

# *Recent Developments in EEO*

“GINA”

“EEO Investigation”

“Lilly Ledbetter”

“Religious Discrimination”

Part 2 of 4

Presenter

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## Title II of GINA

**Prohibits – without exception – the use of genetic information in making decisions as to any terms, conditions, or privileges of employment**

- Restricts the acquisition of genetic information
- Restricts the disclosure and requires the confidentiality of genetic information, and
- Prohibits retaliation

**So how would a GINA claim come up?**

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## GINA: The Newest Basis

- The pitfall here is that “genetic information” is defined to include “family medical history”

E.g., can't ask for family medical history information in connection with medical examinations, request for information regarding a disability, etc. (see 29 CFR 1635.11(a)). How about FMLA?

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## "Genetic Information" is defined in GINA as

**IN GENERAL-** The term 'genetic information' means, with respect to any individual, information about—

- (i) such individual's genetic tests,
- (ii) the genetic tests of family members of such individual, and
- (iii) the manifestation of a disease or disorder in family members of such individual.

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## EEOC's New GINA Regulations

**Issued Nov. 10, 2010 and effective, Jan. 11, 2010**

Regulatory comments to Section 1635.11(a) ("Relationship to other laws, generally")

"GINA does limit, however, an employer's ability to obtain genetic information as a part of a disability-related inquiry or medical examination. For example, an employer will no longer be able to obtain family medical history or conduct genetic tests of post-offer job applicants, as it currently may do under the ADA."

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## GINA

### Safe Harbor Language

29 CFR 1635.8

(B) If a covered entity uses language such as the following, any receipt of genetic information in response to the request for medical information will be deemed inadvertent: "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information."

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## EEO Investigations

MD-110, at 7-7.[Some citations omitted.]

"Agencies are initially responsible for conducting thorough and complete investigations of complaints of discrimination brought against them. ... However, Commission rules recognize that agencies will not always meet their regulatory burden to conduct such comprehensive investigations. The rules thus clarify that 'where a hearing is properly requested and where there has been no investigation or there is an incomplete or inadequate investigation, the record in the case shall be developed under the supervision of the administrative judge.'"

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## Investigations: Role of Legal

*Rucker v. Treasury*, 0120082225 (Feb. 4, 2011): Among other claims of discrimination, Complainant had alleged that the agency's Office of General Counsel "improperly injected itself into the EEO investigation by reviewing and assisting in the development of management officials' statements before submitting them to the EEO investigator." He also asserted that the Office of General Counsel directed management to respond to investigator questions in narrative form, which he claimed led to the agency's actions being portrayed in the most favorable light.

*Problem?*

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## Inadequate or Delayed Investigations

- Complainant filed a non-selection EEO complaint/ 180 days later Agency has not begun the investigation. Agency fails to produce case file for EEOC hearing. Agency assigns an investigator. Complainant asks the EEOC Judge (you are the Judge) to rule in her favor as a sanction for the agency's dilly-dallying.
- Would you do so, and grant her the promotion

*Talahongva-Adams v. Department of the Interior*, 0120081694(2010); see also *Giza v. DOJ*, 0720100051 (2011)

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## Investigations: Failure of Agency to Provide Information

- Complainant alleged reprisal when she was not selected for an EEO Program Manager position / During the investigation, the EEO investigator asked the agency to produce documentation reflecting how it evaluated the candidates for the EEO Program Manager position, including interview notes and any other documentation reflecting the reasons for selecting the candidate / Human Resources responded that the interview notes and evaluation sheets for the EEO Program Manager position "were not preserved"

Did the Agency have an obligation to preserve those records? If so, what was it? Consequence of any failure?

*Newbold-Reese v. DVA*, 0120073324 (2009); see also *Moore v. Army*, 0120070573 (2010)

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## 29 CFR 1602.14

- Provides that agencies must preserve any records pertaining to selections and promotions for a period of one year from the date of the making of the record or the personnel action, whichever comes later. Moreover, the regulation requires that once the complaint process is initiated, the agency is required to retain "personnel records relevant to the charge" until a final disposition of the complaint.

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## Lilly Ledbetter

- ❑ Ledbetter v. Goodyear Tire & Rubber Co., No. 05-1074 (U.S. 2007) (Title VII's statute of limitation period (180 or 300 days) begins to run when "each allegedly discriminatory pay decision was made and communicated to her." / In a 5-4 decision, the Court rejected Ledbetter's argument that each subsequent paycheck was a separate act of discrimination, and her argument that the most recent decision was unlawful because it carried forward intentionally discriminatory disparities from prior years)

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## THE LILLY LEDBETTER FAIR PAY ACT OF 2009

**Amends Title VII and the ADEA, as follows:**

[An] unlawful employment practice occurs, with respect to discrimination in compensation..., when a discriminatory compensation decision or other practice is adopted, when an individual becomes subject to a discriminatory compensation decision or other practice, or when an individual is affected by application of a discriminatory compensation decision or other practice, including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice.

*Effective on May 28, 2007, the date of the Supreme Court's Ledbetter decision*

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## THE LILLY LEDBETTER FAIR PAY ACT OF 2009

### Cases Applying the LLFPA

*Amft, et. Al v. DOT*, 0120081469 (2009): Class complaint / even though more than 45 days had passed from Complainants' exclusion from an OPM Pay Demonstration Project, the Commission, citing the Ledbetter Act, determined that the complaint was timely, providing that a new act of discrimination occurs with each new paycheck

*Kitchen v. Air Force*, 0120090609 (2009): Age discrimination claim based on alleged conversion from GS scale to NSPS system /Commission finds timely based on LLFPA

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## THE LILLY LEDBETTER FAIR PAY ACT OF 2009

- *Smith v. Department of the Navy*, 0120131787, 113 LRP 28290 (2013). In March 2009, Complainant transferred to the Agency's Naval Station in Mayport, Florida as a GS-09 Alternate Electronic Key Management System (EKMS). Between March and October 2009 Complainant became aware that her duties and responsibilities were identical to her co-worker, an EKMS Manager, GS-11. On January 24, 2013, Complainant filed a formal complaint alleging that the Agency subjected her to discrimination on the basis of race (African-American) when the Agency assigned her to a GS-09 position with the same duties and responsibilities as a GS- 11 EKMS Manager. The Agency dismissed Complainant's complaint on the grounds of untimely EEO contact. The Agency found that Complainant initiated contact with an EEO counselor on October 16, 2012, outside of the applicable 45-day time period, and provided no justifiable reason to substantiate her failure to contact an EEO Counselor in a timely manner.

On appeal to EEOC, what result?

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## THE LILLY LEDBETTER FAIR PAY ACT OF 2009

- What about an untimely failure to promote claim, where an employee argues that each paycheck is a new act of discrimination? See *Schuler v. PricewaterhouseCoopers, LLP*, No. 08-7115 (D.C. Cir. 2010) and *Noel v. Boeing Co.* 08-3877 (3d Cir. Oct. 1, 2010)

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## THE LILLY LEDBETTER FAIR PAY ACT OF 2009

- *Johnson v. United States Department of Agriculture*, 04-1609 (EGS) (D.D.C. September 30, 2011). The District Court granted summary judgment to the agency on the plaintiff employee's age claims (i.e., the failure to grant plaintiff's career-ladder promotion to GS-13; the failure to grant prior promotions in a timely manner; the denial of requests for training; and plaintiff's rating of less than "Outstanding" on his performance evaluation). Two of the claims were untimely (i.e., failed to exhaust administrative remedies) and the others simply not proven. As to the timeliness claims, the court rejected the Lilly Ledbetter Fair Pay Act (LLA) argument. Relevantly, here, the court determined, based on circuit precedent, that a promotion decision is not a "discriminatory compensation decision or other practice" under the LLA, to include career ladder as well as other promotions.

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## THE LILLY LEDBETTER FAIR PAY ACT OF 2009

- ❑ *Celestine v. USPS*, 0120103465 (2010): Agency dismissal for untimely counselor contact reversed / LLFPA applied to claim of color and reprisal discrimination as to failure to receive pay increase for 2009 performance rating / allegedly discriminatory compensation decision or practice each time received paycheck
- ❑ *Brakeall v. EPA*, 0120093805 (2010): Agency dismissal of sex discrimination complaint upheld / untimely counselor contact by employee who had retired 12 years previous / claim that each pension payment was an act of discrimination/time period begins running when employee retires / not a continuing violation with each paycheck

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## THE LILLY LEDBETTER FAIR PAY ACT OF 2009

- ❑ *Raulerson v. DOT*, 0120093521 (2009) despite her EEO Counselor contact in March 2009, well beyond the 45-day limitations period, Complainant's contact involving "discrimination in compensation" was timely because it was within 45 days of her receipt of a paycheck, which is sufficient to establish a timely claim under the LLFPA

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## Religious Discrimination

*Tagore v. Department of the Treasury (IRS)*, 735 F.3d 324, 113 LRP 50493 (5th Cir. 11/13/13).

- Complainant's request to wear "*kirpan*" (ceremonial sword) at work as an accommodation of her religious beliefs found by 5th Circuit to be more than "de minimis" cost to employer and therefore not required under Title VII.