

## Health Information Compliance Alert

### Genetic Privacy: RAILROAD PAYS FOR GENETIC TEST

Playing fast and loose with patient privacy can cause more than just Health Insurance Portability and Accountability Act and state law privacy headaches it also can spark the ire of the **Equal Employment Opportunity Commission**.

The EEOC has turned its gaze upon employer-mandated genetic testing and the result is a landmark settlement that should make companies think twice before trying to sneak such tests into their employees' medical exams.

The EEOC and **Burlington Northern and Santa Fe Railroad Co.** May 8 announced an agreement that will see the company pay \$2.2 million to 36 workers to resolve federal allegations that it violated the Americans with Disabilities Act by conducting or seeking to conduct genetic testing on them without their knowledge or consent. Under a mediated settlement with the EEOC, the company, which has not admitted wrongdoing, also agreed not to include genetic testing in future mandatory medical examinations of its employees.

The case arose when several BNSF employees filed charges with the EEOC alleging that the company required them to submit to a comprehensive medical exam, including a blood test for a specific genetic marker supposedly tied to susceptibility to carpal tunnel syndrome, after they filed claims or internal reports saying they had developed work-related cases of that disorder. The employees also alleged that BNSF retaliated against workers who refused to submit to the examination.

"While the EEOC did not find that BNSF had used genetic tests to screen out employees, employers should be aware of the EEOC's position that the mere gathering of an employee's DNA may constitute a violation of the ADA," said agency Commissioner **Paul Steven Miller**. The settlement has been filed for approval with a Wisconsin federal district court.

While this is the first case in which the EEOC has itself challenged genetic testing under the ADA, it is not the first time the act has been wielded to curb such testing. In December 1999, **Lawrence Berkeley Laboratory**, run jointly by the **U.S. Department of Energy** and the **University of California**, paid \$2.2 million to settle a class action suit that charged the company had violated the ADA and federal and state right-to-privacy laws when it secretly tested thousands of employees for sickle cell trait, syphilis and pregnancy. The lab allegedly tested blood and urine samples that employees had provided as part of a mandatory physical examination performed after hiring. The employees were never told about the tests.