

**ABA Labor and Employment Law Section  
Employment Rights and Responsibilities Committee  
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# **Cutting Edges: EEOC Charge Upswing, and New Legislation**

**By**

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**I. EEOC Charge Statistics**

“In FY 2008, we received 95,402 private sector charges of discrimination, a 15.2% increase from FY 2007. We also received 2,666 charges through net transfers from state and local Fair Employment Practices Agencies (FEPAs).”

The above information was downloaded on March 9, 2009, from the EEOC web site, [http://www.eeoc.gov/abouteeoc/plan/par/2008/managements\\_discussion.html#enforcement](http://www.eeoc.gov/abouteeoc/plan/par/2008/managements_discussion.html#enforcement).

The following information was cited to the EEOC, and downloaded on March 9, 2009, from <http://www.msnbc.msn.com/id/29554931/>:

<b>Category</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>Percent Change</b>
Total charges	82,792	95,402	15.2%
Race	30,510	33,937	11.2%
Retaliation	26,663	32,690	22.6%
Sex	24,826	28,372	14.3%

<b>Category</b>	<b>FY 2007</b>	<b>FY 2008</b>	<b>Percent Change</b>
Age	19,103	24,582	28.7%
Disability	17,734	19,453	9.7%
National Origin	9,396	10,601	12.8%
Religion	2,880	3,273	13.6%
Equal Pay Act	818	954	16.6%

## **II. Legislation and Rules Changes**

### **A. Americans with Disabilities Amendments Act, H.R. 3195 and S. 3406**

Signed by the President on September 25, 2008, and is now Public Law No. 110-325.  
The text of the Act is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### SECTION 1. SHORT TITLE.

This Act may be cited as the `ADA Amendments Act of 2008'.

#### SEC. 2. FINDINGS AND PURPOSES.

(a) Findings- Congress finds that--

(1) in enacting the Americans with Disabilities Act of 1990 (ADA), Congress intended that the Act `provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage;

(2) in enacting the ADA, Congress recognized that physical and mental disabilities in no way diminish a person's right to fully participate in all aspects of society, but that people with physical or mental disabilities are frequently precluded from doing so because of prejudice, antiquated attitudes, or the failure to remove societal and institutional barriers;

(3) while Congress expected that the definition of disability under the ADA would be interpreted consistently with how courts had applied the definition of a handicapped individual under the Rehabilitation Act of 1973, that expectation has not been fulfilled;

(4) the holdings of the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases have narrowed the broad scope of protection intended to be afforded by the ADA, thus eliminating protection for many individuals whom Congress intended to protect;

(5) the holding of the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) further narrowed the broad scope of protection intended to be afforded by the ADA;

(6) as a result of these Supreme Court cases, lower courts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities;

(7) in particular, the Supreme Court, in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress; and

(8) Congress finds that the current Equal Employment Opportunity Commission ADA regulations defining the term 'substantially limits' as 'significantly restricted' are inconsistent with congressional intent, by expressing too high a standard.

(b) Purposes- The purposes of this Act are--

(1) to carry out the ADA's objectives of providing 'a clear and comprehensive national mandate for the elimination of discrimination' and 'clear, strong, consistent, enforceable standards addressing discrimination' by reinstating a broad scope of protection to be available under the ADA;

(2) to reject the requirement enunciated by the Supreme Court in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) and its companion cases that whether an impairment substantially limits a major life activity is to be determined with reference to the ameliorative effects of mitigating measures;

(3) to reject the Supreme Court's reasoning in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999) with regard to coverage under the third prong of the definition of disability and to reinstate the reasoning of the Supreme Court in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987) which set forth a broad view of the third prong of the definition of handicap under the Rehabilitation Act of 1973;

(4) to reject the standards enunciated by the Supreme Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), that the terms 'substantially' and 'major' in the definition of disability under the ADA 'need to be interpreted strictly to create a demanding standard for qualifying as disabled,' and that to be substantially limited in performing a major life activity under the ADA 'an individual must have an impairment that prevents or severely restricts

the individual from doing activities that are of central importance to most people's daily lives';

(5) to convey congressional intent that the standard created by the Supreme Court in the case of *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) for 'substantially limits', and applied by lower courts in numerous decisions, has created an inappropriately high level of limitation necessary to obtain coverage under the ADA, to convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis; and

(6) to express Congress' expectation that the Equal Employment Opportunity Commission will revise that portion of its current regulations that defines the term 'substantially limits' as 'significantly restricted' to be consistent with this Act, including the amendments made by this Act.

### SEC. 3. CODIFIED FINDINGS.

Section 2(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12101) is amended--

(1) by amending paragraph (1) to read as follows:

'(1) physical or mental disabilities in no way diminish a person's right to fully participate in all aspects of society, yet many people with physical or mental disabilities have been precluded from doing so because of discrimination; others who have a record of a disability or are regarded as having a disability also have been subjected to discrimination;';

(2) by striking paragraph (7); and

(3) by redesignating paragraphs (8) and (9) as paragraphs (7) and (8), respectively.

### SEC. 4. DISABILITY DEFINED AND RULES OF CONSTRUCTION.

(a) Definition of Disability- Section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102) is amended to read as follows:

#### 'SEC. 3. DEFINITION OF DISABILITY.

'As used in this Act:

'(1) DISABILITY- The term 'disability' means, with respect to an individual--

`(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

`(B) a record of such an impairment; or

`(C) being regarded as having such an impairment (as described in paragraph (3)).

`(2) MAJOR LIFE ACTIVITIES-

`(A) IN GENERAL- For purposes of paragraph (1), major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

`(B) MAJOR BODILY FUNCTIONS- For purposes of paragraph (1), a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

`(3) REGARDED AS HAVING SUCH AN IMPAIRMENT- For purposes of paragraph (1)(C):

`(A) An individual meets the requirement of 'being regarded as having such an impairment' if the individual establishes that he or she has been subjected to an action prohibited under this Act because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.

`(B) Paragraph (1)(C) shall not apply to impairments that are transitory and minor. A transitory impairment is an impairment with an actual or expected duration of 6 months or less.

`(4) RULES OF CONSTRUCTION REGARDING THE DEFINITION OF DISABILITY- The definition of 'disability' in paragraph (1) shall be construed in accordance with the following:

`(A) The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.

`(B) The term 'substantially limits' shall be interpreted consistently with the findings and purposes of the ADA Amendments Act of 2008.

`(C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability.

`(D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.

`(E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as--

`(I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;

`(II) use of assistive technology;

`(III) reasonable accommodations or auxiliary aids or services; or

`(IV) learned behavioral or adaptive neurological modifications.

`(ii) The ameliorative effects of the mitigating measures of ordinary eyeglasses or contact lenses shall be considered in determining whether an impairment substantially limits a major life activity.

`(iii) As used in this subparagraph--

`(I) the term `ordinary eyeglasses or contact lenses' means lenses that are intended to fully correct visual acuity or eliminate refractive error; and

`(II) the term `low-vision devices' means devices that magnify, enhance, or otherwise augment a visual image.'

(b) Conforming Amendment- The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) is further amended by adding after section 3 the following:

#### `SEC. 4. ADDITIONAL DEFINITIONS.

`As used in this Act:

`(1) AUXILIARY AIDS AND SERVICES- The term `auxiliary aids and services' includes--

`(A) qualified interpreters or other effective methods of making aurally delivered materials available to individuals with hearing impairments;

`(B) qualified readers, taped texts, or other effective methods of making visually delivered materials available to individuals with visual impairments;

`(C) acquisition or modification of equipment or devices; and

`(D) other similar services and actions.

`(2) STATE- The term `State' means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands of the United States, the Trust Territory of the Pacific Islands, and the Commonwealth of the Northern Mariana Islands.'

(c) Amendment to the Table of Contents- The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by striking the item relating to section 3 and inserting the following items:

`Sec. 3. Definition of disability.

`Sec. 4. Additional definitions.'

#### SEC. 5. DISCRIMINATION ON THE BASIS OF DISABILITY.

(a) On the Basis of Disability- Section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112) is amended--

(1) in subsection (a), by striking `with a disability because of the disability of such individual' and inserting `on the basis of disability'; and

(2) in subsection (b) in the matter preceding paragraph (1), by striking `discriminate' and inserting `discriminate against a qualified individual on the basis of disability'.

(b) Qualification Standards and Tests Related to Uncorrected Vision- Section 103 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12113) is amended by redesignating subsections (c) and (d) as subsections (d) and (e), respectively, and inserting after subsection (b) the following new subsection:

`(c) Qualification Standards and Tests Related to Uncorrected Vision- Notwithstanding section 3(4)(E)(ii), a covered entity shall not use qualification standards, employment tests, or other selection criteria based on an individual's uncorrected vision unless the standard, test, or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and consistent with business necessity.'

(c) Conforming Amendments-

(1) Section 101(8) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111(8)) is amended--

(A) in the paragraph heading, by striking `WITH A DISABILITY'; and

(B) by striking `with a disability' after `individual' both places it appears.



(2) Section 104(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12114(a)) is amended by striking `the term `qualified individual with a disability' shall' and inserting `a qualified individual with a disability shall'.

#### SEC. 6. RULES OF CONSTRUCTION.

(a) Title V of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201 et seq.) is amended--

(1) by adding at the end of section 501 the following:

`(e) Benefits Under State Worker's Compensation Laws- Nothing in this Act alters the standards for determining eligibility for benefits under State worker's compensation laws or under State and Federal disability benefit programs.

`(f) Fundamental Alteration- Nothing in this Act alters the provision of section 302(b)(2)(A)(ii), specifying that reasonable modifications in policies, practices, or procedures shall be required, unless an entity can demonstrate that making such modifications in policies, practices, or procedures, including academic requirements in postsecondary education, would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations involved.

`(g) Claims of No Disability- Nothing in this Act shall provide the basis for a claim by an individual without a disability that the individual was subject to discrimination because of the individual's lack of disability.

`(h) Reasonable Accommodations and Modifications- A covered entity under title I, a public entity under title II, and any person who owns, leases (or leases to), or operates a place of public accommodation under title III, need not provide a reasonable accommodation or a reasonable modification to policies, practices, or procedures to an individual who meets the definition of disability in section 3(1) solely under subparagraph (C) of such section.';

(2) by redesignating section 506 through 514 as sections 507 through 515, respectively, and adding after section 505 the following:

#### `SEC. 506. RULE OF CONSTRUCTION REGARDING REGULATORY AUTHORITY.

`The authority to issue regulations granted to the Equal Employment Opportunity Commission, the Attorney General, and the Secretary of Transportation under this Act includes the authority to issue regulations implementing the definitions of disability in section 3 (including rules of construction) and the definitions in section 4, consistent with the ADA Amendments Act of 2008.'; and

(3) in section 511 (as redesignated by paragraph (2)) (42 U.S.C. 12211), in subsection (c), by striking `511(b)(3)' and inserting `512(b)(3)'.

(b) The table of contents contained in section 1(b) of the Americans with Disabilities Act of 1990 is amended by redesignating the items relating to sections 506 through 514 as the items relating to sections 507 through 515, respectively, and by inserting after the item relating to section 505 the following new item:

`Sec. 506. Rule of construction regarding regulatory authority.'

#### SEC. 7. CONFORMING AMENDMENTS.

Section 7 of the Rehabilitation Act of 1973 (29 U.S.C. 705) is amended--

(1) in paragraph (9)(B), by striking `a physical' and all that follows through `major life activities', and inserting `the meaning given it in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102)'; and

(2) in paragraph (20)(B), by striking `any person who' and all that follows through the period at the end, and inserting `any person who has a disability as defined in section 3 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12102).'

#### SEC. 8. EFFECTIVE DATE.

This Act and the amendments made by this Act shall become effective on January 1, 2009.

### **B. Consumer Product Safety Commission Reform Act**

Sec. 219 contains the whistleblower protections. Enforcement is through the Department of Labor, but individuals can file suit and obtain trial *de novo* in the district courts if the Department of Labor has not issued a final decision in 210 days. The remedies are reinstatement with back seniority, back pay with interest, and litigation expenses, including attorneys' fees. Sec. 219 provides:

#### **SEC. 219. WHISTLEBLOWER PROTECTIONS.**

(a) In General- The Act (15 U.S.C. 2051 et seq.), as amended by section 206 of this Act, is further amended by adding at the end the following:

#### **`WHISTLEBLOWER PROTECTION**

`Sec. 40. (a) No manufacturer, private labeler, distributor, or retailer, may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment because the employee, whether at the employee's initiative or in the ordinary course of the employee's duties (or any person acting pursuant to a request of the employee)--

(1) provided, caused to be provided, or is about to provide or cause to be provided to the employer, the Federal Government, or the attorney general of a State information relating to any violation of, or any act or omission the employee

reasonably believes to be a violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts;

`(2) testified or is about to testify in a proceeding concerning such violation;

`(3) assisted or participated or is about to assist or participate in such a proceeding; or

`(4) objected to, or refused to participate in, any activity, policy, practice, or assigned task that the employee (or other such person) reasonably believed to be in violation of any provision of this Act or any other Act enforced by the Commission, or any order, rule, regulation, standard, or ban under any such Acts.

`(b)(1) A person who believes that he or she has been discharged or otherwise discriminated against by any person in violation of subsection (a) may, not later than 180 days after the date on which such violation occurs, file (or have any person file on his or her behalf) a complaint with the Secretary of Labor alleging such discharge or discrimination and identifying the person responsible for such act. Upon receipt of such a complaint, the Secretary shall notify, in writing, the person named in the complaint of the filing of the complaint, of the allegations contained in the complaint, of the substance of evidence supporting the complaint, and of the opportunities that will be afforded to such person under paragraph (2).

`(2)(A) Not later than 60 days after the date of receipt of a complaint filed under paragraph (1) and after affording the complainant and the person named in the complaint an opportunity to submit to the Secretary a written response to the complaint and an opportunity to meet with a representative of the Secretary to present statements from witnesses, the Secretary shall initiate an investigation and determine whether there is reasonable cause to believe that the complaint has merit and notify, in writing, the complainant and the person alleged to have committed a violation of subsection (a) of the Secretary's findings. If the Secretary concludes that there is reasonable cause to believe that a violation of subsection (a) has occurred, the Secretary shall accompany the Secretary's findings with a preliminary order providing the relief prescribed by paragraph (3)(B). Not later than 30 days after the date of notification of findings under this paragraph, either the person alleged to have committed the violation or the complainant may file objections to the findings or preliminary order, or both, and request a hearing on the record. The filing of such objections shall not operate to stay any reinstatement remedy contained in the preliminary order. Any such hearing shall be conducted expeditiously. If a hearing is not requested in such 30-day period, the preliminary order shall be deemed a final order that is not subject to judicial review.

`(B)(i) The Secretary shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a prima facie showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

`(ii) Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

`(iii) The Secretary may determine that a violation of subsection (a) has occurred only if the complainant demonstrates that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.

`(iv) Relief may not be ordered under subparagraph (A) if the employer demonstrates by clear and convincing evidence that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

`(3)(A) Not later than 120 days after the date of conclusion of any hearing under paragraph (2), the Secretary shall issue a final order providing the relief prescribed by this paragraph or denying the complaint. At any time before issuance of a final order, a proceeding under this subsection may be terminated on the basis of a settlement agreement entered into by the Secretary, the complainant, and the person alleged to have committed the violation.

`(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) has occurred, the Secretary shall order the person who committed such violation--

`(i) to take affirmative action to abate the violation;

`(ii) to reinstate the complainant to his or her former position together with compensation (including back pay) and restore the terms, conditions, and privileges associated with his or her employment; and

`(iii) to provide compensatory damages to the complainant.

If such an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant for, or in connection with, the bringing of the complaint upon which the order was issued.

`(C) If the Secretary finds that a complaint under paragraph (1) is frivolous or has been brought in bad faith, the Secretary may award to the prevailing employer a reasonable attorneys' fee, not exceeding \$1,000, to be paid by the complainant.

`(4) If the Secretary has not issued a final decision within 210 days after the filing of the complaint, or within 90 days after receiving a written determination, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States with jurisdiction, which shall have jurisdiction over such an action without

regard to the amount in controversy, and which action shall, at the request of either party to such action, be tried by the court with a jury. The proceedings shall be governed by the same legal burdens of proof specified in paragraph (2)(B). The court shall have jurisdiction to grant all relief necessary to make the employee whole, including injunctive relief and compensatory damages, including--

`(A) reinstatement with the same seniority status that the employee would have had, but for the discharge or discrimination;

`(B) the amount of back pay, with interest; and

`(C) compensation for any special damages sustained as a result of the discharge or discrimination, including litigation costs, expert witness fees, and reasonable attorney's fees.

`(5)(A) Unless the complainant brings an action under paragraph (4), any person adversely affected or aggrieved by a final order issued under paragraph (3) may obtain review of the order in the United States Court of Appeals for the circuit in which the violation, with respect to which the order was issued, allegedly occurred or the circuit in which the complainant resided on the date of such violation. The petition for review must be filed not later than 60 days after the date of the issuance of the final order of the Secretary. Review shall conform to chapter 7 of title 5, United States Code. The commencement of proceedings under this subparagraph shall not, unless ordered by the court, operate as a stay of the order.

`(B) An order of the Secretary with respect to which review could have been obtained under subparagraph (A) shall not be subject to judicial review in any criminal or other civil proceeding.

`(6) Whenever any person has failed to comply with an order issued under paragraph (3), the Secretary may file a civil action in the United States district court for the district in which the violation was found to occur, or in the United States district court for the District of Columbia, to enforce such order. In actions brought under this paragraph, the district courts shall have jurisdiction to grant all appropriate relief including, but not limited to, injunctive relief and compensatory damages.

`(7)(A) A person on whose behalf an order was issued under paragraph (3) may commence a civil action against the person to whom such order was issued to require compliance with such order. The appropriate United States district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such order.

`(B) The court, in issuing any final order under this paragraph, may award costs of litigation (including reasonable attorneys' and expert witness fees) to any party whenever the court determines such award is appropriate.

`(c) Any nondiscretionary duty imposed by this section shall be enforceable in a mandamus proceeding brought under section 1361 of title 28, United States Code.

`(d) Subsection (a) shall not apply with respect to an employee of a manufacturer, private labeler, distributor, or retailer who, acting without direction from such manufacturer, private labeler, distributor, or retailer (or such person's agent), deliberately causes a violation of any requirement relating to any violation or alleged violation of any order, regulation, or consumer product safety standard under this Act or any other law enforced by the Commission.'

(b) Conforming Amendment- The table of contents, as amended by section 206 of this Act, is further amended by inserting after the item relating to section 39 the following:

`Sec. 40. Whistleblower protection.'

### **C. Genetic Information Nondiscrimination Act of 2008**

GINA was signed by the President on May 21, 2008, and is now Public Law 110-233, 122 Stat. 881 (2008). The Act draws heavily on Title VII, and in the context of employment gives the same enforcement powers and remedies to the EEOC and persons affected by violations. Title II of the bill covers employment. It prohibits both disparate treatment and disparate impact discrimination. It takes effect November 21, 2009.

The definition of “genetic information” includes the results of “genetic tests” of the individual (except for sex and age) or family members, “the manifestation of a disease or disorder in family members of such individual.” This means that comprehensive physical examinations after the job offer, not prohibited by the ADA, will be unlawful as of November 21, 2009. There are several narrow exceptions as to the gathering of information, but none allow an employer to base employment decisions, or to classify employees, based on the information.

The term “genetic tests” means “an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes,” but “does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.” This means that drug tests are lawful only if they do not detect “genotypes, mutations, or chromosomal changes.”

The text of the relevant provisions of the Act is as follows:

#### **TITLE II--PROHIBITING EMPLOYMENT DISCRIMINATION ON THE BASIS OF GENETIC INFORMATION**

##### **SEC. 201. DEFINITIONS.**

In this title:

(1) COMMISSION- The term `Commission' means the Equal Employment Opportunity Commission as created by section 705 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4).

(2) EMPLOYEE; EMPLOYER; EMPLOYMENT AGENCY; LABOR ORGANIZATION; MEMBER-

(A) IN GENERAL- The term `employee' means--

(i) an employee (including an applicant), as defined in section 701(f) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(f));

(ii) a State employee (including an applicant) described in section 304(a) of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16c(a));

(iii) a covered employee (including an applicant), as defined in section 101 of the Congressional Accountability Act of 1995 (2 U.S.C. 1301);

(iv) a covered employee (including an applicant), as defined in section 411(c) of title 3, United States Code; or

(v) an employee or applicant to which section 717(a) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16(a)) applies.

(B) EMPLOYER- The term `employer' means--

(i) an employer (as defined in section 701(b) of the Civil Rights Act of 1964 (42 U.S.C. 2000e(b)));

(ii) an entity employing a State employee described in section 304(a) of the Government Employee Rights Act of 1991;

(iii) an employing office, as defined in section 101 of the Congressional Accountability Act of 1995;

(iv) an employing office, as defined in section 411(c) of title 3, United States Code; or

(v) an entity to which section 717(a) of the Civil Rights Act of 1964 applies.

(C) EMPLOYMENT AGENCY; LABOR ORGANIZATION- The terms `employment agency' and `labor organization' have the meanings given the terms in section 701 of the Civil Rights Act of 1964 (42 U.S.C. 2000e).

(D) MEMBER- The term `member', with respect to a labor organization, includes an applicant for membership in a labor organization.

(3) FAMILY MEMBER- The term `family member' means, with respect to an individual--

(A) a dependent (as such term is used for purposes of section 701(f)(2) of the Employee Retirement Income Security Act of 1974) of such individual, and

(B) any other individual who is a first-degree, second-degree, third-degree, or fourth-degree relative of such individual or of an individual described in subparagraph (A).

(4) GENETIC INFORMATION-

(A) 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.

(B) INCLUSION OF GENETIC SERVICES AND PARTICIPATION IN GENETIC RESEARCH- Such term includes, with respect to any individual, any request for, or receipt of, genetic services, or participation in clinical research which includes genetic services, by such individual or any family member of such individual.

(C) EXCLUSIONS- The term `genetic information' shall not include information about the sex or age of any individual.

(5) GENETIC MONITORING- The term `genetic monitoring' means the periodic examination of employees to evaluate acquired modifications to their genetic material, such as chromosomal damage or evidence of increased occurrence of mutations, that may have developed in the course of employment due to exposure to toxic substances in the workplace, in order to identify, evaluate, and respond to the effects of or control adverse environmental exposures in the workplace.

(6) GENETIC SERVICES- The term `genetic services' means--

(A) a genetic test;

(B) genetic counseling (including obtaining, interpreting, or assessing genetic information); or

(C) genetic education.

(7) GENETIC TEST-



(A) IN GENERAL- The term `genetic test' means an analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes.

(B) EXCEPTIONS- The term `genetic test' does not mean an analysis of proteins or metabolites that does not detect genotypes, mutations, or chromosomal changes.

## **SEC. 202. EMPLOYER PRACTICES.**

(a) Discrimination Based on Genetic Information- It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire, or to discharge, any employee, or otherwise to discriminate against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or

(2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee.

(b) Acquisition of Genetic Information- It shall be an unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee or a family member of the employee except--

(1) where an employer inadvertently requests or requires family medical history of the employee or family member of the employee;

(2) where--

(A) health or genetic services are offered by the employer, including such services offered as part of a wellness program;

(B) the employee provides prior, knowing, voluntary, and written authorization;

(C) only the employee (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and

(D) any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under subparagraph (A) is only available for purposes of such services and shall

not be disclosed to the employer except in aggregate terms that do not disclose the identity of specific employees;

(3) where an employer requests or requires family medical history from the employee to comply with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws;

(4) where an employer purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history;

(5) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if--

(A) the employer provides written notice of the genetic monitoring to the employee;

(B)(i) the employee provides prior, knowing, voluntary, and written authorization; or

(ii) the genetic monitoring is required by Federal or State law;

(C) the employee is informed of individual monitoring results;

(D) the monitoring is in compliance with--

(i) any Federal genetic monitoring regulations, including any such regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(ii) State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); and

(E) the employer, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific employees; or

(6) where the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification, and requests or requires genetic information of such employer's employees, but only to the

extent that such genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination.

(c) Preservation of Protections- In the case of information to which any of paragraphs (1) through (6) of subsection (b) applies, such information may not be used in violation of paragraph (1) or (2) of subsection (a) or treated or disclosed in a manner that violates section 206.

### **SEC. 203. EMPLOYMENT AGENCY PRACTICES.**

(a) Discrimination Based on Genetic Information- It shall be an unlawful employment practice for an employment agency--

(1) to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of genetic information with respect to the individual;

(2) to limit, segregate, or classify individuals or fail or refuse to refer for employment any individual in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect the status of the individual as an employee, because of genetic information with respect to the individual; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this title.

(b) Acquisition of Genetic Information- It shall be an unlawful employment practice for an employment agency to request, require, or purchase genetic information with respect to an individual or a family member of the individual except--

(1) where an employment agency inadvertently requests or requires family medical history of the individual or family member of the individual;

(2) where--

(A) health or genetic services are offered by the employment agency, including such services offered as part of a wellness program;

(B) the individual provides prior, knowing, voluntary, and written authorization;

(C) only the individual (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and

(D) any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under

subparagraph (A) is only available for purposes of such services and shall not be disclosed to the employment agency except in aggregate terms that do not disclose the identity of specific individuals;

(3) where an employment agency requests or requires family medical history from the individual to comply with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws;

(4) where an employment agency purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history; or

(5) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if--

(A) the employment agency provides written notice of the genetic monitoring to the individual;

(B)(i) the individual provides prior, knowing, voluntary, and written authorization; or

(ii) the genetic monitoring is required by Federal or State law;

(C) the individual is informed of individual monitoring results;

(D) the monitoring is in compliance with--

(i) any Federal genetic monitoring regulations, including any such regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(ii) State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); and

(E) the employment agency, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific individuals.

(c) Preservation of Protections- In the case of information to which any of paragraphs (1) through (5) of subsection (b) applies, such information may not be used in violation of

paragraph (1), (2), or (3) of subsection (a) or treated or disclosed in a manner that violates section 206.

#### **SEC. 204. LABOR ORGANIZATION PRACTICES.**

(a) **Discrimination Based on Genetic Information-** It shall be an unlawful employment practice for a labor organization--

(1) to exclude or to expel from the membership of the organization, or otherwise to discriminate against, any member because of genetic information with respect to the member;

(2) to limit, segregate, or classify the members of the organization, or fail or refuse to refer for employment any member, in any way that would deprive or tend to deprive any member of employment opportunities, or otherwise adversely affect the status of the member as an employee, because of genetic information with respect to the member; or

(3) to cause or attempt to cause an employer to discriminate against a member in violation of this title.

(b) **Acquisition of Genetic Information-** It shall be an unlawful employment practice for a labor organization to request, require, or purchase genetic information with respect to a member or a family member of the member except--

(1) where a labor organization inadvertently requests or requires family medical history of the member or family member of the member;

(2) where--

(A) health or genetic services are offered by the labor organization, including such services offered as part of a wellness program;

(B) the member provides prior, knowing, voluntary, and written authorization;

(C) only the member (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and

(D) any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under subparagraph (A) is only available for purposes of such services and shall not be disclosed to the labor organization except in aggregate terms that do not disclose the identity of specific members;

(3) where a labor organization requests or requires family medical history from the members to comply with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws;

(4) where a labor organization purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history; or

(5) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if--

(A) the labor organization provides written notice of the genetic monitoring to the member;

(B)(i) the member provides prior, knowing, voluntary, and written authorization; or

(ii) the genetic monitoring is required by Federal or State law;

(C) the member is informed of individual monitoring results;

(D) the monitoring is in compliance with--

(i) any Federal genetic monitoring regulations, including any such regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(ii) State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); and

(E) the labor organization, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific members.

(c) Preservation of Protections- In the case of information to which any of paragraphs (1) through (5) of subsection (b) applies, such information may not be used in violation of paragraph (1), (2), or (3) of subsection (a) or treated or disclosed in a manner that violates section 206.

## **SEC. 205. TRAINING PROGRAMS.**

(a) Discrimination Based on Genetic Information- It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs--

(1) to discriminate against any individual because of genetic information with respect to the individual in admission to, or employment in, any program established to provide apprenticeship or other training or retraining;

(2) to limit, segregate, or classify the applicants for or participants in such apprenticeship or other training or retraining, or fail or refuse to refer for employment any individual, in any way that would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect the status of the individual as an employee, because of genetic information with respect to the individual; or

(3) to cause or attempt to cause an employer to discriminate against an applicant for or a participant in such apprenticeship or other training or retraining in violation of this title.

(b) Acquisition of Genetic Information- It shall be an unlawful employment practice for an employer, labor organization, or joint labor-management committee described in subsection (a) to request, require, or purchase genetic information with respect to an individual or a family member of the individual except--

(1) where the employer, labor organization, or joint labor-management committee inadvertently requests or requires family medical history of the individual or family member of the individual;

(2) where--

(A) health or genetic services are offered by the employer, labor organization, or joint labor-management committee, including such services offered as part of a wellness program;

(B) the individual provides prior, knowing, voluntary, and written authorization;

(C) only the individual (or family member if the family member is receiving genetic services) and the licensed health care professional or board certified genetic counselor involved in providing such services receive individually identifiable information concerning the results of such services; and

(D) any individually identifiable genetic information provided under subparagraph (C) in connection with the services provided under subparagraph (A) is only available for purposes of such services and shall not be disclosed to the employer, labor organization, or joint labor-

management committee except in aggregate terms that do not disclose the identity of specific individuals;

(3) where the employer, labor organization, or joint labor-management committee requests or requires family medical history from the individual to comply with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws;

(4) where the employer, labor organization, or joint labor-management committee purchases documents that are commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family medical history;

(5) where the information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if--

(A) the employer, labor organization, or joint labor-management committee provides written notice of the genetic monitoring to the individual;

(B)(i) the individual provides prior, knowing, voluntary, and written authorization; or

(ii) the genetic monitoring is required by Federal or State law;

(C) the individual is informed of individual monitoring results;

(D) the monitoring is in compliance with--

(i) any Federal genetic monitoring regulations, including any such regulations that may be promulgated by the Secretary of Labor pursuant to the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.), the Federal Mine Safety and Health Act of 1977 (30 U.S.C. 801 et seq.), or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.); or

(ii) State genetic monitoring regulations, in the case of a State that is implementing genetic monitoring regulations under the authority of the Occupational Safety and Health Act of 1970 (29 U.S.C. 651 et seq.); and

(E) the employer, labor organization, or joint labor-management committee, excluding any licensed health care professional or board certified genetic counselor that is involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific individuals; or



(6) where the employer conducts DNA analysis for law enforcement purposes as a forensic laboratory or for purposes of human remains identification, and requests or requires genetic information of such employer's apprentices or trainees, but only to the extent that such genetic information is used for analysis of DNA identification markers for quality control to detect sample contamination.

(c) Preservation of Protections- In the case of information to which any of paragraphs (1) through (6) of subsection (b) applies, such information may not be used in violation of paragraph (1), (2), or (3) of subsection (a) or treated or disclosed in a manner that violates section 206.

## **SEC. 206. CONFIDENTIALITY OF GENETIC INFORMATION.**

(a) Treatment of Information as Part of Confidential Medical Record- If an employer, employment agency, labor organization, or joint labor-management committee possesses genetic information about an employee or member, such information shall be maintained on separate forms and in separate medical files and be treated as a confidential medical record of the employee or member. An employer, employment agency, labor organization, or joint labor-management committee shall be considered to be in compliance with the maintenance of information requirements of this subsection with respect to genetic information subject to this subsection that is maintained with and treated as a confidential medical record under section 102(d)(3)(B) of the Americans With Disabilities Act (42 U.S.C. 12112(d)(3)(B)).

(b) Limitation on Disclosure- An employer, employment agency, labor organization, or joint labor-management committee shall not disclose genetic information concerning an employee or member except--

(1) to the employee or member of a labor organization (or family member if the family member is receiving the genetic services) at the written request of the employee or member of such organization;

(2) to an occupational or other health researcher if the research is conducted in compliance with the regulations and protections provided for under part 46 of title 45, Code of Federal Regulations;

(3) in response to an order of a court, except that--

(A) the employer, employment agency, labor organization, or joint labor-management committee may disclose only the genetic information expressly authorized by such order; and

(B) if the court order was secured without the knowledge of the employee or member to whom the information refers, the employer, employment agency, labor organization, or joint labor-management committee shall inform the employee or member of the court order and any genetic information that was disclosed pursuant to such order;

(4) to government officials who are investigating compliance with this title if the information is relevant to the investigation;

(5) to the extent that such disclosure is made in connection with the employee's compliance with the certification provisions of section 103 of the Family and Medical Leave Act of 1993 (29 U.S.C. 2613) or such requirements under State family and medical leave laws; or

(6) to a Federal, State, or local public health agency only with regard to information that is described in section 201(4)(A)(iii) and that concerns a contagious disease that presents an imminent hazard of death or life-threatening illness, and that the employee whose family member or family members is or are the subject of a disclosure under this paragraph is notified of such disclosure.

(c) Relationship to HIPAA Regulations- With respect to the regulations promulgated by the Secretary of Health and Human Services under part C of title XI of the Social Security Act (42 U.S.C. 1320d et seq.) and section 264 of the Health Insurance Portability and Accountability Act of 1996 (42 U.S.C. 1320d-2 note), this title does not prohibit a covered entity under such regulations from any use or disclosure of health information that is authorized for the covered entity under such regulations. The previous sentence does not affect the authority of such Secretary to modify such regulations.

## **SEC. 207. REMEDIES AND ENFORCEMENT.**

(a) Employees Covered by Title VII of the Civil Rights Act of 1964-

(1) IN GENERAL- The powers, procedures, and remedies provided in sections 705, 706, 707, 709, 710, and 711 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-4 et seq.) to the Commission, the Attorney General, or any person, alleging a violation of title VII of that Act (42 U.S.C. 2000e et seq.) shall be the powers, procedures, and remedies this title provides to the Commission, the Attorney General, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee described in section 201(2)(A)(i), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to the Commission, the Attorney General, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to the Commission, the Attorney General, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(b) Employees Covered by Government Employee Rights Act of 1991-

(1) IN GENERAL- The powers, remedies, and procedures provided in sections 302 and 304 of the Government Employee Rights Act of 1991 (42 U.S.C. 2000e-16b, 2000e-16c) to the Commission, or any person, alleging a violation of section 302(a)(1) of that Act (42 U.S.C. 2000e-16b(a)(1)) shall be the powers, remedies, and procedures this title provides to the Commission, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee described in section 201(2)(A)(ii), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to the Commission, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to the Commission, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(c) Employees Covered by Congressional Accountability Act of 1995-

(1) IN GENERAL- The powers, remedies, and procedures provided in the Congressional Accountability Act of 1995 (2 U.S.C. 1301 et seq.) to the Board (as defined in section 101 of that Act (2 U.S.C. 1301)), or any person, alleging a violation of section 201(a)(1) of that Act (42 U.S.C. 1311(a)(1)) shall be the powers, remedies, and procedures this title provides to that Board, or any person, alleging an unlawful employment practice in violation of this title against an employee described in section 201(2)(A)(iii), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to that Board, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to that Board, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(4) OTHER APPLICABLE PROVISIONS- With respect to a claim alleging a practice described in paragraph (1), title III of the Congressional Accountability Act of 1995 (2 U.S.C. 1381 et seq.) shall apply in the same manner as such title applies with respect to a claim alleging a violation of section 201(a)(1) of such Act (2 U.S.C. 1311(a)(1)).

(d) Employees Covered by Chapter 5 of Title 3, United States Code-

(1) IN GENERAL- The powers, remedies, and procedures provided in chapter 5 of title 3, United States Code, to the President, the Commission, the Merit Systems Protection Board, or any person, alleging a violation of section 411(a)(1) of that title, shall be the powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee described in section 201(2)(A)(iv), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to the President, the Commission, such Board, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(e) Employees Covered by Section 717 of the Civil Rights Act of 1964-

(1) IN GENERAL- The powers, remedies, and procedures provided in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) to the Commission, the Attorney General, the Librarian of Congress, or any person, alleging a violation of that section shall be the powers, remedies, and procedures this title provides to the Commission, the Attorney General, the Librarian of Congress, or any person, respectively, alleging an unlawful employment practice in violation of this title against an employee or applicant described in section 201(2)(A)(v), except as provided in paragraphs (2) and (3).

(2) COSTS AND FEES- The powers, remedies, and procedures provided in subsections (b) and (c) of section 722 of the Revised Statutes of the United States (42 U.S.C. 1988), shall be powers, remedies, and procedures this title provides to the Commission, the Attorney General, the Librarian of Congress, or any person, alleging such a practice.

(3) DAMAGES- The powers, remedies, and procedures provided in section 1977A of the Revised Statutes of the United States (42 U.S.C. 1981a), including the limitations contained in subsection (b)(3) of such section 1977A, shall be powers, remedies, and procedures this title provides to the Commission, the Attorney General, the Librarian of Congress, or any person, alleging such a practice (not an employment practice specifically excluded from coverage under section 1977A(a)(1) of the Revised Statutes of the United States).

(f) Prohibition Against Retaliation- No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this title or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title. The remedies and procedures otherwise provided for under this section shall be available to aggrieved individuals with respect to violations of this subsection.

(g) Definition- In this section, the term `Commission' means the Equal Employment Opportunity Commission.

#### **SEC. 208. DISPARATE IMPACT.**

(a) General Rule- Notwithstanding any other provision of this Act, `disparate impact', as that term is used in section 703(k) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-2(k)), on the basis of genetic information does not establish a cause of action under this Act.

(b) Commission- On the date that is 6 years after the date of enactment of this Act, there shall be established a commission, to be known as the Genetic Nondiscrimination Study Commission (referred to in this section as the `Commission') to review the developing science of genetics and to make recommendations to Congress regarding whether to provide a disparate impact cause of action under this Act.

(c) Membership-

(1) IN GENERAL- The Commission shall be composed of 8 members, of which--

(A) 1 member shall be appointed by the Majority Leader of the Senate;

(B) 1 member shall be appointed by the Minority Leader of the Senate;

(C) 1 member shall be appointed by the Chairman of the Committee on Health, Education, Labor, and Pensions of the Senate;

(D) 1 member shall be appointed by the ranking minority member of the Committee on Health, Education, Labor, and Pensions of the Senate;

(E) 1 member shall be appointed by the Speaker of the House of Representatives;

(F) 1 member shall be appointed by the Minority Leader of the House of Representatives;

(G) 1 member shall be appointed by the Chairman of the Committee on Education and Labor of the House of Representatives; and

(H) 1 member shall be appointed by the ranking minority member of the Committee on Education and Labor of the House of Representatives.

(2) COMPENSATION AND EXPENSES- The members of the Commission shall not receive compensation for the performance of services for the Commission, but shall be allowed travel expenses, including per diem in lieu of subsistence, at rates authorized for employees of agencies under subchapter I of chapter 57 of title 5, United States Code, while away from their homes or regular places of business in the performance of services for the Commission.

(d) Administrative Provisions-

(1) LOCATION- The Commission shall be located in a facility maintained by the Equal Employment Opportunity Commission.

(2) DETAIL OF GOVERNMENT EMPLOYEES- Any Federal Government employee may be detailed to the Commission without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

(3) INFORMATION FROM FEDERAL AGENCIES- The Commission may secure directly from any Federal department or agency such information as the Commission considers necessary to carry out the provisions of this section. Upon request of the Commission, the head of such department or agency shall furnish such information to the Commission.

(4) HEARINGS- The Commission may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Commission considers advisable to carry out the objectives of this section, except that, to the extent possible, the Commission shall use existing data and research.

(5) POSTAL SERVICES- The Commission may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

(e) Report- Not later than 1 year after all of the members are appointed to the Commission under subsection (c)(1), the Commission shall submit to Congress a report that summarizes the findings of the Commission and makes such recommendations for legislation as are consistent with this Act.

(f) Authorization of Appropriations- There are authorized to be appropriated to the Equal Employment Opportunity Commission such sums as may be necessary to carry out this section.

## SEC. 209. CONSTRUCTION.

(a) In General- Nothing in this title shall be construed to--

(1) limit the rights or protections of an individual under any other Federal or State statute that provides equal or greater protection to an individual than the rights or protections provided for under this title, including the protections of an individual under the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.) (including coverage afforded to individuals under section 102 of such Act (42 U.S.C. 12112)), or under the Rehabilitation Act of 1973 (29 U.S.C. 701 et seq.);

(2)(A) limit the rights or protections of an individual to bring an action under this title against an employer, employment agency, labor organization, or joint labor-management committee for a violation of this title; or

(B) provide for enforcement of, or penalties for violation of, any requirement or prohibition applicable to any employer, employment agency, labor organization, or joint labor-management committee subject to enforcement for a violation under--

(i) the amendments made by title I of this Act;

(ii)(I) subsection (a) of section 701 of the Employee Retirement Income Security Act of 1974 as such section applies with respect to genetic information pursuant to subsection (b)(1)(B) of such section;

(II) section 702(a)(1)(F) of such Act; or

(III) section 702(b)(1) of such Act as such section applies with respect to genetic information as a health status-related factor;

(iii)(I) subsection (a) of section 2701 of the Public Health Service Act as such section applies with respect to genetic information pursuant to subsection (b)(1)(B) of such section;

(II) section 2702(a)(1)(F) of such Act; or

(III) section 2702(b)(1) of such Act as such section applies with respect to genetic information as a health status-related factor; or

(iv)(I) subsection (a) of section 9801 of the Internal Revenue Code of 1986 as such section applies with respect to genetic information pursuant to subsection (b)(1)(B) of such section;

(II) section 9802(a)(1)(F) of such Act; or

(III) section 9802(b)(1) of such Act as such section applies with respect to genetic information as a health status-related factor;

- (3) apply to the Armed Forces Repository of Specimen Samples for the Identification of Remains;
- (4) limit or expand the protections, rights, or obligations of employees or employers under applicable workers' compensation laws;
- (5) limit the authority of a Federal department or agency to conduct or sponsor occupational or other health research that is conducted in compliance with the regulations contained in part 46 of title 45, Code of Federal Regulations (or any corresponding or similar regulation or rule);
- (6) limit the statutory or regulatory authority of the Occupational Safety and Health Administration or the Mine Safety and Health Administration to promulgate or enforce workplace safety and health laws and regulations; or
- (7) require any specific benefit for an employee or member or a family member of an employee or member under any group health plan or health insurance issuer offering group health insurance coverage in connection with a group health plan.

(b) Genetic Information of a Fetus or Embryo- Any reference in this title to genetic information concerning an individual or family member of an individual shall--

- (1) with respect to such an individual or family member of an individual who is a pregnant woman, include genetic information of any fetus carried by such pregnant woman; and
- (2) with respect to an individual or family member utilizing an assisted reproductive technology, include genetic information of any embryo legally held by the individual or family member.

(c) Relation to Authorities Under Title I- With respect to a group health plan, or a health insurance issuer offering group health insurance coverage in connection with a group health plan, this title does not prohibit any activity of such plan or issuer that is authorized for the plan or issuer under any provision of law referred to in clauses (i) through (iv) of subsection (a)(2)(B).

## **SEC. 210. MEDICAL INFORMATION THAT IS NOT GENETIC INFORMATION.**

An employer, employment agency, labor organization, or joint labor-management committee shall not be considered to be in violation of this title based on the use, acquisition, or disclosure of medical information that is not genetic information about a manifested disease, disorder, or pathological condition of an employee or member, including a manifested disease, disorder, or pathological condition that has or may have a genetic basis.

## **SEC. 211. REGULATIONS.**



Not later than 1 year after the date of enactment of this title, the Commission shall issue final regulations to carry out this title.

**SEC. 212. AUTHORIZATION OF APPROPRIATIONS.**

There are authorized to be appropriated such sums as may be necessary to carry out this title (except for section 208).

**SEC. 213. EFFECTIVE DATE.**

This title takes effect on the date that is 18 months after the date of enactment of this Act.

**D. Civil Rights Tax Relief Act**

This is expected to be re-introduced.

**E. Civil Rights Act of 2009**

An omnibus civil rights bill is expected to be introduced.

**F. Lilly Ledbetter Fair Pay Act of 2009**

The Act is Public Law 111-2, and became law on January 29, 2009. It provides:

SECTION 1. SHORT TITLE.

This Act may be cited as the ``Lilly Ledbetter Fair Pay Act of 2009''.

SEC. 2. FINDINGS.

Congress finds the following:

(1) The Supreme Court in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades. The *Ledbetter* decision undermines those statutory protections by unduly restricting the time period in which victims of discrimination can challenge and recover for discriminatory compensation decisions or other practices, contrary to the intent of Congress.

(2) The limitation imposed by the Court on the filing of discriminatory compensation claims ignores the reality of wage discrimination and is at odds with the robust application of the civil rights laws that Congress intended.

(3) With regard to any charge of discrimination under any law, nothing in this Act is intended to preclude or limit an aggrieved person's right to introduce evidence of an unlawful employment practice that has occurred outside the time for filing a charge of discrimination.

(4) Nothing in this Act is intended to change current law treatment of when pension distributions are considered paid.

### SEC. 3. DISCRIMINATION IN COMPENSATION BECAUSE OF RACE, COLOR, RELIGION, SEX, OR NATIONAL ORIGIN.

Section 706(e) of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5(e)) is amended by adding at the end the following:

“(3)(A) For purposes of this section, an unlawful employment practice occurs, with respect to discrimination in compensation in violation of this title, 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.

“(B) In addition to any relief authorized by section 1977A of the Revised Statutes (42 U.S.C. 1981a), liability may accrue and an aggrieved person may obtain relief as provided in subsection (g)(1), including recovery of back pay for up to two years preceding the filing of the charge, where the unlawful employment practices that have occurred during the charge filing period are similar or related to unlawful employment practices with regard to discrimination in compensation that occurred outside the time for filing a charge.”.

### SEC. 4. DISCRIMINATION IN COMPENSATION BECAUSE OF AGE.

Section 7(d) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(d)) is amended--

(1) in the first sentence--

(A) by redesignating paragraphs (1) and (2) as subparagraphs (A) and (B), respectively; and

(B) by striking “(d)” and inserting “(d)(1)”;

(2) in the third sentence, by striking “Upon” and inserting the following:

“(2) Upon”; and

(3) by adding at the end the following:

“(3) For purposes of this section, an unlawful practice occurs, with respect to discrimination in compensation in violation of this Act, when a discriminatory compensation decision or other practice is adopted, when a person becomes subject to a discriminatory compensation decision or other practice, or when a person 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."

## SEC. 5. APPLICATION TO OTHER LAWS.

(a) Americans With Disabilities Act of 1990.--The amendments made by section 3 shall apply to claims of discrimination in compensation brought under title I and section 503 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq., 12203), pursuant to section 107(a) of such Act (42 U.S.C. 12117(a)), which adopts the powers, remedies, and procedures set forth in section 706 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5).

(b) Rehabilitation Act of 1973.—The amendments made by section 3 shall apply to claims of discrimination in compensation brought under sections 501 and 504 of the Rehabilitation Act of 1973 (29 U.S.C. 791, 794), pursuant to--

(1) sections 501(g) and 504(d) of such Act (29 U.S.C. 791(g), 794(d)), respectively, which adopt the standards applied under title I of the Americans with Disabilities Act of 1990 for determining whether a violation has occurred in a complaint alleging employment discrimination; and

(2) paragraphs (1) and (2) of section 505(a) of such Act (29 U.S.C. 794a(a)) (as amended by subsection (c)).

(c) Conforming Amendments.--

(1) Rehabilitation act of 1973.--Section 505(a) of the Rehabilitation Act of 1973 (29 U.S.C. 794a(a)) is amended--

(A) in paragraph (1), by inserting after "(42 U.S.C. 2000e-5 (f) through (k))" the following: "(and the application of section 706(e)(3) (42 U.S.C. 2000e-5(e)(3)) to claims of discrimination in compensation)"; and

(B) in paragraph (2), by inserting after "1964" the following: "(42 U.S.C. 2000d et seq.) (and in subsection (e)(3) of section 706 of such Act (42 U.S.C. 2000e-5), applied to claims of discrimination in compensation)".

(2) Civil rights act of 1964.--Section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) is amended by adding at the end the following:

"(f) Section 706(e)(3) shall apply to complaints of discrimination in compensation under this section."

(3) Age discrimination in employment act of 1967.—Section 15(f) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 633a(f)) is amended by striking "of section" and inserting "of sections 7(d)(3) and".

## SEC. 6. EFFECTIVE DATE.

This Act, and the amendments made by this Act, take effect as if enacted on May 28, 2007 and apply to all claims of discrimination in compensation under title VII of the Civil Rights Act of 1964 (42 U.S.C. 2000e et seq.), the Age Discrimination in Employment Act of 1967 (29 U.S.C. 621 et seq.), title I and section 503 of the Americans with Disabilities Act of 1990, and sections 501 and 504 of the Rehabilitation Act of 1973, that are pending on or after that date.

### **G. Paycheck Fairness Act of 2009, H.R. 12**

This bill has 198 co-sponsors. It would add compensatory damages as a remedy as all defendants, punitive damages as a remedy for defendants other than the United States, and provide for Rule 23 class treatment rather than opt-in collective-action treatment. The bill would replace the defense for “any other factor other than sex” with a defense for “a bona fide factor other than sex, such as education, training, or experience” that is job-related and consistent with business necessity. It was attached to the Ledbetter bill when that passed the House, but was deleted from it after the Senate passed the Ledbetter bill as a stand-alone bill.

### **H. Arbitration Fairness Act of 2009, H.R. 1020**

H.R. 1020 would amend the FAA by barring the enforcement of any predispute arbitration agreement “if it requires arbitration of” “(1) an employment, consumer, or franchise dispute; or (2) a dispute arising under any statute intended to protect civil rights.” It has 39 co-sponsors in the House.

### **I. American Recovery and Re-Investment Act of 2009**

Sec. 1553 of Pub. L. 111-5 contains the whistleblower protections. Subparagraph (a) contains the broad prohibition:

(a) Prohibition of Reprisals- An employee of any non-Federal employer receiving covered funds may not be discharged, demoted, or otherwise discriminated against as a reprisal for disclosing, including a disclosure made in the ordinary course of an employee's duties, to the Board, an inspector general, the Comptroller General, a member of Congress, a State or Federal regulatory or law enforcement agency, a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct), a court or grand jury, the head of a Federal agency, or their representatives, information that the employee reasonably believes is evidence of--

(1) gross mismanagement of an agency contract or grant relating to covered funds;

(2) a gross waste of covered funds;

(3) a substantial and specific danger to public health or safety related to the implementation or use of covered funds;

(4) an abuse of authority related to the implementation or use of covered funds; or

(5) a violation of law, rule, or regulation related to an agency contract (including the competition for or negotiation of a contract) or grant, awarded or issued relating to covered funds.

Complaints are to be investigated by the Inspector General of the agency, and both the agency and the complainant may sue. Complainants who are retaliated against may sue, and need only show that their reports were a contributing factor in the adverse employment action. They may sue for compensatory damages and other remedies, and jury trial is available.

**J. Tax on Bonuses Paid by TARP Recipients: H.R. 1586**

This was introduced in the House on March 18, 2009, and passed the next day. Its text is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**SECTION 1. BONUSES RECEIVED FROM CERTAIN TARP RECIPIENTS.**

(a) In General- In the case of an employee or former employee of a covered TARP recipient, the tax imposed by chapter 1 of the Internal Revenue Code of 1986 for any taxable year shall not be less than the sum of--

(1) the tax that would be determined under such chapter if the taxable income of the taxpayer for such taxable year were reduced (but not below zero) by the TARP bonus received by the taxpayer during such taxable year, plus

(2) 90 percent of the TARP bonus received by the taxpayer during such taxable year.

(b) TARP Bonus- For purposes of this section--

(1) IN GENERAL- The term `TARP bonus' means, with respect to any individual for any taxable year, the lesser of--

(A) the aggregate disqualified bonus payments received from covered TARP recipients during such taxable year, or

(B) the excess of--

(i) the adjusted gross income of the taxpayer for such taxable year, over

(ii) \$250,000 (\$125,000 in the case of a married individual filing a separate return).

(2) DISQUALIFIED BONUS PAYMENT-

(A) IN GENERAL- The term `disqualified bonus payment' means any retention payment, incentive payment, or other bonus which is in addition to any amount payable to such individual for service performed by such individual at a regular hourly, daily, weekly, monthly, or similar periodic rate.

(B) EXCEPTIONS- Such term shall not include commissions, welfare or fringe benefits, or expense reimbursements.

(C) WAIVER OR RETURN OF PAYMENTS- Such term shall not include any amount if the employee irrevocably waives the employee's entitlement to such payment, or the employee returns such payment to the employer, before the close of the taxable year in which such payment is due. The preceding sentence shall not apply if the employee receives any benefit from the employer in connection with the waiver or return of such payment.

(3) REIMBURSEMENT OF TAX TREATED AS TARP BONUS- Any reimbursement by a covered TARP recipient of the tax imposed under subsection (a) shall be treated as a disqualified bonus payment to the taxpayer liable for such tax.

(c) Covered TARP Recipient- For purposes of this section--

(1) IN GENERAL- The term `covered TARP recipient' means--

(A) any person who receives after December 31, 2007, capital infusions under the Emergency Economic Stabilization Act of 2008 which, in the aggregate, exceed \$5,000,000,000,

(B) the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation,

(C) any person who is a member of the same affiliated group (as defined in section 1504 of the Internal Revenue Code of 1986, determined without regard to paragraphs (2) and (3) of subsection (b)) as a person described in subparagraph (A) or (B), and

(D) any partnership if more than 50 percent of the capital or profits interests of such partnership are owned directly or indirectly by one or more persons described in subparagraph (A), (B), or (C).

(2) EXCEPTION FOR TARP RECIPIENTS WHO REPAY ASSISTANCE- A person shall be treated as described in paragraph (1)(A) for any period only if--

(A) the excess of the aggregate amount of capital infusions described in paragraph (1)(A) with respect to such person over the amounts repaid by such person to the Federal Government with respect to such capital infusions, exceeds

(B) \$5,000,000,000.

(d) Other Definitions- Terms used in this section which are also used in the Internal Revenue Code of 1986 shall have the same meaning when used in this section as when used in such Code.

(e) Coordination With Internal Revenue Code of 1986- Any increase in the tax imposed under chapter 1 of the Internal Revenue Code of 1986 by reason of subsection (a) shall not be treated as a tax imposed by such chapter for purposes of determining the amount of any credit under such chapter or for purposes of section 55 of such Code.

(f) Regulations- The Secretary of the Treasury, or the Secretary's delegate, shall prescribe such regulations or other guidance as may be necessary or appropriate to carry out the purposes of this section.

(g) Effective Date- This section shall apply to disqualified bonus payments received after December 31, 2008, in taxable years ending after such date.