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Exclusively Representing Management in Labor and Employment Law

FMLA Update

DOL Releases Updated FMLA Forms for Immediate Use

The *good news* is that the United States Department of Labor has finally “updated” its model Family and Medical Leave Act (“FMLA”) certification and notification forms. Many employers have expressed concern because the model FMLA certification and notification forms available from the DOL website still carried an expiration date of December 31, 2011. Although the DOL had informed employers that they could continue to use the outdated forms, the new forms carry an expiration date of February 28, 2015, which is displayed in the upper right corner. As was the case with the old forms, employers may use the DOL forms or they can develop their own versions using the DOL forms as models.

The *bad news* is that the DOL missed the opportunity to include some critical information in these new forms: the update is limited to a change in the expiration date. Unfortunately, the new forms do not include changes required by the 2010 military family leave amendments, nor do they address information recommended to insure compliance with the Genetic Information Nondiscrimination Act. We’re hopeful that the DOL may reissue new forms later in the year to address these topics, but meanwhile, here is a brief reminder of the concerns raised by these two statutes.

The 2010 Military Family Leave Amendments

In 2009, Congress amended the FMLA through the National Defense Authorization Act for Fiscal Year 2010 (2010 NDAA). Section 565 of the 2010 NDAA expanded coverage for “qualifying exigency” leave and extended that leave to eligible employees with covered family members in the Regular Armed Forces who are called to duty in a foreign country. The amendment also extended “military caregiver leave” to eligible employees who are the spouse, son, daughter, parent, or next of kin of certain veterans with a “serious injury or illness.” Unfortunately, DOL’s updated forms do not address these changes, so employers will still need to be sure that their communications with employees cover these possibilities.

GINA Privacy Language

Under GINA, employers who ask for any medical information must tell the health care provider that they do not want any genetic information about their employees. However, if an employer receives genetic information in response to a request for FMLA leave, the employer will not be considered to have violated GINA if the employer has warned both the employee and his/her health care provider *not* to provide any genetic information.

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With this in mind, the EEOC provided language that the agency suggested employers add to forms that seek health information. We have recommended that employers either add the EEOC language to any form (FMLA or otherwise) if that form seeks health-related information from their employees. You can either add this language on your own FMLA forms, or, if you use the DOL forms, you can attach a separate sheet with the language to the DOL medical certification forms. The EEOC's suggested language reads as follows:

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.

Even with this warning, a health care provider may give you genetic information, but if you attach this warning, the acquisition of that genetic information will be considered inadvertent. You should attach or incorporate this warning to all requests for medical information, including recertification requests.

The updated DOL model FMLA forms with the new expiration date can be found on the following links:

- [Certification of Health Care Provider for Employee's Serious Health Condition \(WH-380-E\)](#)
- [Certification of Health Care Provider for Family Member's Serious Health Condition \(WH-380-F\)](#)
- [Notice of Eligibility and Rights & Responsibilities \(WH-381\)](#)
- [Designation Notice \(WH-382\)](#)
- [Certification of Qualifying Exigency For Military Family Leave \(WH-384\)](#)
- [Certification for Serious Injury or Illness of Covered Servicemember for Military Family Leave \(WH-385\)](#)

If you need assistance in determining your obligations under the FMLA, please contact any of the attorneys at Skoler, Abbott & Presser, P.C., for further guidance.

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