

Many new risks of the information age revolve around - what else? - information. Recent laws, rules and legal cases are focusing more attention on the use, disclosure and accuracy of information. Organizations of all kinds stand warned that they must be careful with their information and communications, both internally and externally.

## **LAW BANS DISCRIMINATION BASED ON GENETIC INFORMATION**

On November 21, the most sweeping U.S. anti-discrimination law in almost 20 years took effect. The Genetic Information Nondiscrimination Act (GINA) prohibits employers from hiring, firing or determining promotions based on genetic information. The law also prohibits health insurers from considering a person's genetic makeup - for example, family medical history that might indicate a predisposition to a disease - when setting insurance rates or denying coverage. GINA is the most far-reaching workplace protection since the Americans with Disabilities Act (ADA) was signed into law in 1990. Since then, several states have implemented workplace prohibitions similar to those of GINA. GINA sets a *minimum* standard of protection that must be met in all states, but does not weaken any protections provided by state law.

For those worried about a flood of cases and high damages, the good news is that there is little evidence as of yet that this is an area rife with discrimination.<sup>1</sup> The Equal Employment Opportunity Commission (EEOC) had brought suit in 2001 against the Burlington Northern Santa Fe Railway Co. under the ADA for allegedly secretly testing some workers for a genetic defect potentially related to carpal tunnel syndrome. The EEOC argued that the tests were unlawful under the ADA because they were not job-related, and that any condition of employment based on such tests would be cause for illegal discrimination based on disability. The lawsuit was settled quickly, with BNSF agreeing to pay \$2.2 million<sup>2</sup>, an outcome that may give pause to employers.



## **TIPS FOR FINANCIAL FILERS**

Financial statements are often the focus of litigation involving corporate executives. Therefore, when the Securities and Exchange Commission's Division of Corporation Finance speaks, it behooves financial filers and other interested parties to listen. Several items are currently in the works, including an update to the Financial Reporting Manual. The manual, which reflects the SEC's view on various reporting issues, was updated in 2008 for the first time in almost a decade.<sup>3</sup> The next update is slated for early December. Some general suggestions for preparing upcoming 10-Ks include:

- Be more concise where possible.
- Avoid redundancy in disclosures.



- Look at the 10-K as more of a disclosure and communication document for investors than a compliance document.
- Consider the information you're providing on your website and in press releases: it may be appropriate to put into the 10-K.<sup>4</sup>

Areas where SEC staffers have focused their comments this year include impairment of goodwill, accounting for income tax issues, liquidity, pension assumptions, aggregation, materiality and other-than-temporary impairments.

## THE BILLION-DOLLAR TYPO

A typographical error in a pension plan document was a key factor in an ERISA class action seeking \$1.67 billion in damages under the Employee Retiree Income Security Act of 1974 (ERISA).<sup>5</sup> In the 1990s, Bell Atlantic – before being acquired by Verizon – switched pension plans. To make the change appealing to participants, the company boosted opening balances in the new plan by multiplying the cash-out value of each employee's stake in the old plan by a "transition factor" that was based on age and years of service. The reference to the transition factor inadvertently appeared twice in the document, and plaintiffs contended that they were therefore entitled to apply the multiplier twice – which would have increased their pensions by \$1.67 billion. The defense argued that all of the literature to employees about the change made it clear that the transition multiplier was only to be applied once.

A Chicago federal district court magistrate ruled that the language of the plan as mistakenly drafted was not ambiguous and the plan administrator did not have the discretion to interpret it otherwise. The defendant's only recourse, then, was to ask the court to reform the ERISA plan and to order the mistake corrected as a harmless "scrivener's error."

In an exhaustive 105-page ruling, the court ultimately found for the employer, ruling that the ERISA plan language should be changed to

eliminate the second reference to the transition factor multiplier. "The phrase calling for a second multiplication was a drafting error," he wrote. "No evidence exists to suggest that any plan participant relied upon the error. In fact, the course of dealing between defendants and the plan participants shows that benefits were consistently calculated by multiplying the transition factor once. To enforce the erroneous plan provision now would result in an enormous windfall to the class participants." The plaintiffs are currently considering an appeal.

## MORE DISCLOSURE FOR DEFINED BENEFIT PLANS

### NEW ACCOUNTING RULES EXPAND 10K DISCLOSURES

Employers who sponsor defined benefit pension plans will soon have to provide significantly greater disclosure about plan assets in their companies' financial statements. A new Financial Accounting Standards Board (FASB) Staff Position (FSP FAS 132(R)-1) will now require companies to drill deeply into plan investment details. This includes investment policies and strategies, and identification of significant concentrations of risk for expanded categories of plan assets. The new rules go into effect for fiscal years ending after December 15, 2009.

Some of the new requirements might be familiar because they appear in FAS Statement 157, Fair Value Measurements, but the new rules require greater detail and transparency.

FAS 157 defined “fair value,” established a framework for measuring it, and expanded disclosure about fair-value measurements for plan assets. For certain assets, employers will need to provide much greater detail on how the assets are valued and how this value may have changed during the year.

Additionally, employers will now have to provide a comprehensive narrative description of how asset allocation decisions are made and how expected return assumptions are derived. This includes target allocations or ranges for any funds that are invested in major asset categories and other factors that would increase investors’ understanding of a plan’s investment strategies and policies. These factors include investment goals, diversification, risk management practices, investments that the plan may permit and prohibit (e.g., derivatives), and the relationship between plan assets and benefit obligations.

The new rules require a more extensive disclosure of the categories of assets that a pension plan invests in. Disclosure documents have typically listed three or four categories of assets, such as equity securities, debt securities, real estate and “all other.” Now some pension plans will need to greatly expand this information while also disclosing the nature and concentration of risks within or across these categories. FASB defines concentration of risks for significant investments as a concentration in a single entity, industry, country, commodity or investment.

## INTRANET POSTING AS PART OF DISCLOSURE

The Pension Protection Act (PPA) of 2006 made a number of changes to rules on disclosing defined benefit plan information to plan participants, including adding the requirement that employers post information from the Form 5500 (also referred to as the annual report). Section 504 of the PPA requires both the employer and the Department of Labor (DOL) to post actuarial information on the funding status of defined benefit plans. (If organizations have no intranet, then no action is necessary.)

The requirement is effective for plan years beginning after December 31, 2007. For calendar year plans, this means the first required postings are coming in now on the 2008 Form 5500. The 2008 Form 5500 instructions also indicate that employers need to post the information only for defined benefit plans.

The statute states that the posting must include the identification, basic plan and actuarial information included in the annual report. It appears that employers will need to post Part I (identification information) and Part II (basic plan information) from Form 5500, and Schedule SB from Form 5500.

The statute does not specify a posting deadline so until regulations are issued, employers must make a reasonable, good faith interpretation of the statute. The statute requires the DOL to post the form 5500 information within 90 days of receiving it, so the DOL regulations will likely require employers to post the information in less than 90 days after submitting the Form 5500.

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- <sup>1</sup> The Counsel for Responsible Genetics **recently documented** hundreds of cases of genetic discrimination against people who allegedly could not obtain employment, health or life insurance because they or a member of their family had a genetic condition. Other experts note, however, that these were subjective accounts and that objectively determining whether actions taken by employers and insurers were based on genetic factors or other legitimate concerns would be difficult.
  - <sup>2</sup> <http://www.eeoc.gov/eeoc/newsroom/release/archive/4-18-01.html>
  - <sup>3</sup> <http://www.sec.gov/divisions/corpfin/cffinancialreportingmanual.pdf#contents>
  - <sup>4</sup> <http://www.complianceweek.com/blog/aguilar/2009/11/19/updates-and-tips-for-filers-from-corp-fins-carnall>
  - <sup>5</sup> *Young v. Verizon’s Bell Atlantic Cash Balance Plan*, 05 C 7314, U.S. District Court, Northern District of Illinois (Chicago).

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