



DOL Releases Updated FMLA Forms - But Do They Comply with the Law?

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The U.S. Department of Labor (DOL) recently released updated Family and Medical Leave Act (FMLA) certification forms. These updated forms replace the previous forms that stated they expired on “December 31, 2011,” and carry a new expiration date of February 28, 2015. However, these updated forms do not include any substantive changes and fail to address a couple of key shortcomings on the previous forms. In particular, the updated forms avoid any references to the additional FMLA rights provided under the 2010 amendments for military family leave, as well as any reference to the “safe harbor” privacy language recommended under the Genetic Information Nondiscrimination Act of 2008 (GINA).

The forms that the DOL has updated are the following:

- Certification of Health Care Provider for Employee’s Serious Health Condition
- Certification of Health Care Provider for Family Member’s Serious Health Condition
- Notice of Eligibility and Rights & Responsibilities
- Designation Notice
- Certification of Qualifying Exigency for Military Family Leave
- Certification for Serious Injury or Illness of Covered Servicemember—for Military Family Leave

The most glaring omission in these new forms is the failure to address GINA. Under GINA, employers are generally prohibited from requesting an applicant’s or employee’s genetic information, even if it is never used. To avoid violating GINA, the U.S. Equal Employment

Opportunity Commission (EEOC) has stated that when an employer makes a request for health-related information, such as to support an employee’s request for leave, the employer should warn the employee and/or health care provider not to provide genetic information in response. The EEOC has offered the following GINA “safe harbor” language for employers to include in such requests and thereby avoid liability under GINA:

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. “Genetic information,” as defined by GINA, includes an individual’s family medical history, the results of an individual’s or family member’s genetic tests, the fact that an individual or an individual’s family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual’s family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.

Also, the updated forms do not account for the changes to exigency leave for military family members, which now is possible as a result of a family member’s call to duty in a foreign country. Indeed, the updated forms still contain the confusing “contingency operation” language of the previous forms. Finally, the forms lack any reference to a servicemember’s past service, which is of particular importance since caregiver leave can now be taken up to five years after the servicemember leaves the military.

Varnum Advisory

We strongly recommend that employers update their FMLA certification forms to include the GINA “safe harbor” language recommended by the EEOC, despite the omission of this language from the DOL’s updated forms. For military and servicemember related leaves, employers may also want to consider using language that addresses the new rules under these provisions. Employers may wish to consult with Varnum’s employment counsel to address any questions or concerns regarding the new forms and how best to incorporate the recommended language into them.

