



## An Update on New Protected Classes

by James B. Yates and Colleen L. Maloney

In 2009, the legislative focus of Congress was on the passage of President Obama's Stimulus Plan and health care legislation. Ohio legislators spent much of the year addressing budget shortfalls and related issues. Despite the legislative focus being elsewhere, several classes of employees received new or enhanced protection under federal law. Additionally, 2009 federal and Ohio legislative proposals highlight other classes of employees that will receive protection in the not-so-distant future.

### Proposed Regulations Detail "New Disabled"

On September 23, 2009, the Equal Employment Opportunity Commission issued proposed regulations under the ADA Amendments Act of 2008 (ADAAA) which was effective January 1, 2009. The period for submitting comments to the proposed regulations has expired. The proposed regulations leave no doubt that vast numbers of heretofore "non-disabled" employees and applicants will now fall under the protection of the ADAAA. An individual is now disabled if any one of an expansive number of "major life activities" is limited or restricted – and not necessarily "significantly" limited. "Mitigating measures" such as medication which controls high blood pressure, high cholesterol or diabetes or prosthetic devices or hearing aids can no longer be considered when making this determination. Further, the proposed regulations clarify that individuals

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claiming to be protected because they were "regarded as" being disabled no longer have to prove that an employer regarded them as substantially limited in a major life activity. The foregoing major changes to federal disability law will exponentially increase the number of employees (and applicants for employment) entitled to protection under the ADAAA.

### **Protected Employees Under GINA**

The employment provisions of the Genetic Information Nondiscrimination Act of 2008 (GINA) became effective on November 21, 2009. Employers with 15 or more employees now are prohibited from discriminating against employees or applicants based upon genetics or genetic information. Under GINA, employers are prohibited from using genetic information in making employment decisions, intentionally acquiring genetic information or disclosing genetic information. "Genetic information" is defined expansively under GINA and includes not only information about an employee's genetic tests and genetic tests of family members, but also includes information related to family medical history. Therefore, information that is routinely shared at some workplaces by employees regarding family member illnesses/medical conditions may subsequently give rise to a claim of genetic discrimination should the employee subsequently be laid off or terminated. Expect to see these claims included in employment discrimination lawsuits.

### **Sexual Orientation and Gender Identity**

Federal and Ohio legislation prohibiting discrimination on the basis of sexual orientation and gender identity likely will pass this year. Proposed federal legislation would add sexual orientation and gender identity or expression to the list of protected classes under Title VII of the Civil Rights Act of 1964, as amended, and would apply to employers with 15 or more employees. Proposed Ohio legislation would add sexual orientation and gender identity to the list of protected classes under Ohio Revised Code Chapter 4112. The latest version of the Ohio legislation clarifies that the new protections would not require employers to provide new facilities (i.e. separate restrooms for transgendered employees) and specifies that employers could continue to enforce existing grooming and dress policies. In Ohio, an executive order already prohibits employment-related discrimination on the basis of sexual orientation or gender identity for state employees and many Ohio municipalities have similar prohibitions contained in local ordinances.

### **Lactating Mothers**

Proposed federal legislation, dubbed the Breastfeeding Promotion Act of 2009, would add lactating mothers to the list of protected classes under Title VII of the Civil Rights Act of 1964, as amended. The proposed legislation would make breastfeeding and expressing breast milk protected activities. Additionally, the proposed legislation requires employers to provide lactating mothers reasonable break times to express milk and a private place, other than a bathroom, to express milk. Versions of proposed federal health care also contain language requiring breaks for lactating mothers. Similarly, about half of the states have passed or proposed legislation encouraging or requiring employers to provide breaks to lactating mothers. Ohio currently is considering analogous legislation. Expect the federal legislation to pass sometime this year.

### **Debtors**

Proposed Ohio legislation prohibiting employers from using a person's credit rating or score or consumer credit history as a factor in making employment decisions is currently under debate. In its current form, the legislation has no exceptions for employees or applicants whose job duties require handling money or other involvement with the employer's finances.

## Victims of Domestic Violence

Another Ohio legislative proposal currently under debate would prohibit Ohio employers from discriminating against employees who are, or are perceived to be, victims of domestic violence, dating violence or stalking. More specifically, the proposed legislation would prohibit employers from taking any adverse employment action against employees because of an actual or threatened disruption in the workplace due to threats of domestic or dating violence or stalking by another individual against an employee. Additionally, the proposed legislation would require employers to provide unpaid leave, without advance notice, to employees for:

1. attending court proceedings to seek a civil protection order or seek “other injunctive relief” for himself or herself or a child; or
2. seeking medical attention related to an incident of domestic or dating violence or stalking.

Under the proposal, employers also will have to provide unpaid leave, with reasonable notice, to employees for:

1. seeking nonemergency medical attention related to an incident of domestic or dating violence or stalking;
2. meeting with law enforcement officials;
3. seeking legal or other assistance from a counselor, social worker, health care provider or other professional who assists individuals in dealing with domestic violence issues; and
4. attending criminal court proceedings related to the prosecution of an incident of domestic or dating violence or stalking.

However well intentioned, these new and expanded protected classes create additional compliance and training burdens for struggling businesses and already overburdened human resource professionals. With so many new protected classes, it may be difficult to find an employee who does not receive special “protection” under federal or state law.



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