



**Wimberly Lawson**  
Seale Wright & Daves, PLLC

*Attorneys & Counselors at Law*

**Briefly**  
August 2009      Volume 9, Issue 8

**INITIAL REGULATIONS PUBLISHED ON NEW GENETIC DISCRIMINATION LAW**



**Patty K. Wheeler** .....

**“Much of the debate concerning the regulations relates to what is genetic information, but also clarifies six exceptions that permit lawful acquisition of genetic information.”**

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The EEOC has issued proposed regulations to the Genetic Information Non-Discrimination Act (GINA), as the provisions applicable to employment take effect on November 21, 2009. GINA is modeled after Title VII, and prohibits health insurers and employers from requesting, requiring, or purchasing genetic information about an employee, job applicant, or family member. GINA applies only to genetic information, while the ADA still covers any discrimination related to the manifestation of a disease or disability.

Much of the debate concerning the regulations relates to what is genetic information, but also clarifies six exceptions that permit lawful acquisition of genetic information. These exceptions include when an employee submits such information for a voluntary wellness program, or a request for accommodation under the ADA, or for a request for leave under the FMLA. A “water cooler” exemption allows for conversations between managers and employees where genetic information may be inadvertently revealed. Forensic labs engaged in DNA collection or human remains identification are exempted, as are instances of genetic monitoring of toxic substances in the workplace if employees provide voluntary consent for the tests. There is also an exception about media reports that has generated some confusion.

A survey by the American Management Association in 2004 found some companies conduct medical tests that could violate GINA. Some 3% of companies reported medical testing for breast or colon cancer, 2% for sickle-cell anemia, and 1% for Huntington’s disease. Also, 15% of companies collected family medical histories, which can reveal hereditary genetic predispositions for some diseases.

Civil rights groups argue that it is critical that the exceptions allowing an employer to obtain genetic information be narrowly construed, since if an employer never acquires genetic information regarding a worker, the employer will never have the opportunity to discriminate against that employee.

Regarding the definition of “genetic tests,” employer groups commended the EEOC for including examples of medical tests that are not “genetic,” including alcohol and drug tests and routine blood tests, but they also urged the EEOC to provide more examples of permissible tests. Some employer groups expressed concern about EEOC’s preamble to the proposed rule which leaves employers exposed to GINA liability if they receive unsolicited genetic information from a health care provider in response to the employer’s valid pre-employment request for a prospective employee’s medical exam. Other groups argued for the current version of the proposed regulation, arguing that an employer would be in violation of GINA if it acquired genetic information because it failed to modify the way medical inquiries are made to avoid obtaining genetic information, even if the employer did not have the specific intent of acquiring such information. Similar issues arose as to whether employers seeking medical documentation to support a leave of accommodation request under the FMLA, the ADA, or other state or local law, should be required to state in their request that no genetic information should be returned to them.

There is a great deal of discussion or debate on “voluntary” wellness programs. Business groups argued the EEOC should conform GINA regulations to existing healthcare non-discrimination and privacy rules under HIPAA and deem wellness programs “voluntary” even if employees are offered financial inducements to participate. Other groups contend that if a wellness

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*Our Firm Wimberly Lawson Seale Wright & Daves, PLLC is a full service labor, employment and immigration law firm representing management exclusively. The firm has offices in Knoxville, Morristown, Cookeville and Nashville, Tennessee and maintains its affiliation with the firms of Wimberly, Lawson, Steckel, Schneider & Stine, P.C., Atlanta, Georgia; and Wimberly Lawson Daniels & Fisher, LLC, Greenville, South Carolina.*

## EEOC PREPARING BROAD INTERPRETATION IN FAVOR OF DISABILITY COVERAGE



On June 17 the EEOC approved a notice of proposed rulemaking under the ADA Amendments Act of 2008, by a 2-1 vote. The EEOC had previously tried to approve the proposed regulations in December, but that motion failed on a 2-2 vote, as the two commissioners who were Democrats voted against the proposal. In June the proposed regulation passed by a 2-1 vote, with the sole Republican on the Commission voting against the proposal.

### Suzanne K. Roten ....

**“Under the proposed regulations, an individual need not show that an impairment that substantially limits at least one major life activity inhibits any other major activity.”**

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regulations, an individual need not show that an impairment that substantially limits at least one major life activity inhibits any other major activity. The proposal provides that comparison of an impaired individual’s limitations to an average person’s abilities can be made on a “common sense” basis, without resort to scientific or medical evidence.

The proposed rule provides that “mitigating measures,” such as medication, prostheses, or other steps taken to ameliorate an impairment, shall not usually be considered in determining whether an individual is disabled. The statutory exception that use of “ordinary” eyeglasses or contact lenses should be considered in determining disability applies only if those measures “fully correct” vision.

The proposed rule identifies impairments that “will obviously be substantially limiting” including cancer, diabetes, HIV/AIDS, major depression, post-traumatic stress disorder, and schizophrenia.

The proposed regulation sets forth in some detail how individuals might be substantially limited in the major life activity of working. Instead of having to demonstrate that the claimant is unable to perform a “range or class of jobs,” an ADA plaintiff now can show his condition renders him unable to perform a “type of work.” The proposal provides examples of “type of work,” such as commercial trucker, assembly line work, clerical work, or law enforcement. The proposed regulation also states that an individual’s “paid employment elsewhere is not dispositive” in deciding whether he is “substantially limited” in “working.”

In reacting to the proposal, certain employer associations believe that the EEOC has overstepped its bounds, such as by deleting the “condition, manner, or duration” language from the “substantially limits” test, to list conditions that are

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## KNOW YOUR ATTORNEY

### Gary W. Wright



GARY W. WRIGHT is Regional Managing Member of Wimberly Lawson Seale Wright & Daves, PLLC in the Knoxville, Tennessee office. He practices in the

areas of labor and employment law, with a particular emphasis on NLRB work, collective bargaining, contract administration, and arbitration law. He has served on the Executive Council of the Tennessee Bar Association, Labor Law Section, and is a member of the Labor and Employment Law Sections of the Tennessee Bar Association and the American Bar Association. He is a Tennessee Supreme Court Approved Mediator and has received his Certification in Alternative Dispute Resolution from Cornell University, School of Industrial and Labor Relations. Prior to entering private practice, Gary was a federal prosecutor for the National Labor Relations Board working in its Peoria and Atlanta Regions. He has also served as an instructor of business law at Virginia Tech and Carson Newman College and is currently teaching in the University of Tennessee Professional Development Program. Gary received his BS degree, cum laude in 1974 and his J.D. degree in 1977, both from the University of Tennessee.

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# HOT NEW DEVELOPMENTS IN IMMIGRATION COMPLIANCE



**Jerome D. Pinn** .....

**“The federal contractor rule extends use of the voluntary E-Verify system to require its use by covered federal contractors and subcontractors, including those who receive American Recovery and Reinvestment Act funds.”**

## E-Verify for Federal Contractors Will be Effective September 8, 2009

On July 8, 2009, Department of Homeland Security (DHS) Secretary Janet Napolitano strengthened employment eligibility verification by announcing the Administration’s support for a regulation that will award federal contracts only to employers who use E-Verify to check employee work authorization.

E-Verify, which compares information from the Employment Eligibility Verification Form (I-9) against federal government databases to verify workers’ employment eligibility, is a free web-based system operated by DHS in partnership with the Social Security Administration (SSA).

The federal contractor rule extends use of the voluntary E-Verify system to require its use by covered federal contractors and subcontractors, including those who receive American Recovery and Reinvestment Act funds. After a careful review, the Administration will push ahead with full implementation of the rule, which will apply to federal solicitations and contract awards government-wide starting on September 8, 2009.

Effect: There will be no more delay in the implementation of the E-Verify requirements for federal contractors. When a contractor subject to the rule wins a bid on a federal contract that contains the E-Verify clause, the contractor and any covered subcontractors on the project are required to enroll in the E-Verify program within 30 calendar days of the contract or subcontract award date. The new rule would require covered contractors to use E-Verify to

confirm the employment eligibility of all persons hired during a covered contract term, and also to confirm the employment eligibility of covered contractors’ current employees who perform contract services for the federal government within the U.S. The rule exempts contracts that include only commercially available off-the-shelf items and related services.

Action Plan: Federal contractors who are covered by the rule need to register for E-Verify and to train their employees in the use of the E-Verify system. Because E-Verify provides DHS with information that could be the basis for an immigration compliance inspection, employers should make sure that all I-9s are completed properly, that human resources employees are trained in how to complete and audit I-9s, and that written policies and procedures reflect an intent to comply with the I-9 rules.

## DHS Will Rescind Its Social Security No-Match Regulation

On July 8, 2009, Secretary Napolitano also announced the DHS’s intention to rescind the Social Security No-Match Rule, which has never been implemented and has been blocked by court order, in favor of the E-Verify system. That rule established procedures that employers could follow if they receive SSA No-Match letters or notices from DHS that call into question work eligibility information provided by employees. These notices most often inform an employer many months or even a year later that an employee’s name and Social Security Number provided for a W-2 earnings report do not match SSA records—sometimes due to typographical errors or unreported name changes.

Effect: The most likely effect is that the Social Security Administration will resume issuing Social Security No-Match letters, which it has not done for the last three to four years because of the DHS rule and the related litigation.

Action Plan: Employers need to decide how they will deal with No-Match letters given that the safe harbor provided by the No-Match Rule will go away. It may be appropriate to follow the procedures of the No-Match Rule until better guidance is available. At the same time, employers should recognize that relying on the No-Match Rule procedures will not protect employers who have actual or constructive knowledge that specific employees are not authorized to work in the United States.

## 652 businesses nationwide served with I-9 audit notices on July 1

On July 1, 2009, U.S. Immigration and Customs Enforcement (ICE) issued Notices of Inspection (NOIs) to 652 businesses nationwide - which is more than ICE issued throughout all of last fiscal year. The notices alert business owners that ICE will be inspecting their hiring records to determine whether or not they are complying with employment eligibility verification

**“GENETIC DISCRIMINATION LAW”**  
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program offers financial inducements to participate, the EEOC should not deem such programs “voluntary” and should not extend a GINA exception for genetic information, including a participant’s family medical history, as gathered by such programs.

Commentors to the proposed regulation also split along business and individual rights lines on whether “aggregated” genetic information from wellness programs that an employer receives should qualify for the GINA exemption if individuals can be identified from the aggregate information because the group is so small.

Commentors also divided on whether an exemption for commercially or publicly available material should extend to social networking sites or web blogs. Although business groups said employers should not be at risk under GINA for material discovered on the Internet when searching for other purposes, other groups said the exception should not include sites that are likely to include such information, regardless of whether such sites are public or private.

**“EEOC PREPARING BROAD INTERPRETATION”**  
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“per se” disabilities, and to change the definition of the major activity of working.

EEOC spokespersons point out that the listing of impairments that will consistently meet the definition of disability does not mean that persons with those conditions necessarily will prevail on ADA claims. For example, such individuals may not need

reasonable accommodation, may pose a “direct threat” to health or safety, or may experience adverse action because of legitimate, non-discriminatory business reasons. The text of the proposed rule is expected to be released in the near future.

**“NEW DEVELOPMENTS IN IMMIGRATION COMPLIANCE”**  
**continued from page 3**

laws and regulations. Inspections are one of the most powerful tools the federal government has to enforce employment and immigration laws.

The 652 businesses were selected for inspection as a result of leads and information obtained through other investigative means. Due to the ongoing law enforcement sensitive nature of these audits, the names and locations of the businesses was not released.

Effect: Those employers who received NOIs are busy correcting their I-9s, compiling the information requested in the NOIs, and seeking legal advice about what to do with workers who are not authorized to work in the United States. Other employers are breathing a collective sigh of relief, but are wondering if they are next.

Action Plan: Avoid being a target. Employers should make sure that all I-9s are completed properly, that human resources employees are trained in how to complete and audit I-9s and review employment authorization documents, and that written policies and procedures reflect an intent to comply with the I-9 rules. In addition, audits of I-9s by outside counsel can alert employers to compliance problems and to issues to address in training. Management should make sure that employees at all levels know the importance of complying with immigration laws through annual training, internal communications and corporate culture. In addition, employers should have protocols in place for handling evidence of unlawful workers in the workplace and responding to Social Security letters. Senior management should issue memos to managers, supervisors and HR staff about how to deal with immigration issues.

**Current Form I-9 Still Valid**

The Form I-9 that is now posted on the USCIS web site did not expire on June 30, 2009, as had been scheduled. This version will remain current for an indefinite period of time, as USCIS waits for the Office of Management and Budget to officially approve its continued use.



**Wimberly Lawson**

*Attorneys & Counselors at Law*

We invite you to attend our 30th Annual Labor and Employment Law Update

## **TARGET OUT OF RANGE**



### **THE WIMBERLY LAWSON LABOR & EMPLOYMENT LAW UPDATE**

**Knoxville Marriott Downtown  
500 Hill Avenue, Knoxville, Tennessee  
November 5 & 6, 2009**

#### **A FEW COMMENTS FROM PRIOR YEARS**

““ Accurate updates -  
excellent presentations ““

““ This is always the most  
valuable seminar of the year. ““

““ Very informative -  
great resource ““

““ So well organized -  
materials, speakers;  
the best seminar  
presentation of any  
I have attended. ““



**GUEST SPEAKER**  
Hallerin Hilton Hill  
*Author, Motivational Speaker,  
Trainer, Talk Show Host*



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## **TARGET OUT OF RANGE**



Dear Clients and Friends:

Our Annual Conference is truly the high point of the year for us -- a time to gather with friends and discuss important, contemporary employment issues. Please plan now to join us.

Our day and a half program covers important legal decisions and societal trends affecting employment. Topics are carefully selected to address the concerns of all employers and to give you an opportunity to select from a wide array of topics dealt with in detail. Some of the twenty-five or more topics are:

- FMLA Amendments and Issues
- Records Retention and Destruction
- Amendments to Americans with Disabilities Act
- COBRA Regulations
- Genetic Information Non-Discrimination Act
- Wage/Hour Compliance under New Administration
- Lilly Ledbetter Fair Pay Act
- Employee Free Choice Act
- I-9, E-Verify and Immigration Issues
- Recession and RIFs – Tips for Dealing with the Downturn
- Workers' Compensation Strategies

Join us in Knoxville on November 5 and 6! We promise you an informative, but light-hearted, thorough and practical journey through today's workplace issues.

Hope to see you there!

Respectfully,

Ronald G. Daves  
Managing Member

**We are also pleased to announce that our keynote speaker will be author, motivational speaker, trainer, radio talk show host and one of the nations most sought after public speakers,**

***Hallerin Hilton Hill***



## AGENDA

**Thursday, November 5, 2009 (9:00 a.m. - 5:00 p.m.)**

**8:00 a.m. – 9:00 a.m. Registration and Continental Breakfast**

**9:15 a.m. - 10:45 a.m. - General Session**

The Year in Review - Employment/Labor Update  
Wage and Hour Insights Regarding U.S. Department of  
Labor Enforcement of FLSA

ADAAA - What Difference Does it Make?

Pending Workplace Legislation - Are You Ready for Change?

**11:00 a.m. - 12:00 p.m. - Breakout Sessions**

Employee and Employer Rights and Obligations Under the FMLA

HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)

OSHA - There is a New Sheriff in Town

Workers Compensation - Strategies to Manage Claims

Immigration Issues from A to Z

**12:00 p.m. - 1:30 p.m. - Lunch** (*Courtesy of Wimberly Lawson*)

**1:30 p.m. - 2:30 p.m. - General Session**

“Striking the Right Chord with the Six Strings of Success for  
Maximum Personal and Professional Effectiveness” (by Hallerin Hilton Hill)

**2:45 p.m. - 3:45 p.m. - Breakout Sessions**

Recession, RIFs and Reality: Tips for Dealing with the Downturn

Major Labor Law Reform - EFCA, NLRB Decisions, and More

Workplace Violence - Prevention and Policies

Wage and Hour Issues - A Refresher Course for Compliance

Individual Employee Contracts - Who, What, When & How

**4:00 p.m. - 5:00 p.m. - General Session**

Records Retention and Destruction

Dress Codes and Employee Appearance Issues

Ledbetter Fair Pay Act - What It Means to You

Electronic Discovery Rules - What They Mean to You Before a Lawsuit is Filed

**5:00 p.m. – 7:00 p.m. - Reception** (*please join us for scrumptious hors d'oeuvres*)

**Friday, November 6, 2009 (8:30 a.m. - 12:30 p.m.)**

**8:00 a.m. – 8:30 a.m. - Continental Breakfast**

**8:45 a.m. - 9:45 a.m. - General Session**

OFCCP and Affirmative Action Update

Class Action Lawsuits - Could This Mean You?

Developing a Crisis Management Plan

**10:00 a.m. - 11:00 a.m. - Breakout Sessions**

Union Organizing Update - Don't Be Caught Unaware

Alternative Dispute Resolution - Mediation & Arbitration Analyzed

Socialism Run Amok - Employee Benefit Strategies in an Era of Governmental Mandates

Immigration Worksite Enforcement

HR Jeopardy - the Game (Interplay between ADA/FMLA/WC)

**11:00 a.m. - 12:30 p.m. General Session**

EEOC Enforcement Initiatives

New Prohibitions Regarding Use of Genetic Information

Diversity - Why Can't We All Get Along?

2009 COBRA Subsidy

**12:30 p.m. - 12:45 p.m. Conclusion and Prizes**



This program has been approved for 9 recertification credit hours toward PHR, SPHR and GPHA recertification through the Human Resource Certification Institute (HRCI). For more information about certification or recertification, please visit the HRCI home page at [www.hrci.org](http://www.hrci.org).

This program has been accredited by Tennessee CLE for 9.0 general credit hours.



# Wimberly Lawson

Attorneys & Counselors at Law

## Thirtieth Annual Labor & Employment Law Update Conference

Knoxville Marriott - Knoxville, Tennessee  
November 5-6, 2009

### COST:

Early Bird (registration AND payment received by October 1)  
\$295 per person  
\$275 for each additional person from same company  
\$230 for eight or more from same company

Registration and payment received AFTER October 1  
\$335 per person  
\$315 for each additional person from same company  
\$295 for eight or more from same company

### REGISTRATION INCLUDES:

Seminar (1 1/2 days), materials, two continental breakfasts, lunch and evening reception on Thursday, November 5, 2009

### CANCELLATION CHARGE:

50% cancellation fee will be incurred for cancellations after October 14. Cancellations made after October 28, 2009 will forfeit registration fee (registrants will receive the conference materials post-seminar)

### HOTEL ACCOMMODATIONS Knoxville Marriott • 500 Hill Avenue

### SPECIAL RATES AVAILABLE

Be sure to state you are attending the Wimberly Lawson conference in order to receive the room rate of \$105.95/standard.

**800-836-8031**

**RESERVE ONLINE** at [www.marriott.com/TYSMC](http://www.marriott.com/TYSMC)  
(use the Group Code LAWLAWA to reserve at the conference rate)

### FOUR WAYS TO REGISTER

1. Mail to: Bernice Houle  
Wimberly Lawson Seale  
Wright & Daves, PLLC  
P.O. Box 2231  
Knoxville, TN 37901
2. Fax to: 865-546-1001
3. Email to: [bhoul@wimberlylawson.com](mailto:bhoule@wimberlylawson.com)
4. Via website: [www.wimberlylawson.com](http://www.wimberlylawson.com)



### GUEST SPEAKER

Hallerin Hilton Hill  
Author, Motivational Speaker,  
Trainer, and Talk Radio Host

### Striking the Right Chord with the Six Strings of Success for Maximum Personal and Professional Effectiveness!

Hallerin Hilton Hill will inspire and challenge you to reach your own personal and professional success with his latest presentation.

Hallerin is a radio talk show host, motivational speaker, and trainer. Hallerin's morning radio show airs from 5:30-10 every weekday mornings on Newstalk 100 WNOX. Hallerin was named to the "Top 100 Most Powerful People in Tennessee" and the "Top 50 Most Powerful African-Americans in Tennessee by Business Tennessee magazine (April 2004; page 39). He is the author of the books *Make 'em Say WOW!* and *The Seven Pillars of Wisdom*. Hallerin is also the television talk show host of *Anything Is Possible*, airing Sunday's at noon on the NBC affiliate in Knoxville. Hallerin has been voted Best Talk Show host by Metro Pulse 9 years in a row. His mission is to inspire, inform and entertain every time the microphone comes on. Hallerin is a graduate of Oakwood College in Huntsville, Alabama where he studied Communications. He is married to Nedra, and they have two children, Hallerin II and Halle Nicole. Hallerin is the CEO and founder of Wisdom House - a multimedia company focused on inspiring people around the world to grow in wisdom. He speaks to thousands of people each year to help inspire, motivate and encourage excellence.

Name \_\_\_\_\_

Company \_\_\_\_\_ Address \_\_\_\_\_

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Phone \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_ Fax \_\_\_\_\_ - \_\_\_\_\_ - \_\_\_\_\_

Email \_\_\_\_\_

BPR and State for CLE: \_\_\_\_\_ No. Attending Reception: \_\_\_\_\_

Special Needs? If you should have any special needs, such as wheel chair access or special dietary requirements, please contact Bernice Houle at 865-546-1000 no later than 10 days before the event.