:

- 1) It prohibits discrimination on the basis of genetic information, without regard to how the information is derived, in hiring, promotion, compensation, termination and other terms and conditions of employment;
- 2) It prohibits employers from requiring or requesting genetic testing or from purchasing or collecting genetic information;
- 3) It prohibits disclosure of genetic information; and
- 4) It provides for genetic information received by the employer to be maintained in a confidential manner and limits disclosure of the information.

Genetic information is defined as information regarding an employee's own genetic tests, the genetic tests of family members, and any manifestation of disease or disorder in family members. Family members are defined to include the employee's spouse, dependent children (either by birth or adoption) and up to fourth-degree relatives (great-great-grandparent).

There are exceptions to some of these prohibitions. For instance, although GINA generally prohibits disclosure of genetic information, it does not do so: 1) in the event of an employee request for the information; 2) to an occupational or health researcher; 3) under court order; 4) to a governmental

official investigating compliance with the law; 5) in connection with FMLA compliance; or 6) to a public health agency.

There are also exceptions to the provision that the employer is not permitted to require, request, or purchase genetic information. This prohibition would not apply: 1) when the information is inadvertently disclosed to or received by the employer (i.e. from idle chat around the coffee maker); 2) in the event of an FMLA medical certification necessary to support a request for FMLA leave for a family member; 3) when the employer is required by law to conduct genetic monitoring for toxic substances; 4) where the employer offers health or genetic services (such as wellness programs); or 5) where the employer purchases "commercially and publicly available" documents that contain genetic information about an employee or an employee's family member (such as an obituary in a newspaper).

---

***Employers need to be sure that  
wellness programs do not violate  
GINA's provisions***

---

If an employer obtains genetic information inadvertently, it cannot use the information for purposes of unlawful employment action and it must maintain the information in a confidential manner. In the event genetic information is sought as part of an employer's wellness program, the law requires that the production of the information by the employee be entirely voluntary and accompanied by a written authorization signed by the employee *before* the information is revealed. The information has to remain with the licensed health care professional or board certified genetic counselor involved in providing the services and cannot be shared or produced to the employer.

GINA follows the enforcement scheme of Title VII. Employees must comply with administrative remedies, and damage awards are subject to the same restrictions as Title VII claims. The law also prohibits retaliation. Unlike Title VII, GINA does not currently recognize disparate impact claims. The EEOC is charged with studying genetic developments and making a recommendation as to whether this should change.

The EEOC is charged with issuing regulations within a year of the Act's effective date. Assuming that happens on time, employers will have approximately six months to comply with any additional requirements of the implementing regulations before the Act takes effect.

Even before the effective date of the Act, employers should take steps to ensure compliance. These might include amending policies addressing protection from discrimination to add genetic information, putting into place adequate practices under wellness programs to be certain proper employee authorization is given and to insulate the employer from receiving any genetic information, and double-checking that all medical information related to any employee is maintained in a separate and confidential file.

Maine employers should also keep in mind that although GINA is not effective yet, failing or refusing to hire, discharge, or otherwise discriminate against an employee or applicant for employment with respect to the compensation, terms or conditions of employment on the basis of genetic information concerning that individual or because of the individual's refusal to submit to a genetic test or make available the results of a genetic test or on the basis that the individual received a genetic test or genetic counseling, except when based on a bona fide occupational qualification, is already unlawful under Maine's public health statutes. If a state law provides greater protection to an

individual, GINA says it will not limit those rights or protections, so employers will need to be familiar with both laws and their overlap.

Finally, employers should recall that in addition to the provisions described above, the disability discrimination provisions under the ADA and the MHRA may also provide coverage under the "regarded as" prong of the definition of disability for discrimination based on genetic information related to illness, disease or other disorders. The provisions of those laws prohibiting association discrimination may also provide some protection to an individual whose dependent or relative has such a condition. Finally, once an individual has a condition that actually manifests itself, that person may be covered by the ADA or MHRA in addition to or in lieu of GINA.

---

### **Seminar Series Reminder**

**Anne-Marie Storey** will present the Fall session of the Bangor Region Chamber of Commerce Workplace Seminar Series starting in September on the following dates and topics: September 11, Leave Laws; October 1, Workers' Compensation; and November 12, Disabilities. The sessions run from 9 to 11 a.m. To register, please contact the Chamber of Commerce.

---

### **GINA Meets ERISA**

*by*  
*Brent A. Singer*

GINA amends ERISA, and portions of HIPAA (which is also part of ERISA), by imposing new restrictions on group health plans and the use and disclosure of genetic information about an individual.

GINA basically prohibits a group health plan or health insurance issuer offering group

coverage from (1) adjusting premium or contribution amounts for the group on the basis of genetic information; (2) requesting or requiring an individual or a family member of an individual to undergo a genetic test; (3) requesting, requiring, or purchasing genetic information for underwriting purposes; or (4) requesting, requiring, or purchasing genetic information of an individual prior to the individual's coverage under the plan.

Penalties range from \$100 a day for noncompliance, up to the lesser of \$500,000 or 10% of the aggregate amount paid by the plan sponsor during the preceding year for the plan. No penalty is imposed for noncompliance due to reasonable cause which has been corrected within 30 days of its discovery, or for noncompliance that was not discovered and would not have discovered with reasonable diligence. The cap on the penalty does not apply in cases of "willful neglect."

These new restrictions do not apply until plan years beginning after the date that is one year after the date of enactment of GINA. This means that for calendar year plans, the new restrictions do not apply until the plan year starting January 1, 2010.

GINA also provides that effective May 21, 2009, HIPAA's privacy regulation shall be amended to state that a group health plan's use or disclosure of genetic information about an individual for underwriting purposes is not a permitted use or disclosure.

---

## Supreme Court Ends Term With Age Cases

by  
*Frank T. McGuire*

The Supreme Court issued three decisions under the Age Discrimination In Employment

Act (ADEA) in the last month of its 2008 term.

In *Kentucky Retirement System v. EEOC*, the Court ruled that a state disability retirement program that imputed more bonus years of service credit to younger workers than to older ones did not violate the ADEA. Workers with 20 years of service, or five years service plus having attained age 55, have full normal retirement eligibility. Disabled workers in hazardous positions who were not yet eligible for normal retirement may retire after five years service. In calculating benefits for such a retiree the plan imputes the years of service needed to reach normal retirement, but only up to the total of years actually worked. Thus, for example, a 35 year old worker with 10 years service might gain an additional ten years, while a 54 year old worker with 10 years service would gain only one year. The EEOC argued this discriminates in favor of younger workers on the basis of age.

The Court held that to prove intentional "disparate treatment" discrimination under the ADEA the plaintiff must prove that his or her age had a "determinative influence" on the employer's decision, and that the differences in the Kentucky plan were not "actually motivated" by age. They instead were rooted in the "pension status" of the workers, a criterion "analytically distinct" from age, which did not serve as a proxy for age. The Court noted that Congress has approved of programs that calculate permanent disability benefits based on formulas that take account of age (such as under the Social Security disability system), that the disability provisions simply track and match the normal retirement rules in the Kentucky plan, and that no "stereotypical assumptions" about older workers were involved.

In dissent, four justices pointed out the difficulty of reconciling this decision with the plain words in the age discrimination statute.

In *Meacham v. Knolls Atomic Power Laboratory*, the Court held that an employer who defends an age discrimination claim by asserting that its actions were based upon "reasonable factors other than age" has the burden of proof—both to produce evidence and to persuade the factfinder—that this contention is true.

The case involved a reduction in force. Needing to cut back its workforce, Knolls had its managers rate employees based on "performance", "flexibility", and "critical skills". To those scores they added the number of years of service, and the totals determined who should be let go. Of the 31 salaried employees laid off, 30 were at least 40 years old. Some brought an age discrimination suit, alleging the workforce reduction process had a discriminatory impact on older employees. A jury found in the employees' favor. The Court of Appeals reversed, stating that once an employer expressed a factor other than age as the basis for its decision, the burden was on the employee to prove the factor was unreasonable. The Supreme Court reversed. It held that the "reasonable factors other than age" is an "affirmative defense" under the ADEA, on which the employer must bear the burden of producing evidence and persuading the factfinder.

In *Gomez-Perez v. Potter*, the Supreme Court held that retaliation against an employee because she had advanced an age discrimination claim is itself a violation of the ADEA, even though the statutory wording prohibiting "discrimination based on age" does not expressly include a retaliation provision.

---

## Did You Know?

**Anne-Marie Storey** was elected to serve as President of the Board of Directors of the Human Resources Association of Eastern Maine. **Anne-Marie** will also be a speaker at the Maine State Bar Association's Employment Law Seminar to be held in November. Her topic is the FMLA.

**Paul Chaiken** has been appointed by the Maine Supreme Judicial Court to chair its Advisory Committee on the Rules of Professional Responsibility. **Paul** will also be speaking on the issue of discovery tools during the 2008 Litigation Institute sponsored by the Maine State Bar Association.

**Paul Sighinolfi** will be co-presenting a seminar with Dr. Philip Kimball on the topic of effective use of independent medical examinations in the workers' compensation field during the annual meeting of The Maine Health Care Association Workers' Compensation Trust on August 12. **Paul** will also be presenting the topic of Trends in Workers' Compensation for the Northern New England Society for Human Resources Law Conference in October.

## ERISA Litigation Just Got Messier

By  
*Brent A. Singer*

When a participant in an employer sponsored health or disability insurance plan sues the plan for benefits, the case is governed by specialized rules developed under ERISA. In most cases, these rules prohibit the

introduction of evidence beyond what was submitted to the plan prior to the litigation, there are no live witnesses and no jury. The case is usually decided based on the record that was before the plan and the legal briefs submitted to the court. Usually the plaintiff is not permitted to question plan representatives under oath or receive additional information not already provided when the claim was denied. And finally, in most cases, the court defers to the discretionary decision making of the plan, meaning that even if a conflicting record exists which would also support an award of benefits, the denial of benefits is upheld if there is any support for it in the record. When the company deciding the claim is also the company paying the claim—which is very common—this seems patently unfair and borderline absurd to losing plaintiffs. However, in light of a June 19, 2008, U.S. Supreme Court decision, *Metropolitan Life Ins. Co. v. Glenn*, things are now a bit brighter for plaintiffs and more complicated for defendants.

The issue before the Supreme Court was how to take into account the fact that a plan administrator (i.e., insurance company in many cases) both evaluates claims for benefits and pays the claims. This is an obvious conflict of interest, but for years, except in the most egregious cases, the conflict was not only ignored, but as indicated, deference was given to the decision of the administrator. The Supreme Court now finally acknowledges that this is a conflict and directs judges to “weigh the conflict as a factor in determining whether the denial of the claim was an abuse of discretion.” The Court explains that this conflict is “more important (perhaps of great importance) where circumstances suggest a higher likelihood that it affected the benefits decision,” and not important “where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances.” But how is a plaintiff supposed to know whether the conflict played a role in the benefits

decision, or whether, for example, the claims processing unit was “walled off” from the people pushing the “bottom line.”

The answer seems to be that now plaintiffs will be permitted either to interrogate plan officials under oath and/or receive documentation, beyond the claims denial, that speaks to whether or not the conflict played a role in the decision. For example, plaintiffs' attorneys will be keenly interested in discovering whether claims processors feel pressure, directly or indirectly, explicitly or implied, to deny a certain percentage of claims—which of course many do. The Court probably hopes that insurance companies and self-insured plans will now become proactive, putting in place walls to ensure unbiased claims review. However, it seems to this author that even if a plan states that the person processing the claim was unbiased by financial pressures, a plaintiff, under this rule, ought to be entitled to directly question that claims processor under oath, rather than just “accepting the plan’s word on it.” The result will be that ERISA litigation will become more complicated and expensive, especially for defendants. Will this result in fairer claims processing or will it only increase the costs of health insurance even more? Time will tell.

---

## U.S. Supreme Court Narrows “Equal Protection” In Employment Case

By  
*Frank T. McGuire*

In *Engquist v. Oregon Dept. of Agriculture*, the Court limited public employers' exposure to claims of violation of the Equal Protection Clause of the Constitution.

When government exercises legislative or regulatory power, courts have recognized that

the Equal Protection Clause prohibits singling out an individual (a so-called "class of one") for unfair treatment. This is an exception to the predominant rule that the Equal Protection Clause guards against unfair treatment based on membership in a "suspect class" (such as race, sex, or national origin).

In *Engquist*, a jury had found that a public employee was singled out for negative job treatment arbitrarily and vindictively, but not based on membership in an identified class. The Ninth Circuit Court of Appeals reversed that ruling. The Supreme Court agreed, holding that the "class of one" theory of equal protection does not apply in the public employment context. The Court observed that the theory was a poor fit for the employment relationship, where to treat employees differently on an individual basis is not to classify them in a way that raises equal protection concerns, but was simply part of the broad discretion that is typically part of the employment relationship. The Court noted that although many states and public employers have limited the "at will" employment doctrine, this limitation is not a matter of constitutional right.

RUDMAN & WINCHELL ATTORNEYS	
Michael P. Friedman	Leigh McCarthy
Robert E. Sutcliffe	Anne-Marie L. Storey
Paul W. Chaiken	Anthony D. Pellegrini
David C. King	Christopher J. Austin
John W. McCarthy	Hans S. Peterson
Frank T. McGuire	Debra A. Reece
Bruce C. Mallonee	Timothy A. Pease
Paul H. Sighinolfi	Robert W. Laffin, Jr.
William H. Hanson	John K. Hamer
George F. Eaton, II	Charles F. Budd, Jr.
Edith A. Richardson	Wendy A. Brown
Michael M. McAleer	F. David Walker, IV
Edmond J. Bearor	April A. Bentley
Curtis E. Kimball	Joseph D. McCarthy
Brent A. Singer	
Of Counsel:	
Gerald E. Rudman, Paul L. Rudman, Phillip D. Buckley, Winfred A. Stevens, Robert S. Lingley, Nathan Dane III	

*This Newsletter is designed to provide information of a general nature only and is not intended to replace or provide professional legal advice.*

# SAVE THE DATE

## Rudman & Winchell's

### ANNUAL EMPLOYMENT SEMINAR

**Is scheduled for  
OCTOBER 31, 2008  
in Bangor**

**The location and schedule will be announced at a later date. We anticipate topics covering any new legislation, disability issues, FMLA, workers' compensation, and much more.**

**You may RSVP to Anne-Marie Storey at [astorey@rudman-winchell.com](mailto:astorey@rudman-winchell.com) or Linda Dupuis at [ldupuis@rudman-winchell.com](mailto:ldupuis@rudman-winchell.com).**