



# Recent Developments In Employment Law

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Beginning with our Summer 2000 issue, we will offer our readers the option to receive our employment law newsletter by e-mail rather than "snail mail." E-mail recipients will receive a fully printable version, in Adobe Acrobat© format, **up to one week earlier** than traditional mail recipients. To receive the electronic version of *Recent Developments in Employment Law*, e-mail us at [info@bodmanlongley.com](mailto:info@bodmanlongley.com) with your request. Please include your full e-mail and traditional mail addresses with your message so that we may verify our distribution database.

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**MICHIGAN LEGISLATURE LIMITS EMPLOYERS' USE OF GENETIC TEST INFORMATION**

Effective March 15, 2000, the Michigan legislature amended the Michigan Persons with Disabilities Civil Rights Act (the "Act") to prohibit employers from requiring that applicants or employees submit to genetic testing or provide genetic information. Employers also are prohibited from taking any employment action based on genetic information. Applicants and employees may voluntarily provide genetic information related to health or safety in the workplace. If so, employers are not prohibited from using such volunteered information to protect an employee's health or safety in the workplace. However, employers still are prohibited from obtaining or using genetic information concerning employees, applicants and their family members for any other purpose.

Genetic information is defined broadly and includes both technical information from a genetic test as well as information about an individual's inherited characteristics which can be learned from a family history. The Act defines genetic testing as "the analysis of human DNA, RNA, chromosomes, and those proteins and metabolites used to detect heritable or somatic disease-related genotypes or karyotypes for clinical

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purposes.” Employers are not prohibited from conducting routine physical examinations and analyses and routine chemical analyses of body fluids, such as drug tests, so long as they are not conducted specifically to determine the presence, absence or mutation of a gene or chromosome.

Enforcement of the Act, including these new provisions concerning genetics, is by a private lawsuit or through an administrative complaint to the Michigan Department of Civil Rights.

The Michigan legislature also passed three laws prohibiting insurers and HMOs from requiring members, applicants and their dependents to be genetically tested and from disclosing the results of prior tests.

Currently, there is no comparable federal statute which specifically regulates genetic testing in the workplace, though several bills proscribing discrimination on the basis of genetic testing have been introduced and are pending in Congress. However, an EEOC Commissioner and other civil rights advocates have taken the position that the federal Americans with Disabilities Act prohibits employment discrimination based on genetic information, even though there is no reference to the subject in that statute. Such proponents argue that if an employer has genetic information about an employee and makes an employment decision based on that information, then the employee is protected by ADA because the employer regards the employee as disabled.

Also, in the federal arena, an executive order issued on February 8, 2000 by President Clinton bans federal agencies from discriminating against federal employees based on genetic information.

The Health Insurance Portability and Accountability Act (“HIPAA”) is a federal law

which prohibits group health plans sponsored by employers from denying eligibility to employees based upon genetic information. In addition, such employee plans cannot deny coverage of a newborn’s or newly adopted child’s medical problems if the child is signed up for health insurance within 30 days of birth or adoption.

While there are complex issues to be resolved concerning federal preemption of state laws as applied to employer group health plans, it is clear that genetic information cannot be used as an eligibility criterion.

### **MICHIGAN COURT OF APPEALS RULES THAT ELLIOTT-LARSEN ACT PROTECTS YOUNGER WORKERS**

In *Zanni v Medaphis Physician Services Corp* a special conflict panel of the Michigan Court of Appeals decided that Michigan’s Elliott-Larsen Civil Rights Act (“ELCRA”) prohibits age discrimination against younger employees and applicants.

In *Zanni*, the employer terminated a 31 year old account executive because she lost two accounts and had violated a performance plan. The employee claimed age discrimination, alleging a less qualified, older female replaced her; her supervisor had told her that her voice sounded too young on the phone and that clients wanted an older account executive. She also claimed that older account executives who had lost two or more accounts had not been discharged.

An earlier panel in *Zanni* had similarly opined that ELCRA protects younger employees, but had to dismiss the case because it was required to follow precedent established in *Zoppi v Chrysler Corp*. The *Zoppi* court held that ELCRA did not apply to claims of discrimination based on youth.

The special conflict panel overruled *Zoppi*, noting that ELCRA prohibits discrimination against an individual because of age. ELCRA defines "age" as "chronological age except as otherwise provided by law." The court concluded that ELCRA was not limited to protection of older workers.

The court observed that its ruling did not preclude discrimination against workers on the basis of job-related factors, such as experience and education, that are often correlated with age. This is consistent with cases such as *Plieth v St. Raymond Church* (1995) from the Michigan Court of Appeals and *Hazen Paper Co v Biggins* (1993) from the U.S. Supreme Court. Those cases determined that age-related factors, such as pension eligibility and seniority, do not constitute age discrimination.

### **EEOC EXTENDS DISCRIMINATION REMEDIES TO UNDOCUMENTED WORKERS**

Without noticeable fanfare, on October 26, 1999 the EEOC issued an enforcement guidance on "Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws." The EEOC Web site at [www.eeoc.gov/policy/guidance](http://www.eeoc.gov/policy/guidance) sets forth the text of this and other guidances.

The guidance explains that undocumented and/or legally unauthorized workers are entitled to the same remedies for discrimination as any other workers. Relief such as back pay, punitive or liquidated damages, appropriate injunctive relief and recovery of attorney fees are available. Employers can also be ordered to hire or reinstate employees if the employee was unlawfully terminated or if the applicant was denied a job due to discrimination.

According to the EEOC, the purposes of the Immigration Reform and Control Act are not

eroded by these remedies because eligibility for reinstatement depends on the worker being able to satisfy IRCA's requirements for work eligibility verification.

### **IRS ISSUES NEW "SAFE HARBOR" PENSION DISTRIBUTION NOTICE**

The Internal Revenue Code requires pension plan administrators to inform plan participants of the income tax options available to them in advance of receiving a distribution which might be rolled over to another plan or an IRA. A written notice must be given to such participants no more than 90 days and no fewer than 30 days before such a distribution.

The IRS is required by law to provide taxpayers with a model notice which fulfills this Code requirement. The Service has recently issued an updated model "Special Tax Notice Regarding Plan Payments" in IRS Notice 2000-11. The notice is available over the Internet at [www.fedworld.gov/pub/irs-regs/no200011.pdf](http://www.fedworld.gov/pub/irs-regs/no200011.pdf) or call Jim Buschmann at our Detroit office for a faxed copy.

### **SEVERANCE AGREEMENT RELEASING EMPLOYER AND EMPLOYEES FROM CLAIMS IS ENFORCEABLE**

The Michigan Court of Appeals has affirmed that a severance agreement signed by a terminating employee that expressly released both the employer and its employees precluded future claims against the terminated employee's former co-workers.

In *Collucci v Eklund* (April 28, 2000), an employee was accused by a co-worker of sexual harassment. The company investigated and concluded that while the employee's conduct did not constitute illegal harassment, it was "unprofessional" and demonstrated "poor

judgment.” Within two months, the employee was selected for termination as part of a reduction-in-force because of this incident and other performance issues. He was offered an enhanced severance package in exchange for a release, which he accepted. The severance agreement expressly released the company and its employees from any and all claims arising out of the employee’s employment or termination. When the severance payments ended, the employee sued his former co-worker who had accused him of harassment, claiming he had been defamed.

The co-worker sought dismissal of the case, arguing the defamation claim was barred by the severance agreement. The employee countered that the severance agreement did not bar his claim because the co-worker had not been a party to the agreement and had not provided any of the consideration paid to him. The court dismissed the case and ruled that the severance agreement expressly released all claims against the employer and its employees.

### **DATES ANNOUNCED FOR ANNUAL EMPLOYMENT LAW SEMINAR**

**Bodman, Longley & Dahling LLP's  
Annual Employment Law Update will be  
held this year on the following dates:**

**Wednesday, September 20 Dearborn  
Thursday, September 21 East Lansing  
Friday, September 22 Northern Michigan**

All persons on our employment law mailing list will receive invitations by mail. Later in the summer, updates and registration information will be posted on our Web site at [www.bodmanlongley.com](http://www.bodmanlongley.com).

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We are distributing this RECENT DEVELOPMENTS IN EMPLOYMENT LAW to our clients and friends. This newsletter is intended to provide a concise overview of some recent legal developments which may affect employment practices. The matters discussed are intended to provide general information only and are not intended to provide legal advice. Specific action should be taken only after obtaining competent legal advice.

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