



The DOL's FMLA Forms Expired on December 31, 2011. Should Employers Still Use Them?

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The current forms approved by the U.S. Department of Labor (DOL) for obtaining medical certifications under the Family and Medical Leave Act (FMLA) expired on December 31, 2011. However, under an extension of time permitted pursuant to the Paperwork Reduction Act of 1995 the DOL has re-submitted its current FMLA forms to the Office of Management and Budget (OMB) for renewal of the approval granted originally in December 2008. The law permits the DOL to continue using the forms while it seeks renewal of the forms. Thus, employers may continue to use the DOL's FMLA forms, although consider our suggestions below before using these standard DOL forms.

Q. Even if employers can continue to use the DOL's FMLA forms, should they?

A. Yes, but. . . . Employers should proceed with caution. At the very least the employer should be mindful of the following and make appropriate changes in 2012 and beyond:

Add the GINA safe harbor provision to your FMLA notices and forms.

The Genetic Information Nondiscrimination Act (GINA) requires employers requesting medical certification or fitness for duty certification to instruct health care providers *not* to collect or provide any genetic information about the employee who is the subject of the request. Thus , employers should add the "GINA Safe-Harbor" language to their FMLA medical certification forms both for an employee's own serious health condition and when an employee is seeking to care for a family member with a serious health condition. Here is the language you should include:

Employee's Serious Health Condition

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.

Family Member's Serious Health Condition

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 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. Please provide medical history information regarding your patient only to the extent necessary to fully respond to all relevant items below.

This language should be added to employers' FMLA medical certification forms or to other written documentation that accompanies the form when it is sent to the health care provider. It also should be used whenever a fitness for duty certification is requested. In fact, it is a good idea to include the Safe Harbor language in any correspondence to a health care provider where the employer is requesting medical information about an employee or his family member. (*e.g.*, when seeking information regarding a request for an ADA accommodation). Employers should consider adapting the DOL's "model" FMLA forms to suit their own needs. The DOL's "model" FMLA forms are not perfect; in fact they fall short in several respects. These include:

- Since the DOL's forms are designed as a "one-size-fits-all" solution, they also include extraneous information that will not apply to all or even most employers, and do not reflect individual employers' policies and procedures.
- The DOL medical certification forms fail to request all of the information that employers may require, such as information regarding an employee's work restrictions;
- The model designation notice does not include language addressing the rules for fitness-for-duty certifications for intermittent or reduced work schedule leave, which will be crucial to combat FMLA misuse and abuse; and,
- The forms do not account for the changes to exigency leave, which now is possible as a result of a family member's call to duty in a foreign country (as opposed to the confusing "contingency operation" language originally used).

Employers must take care when altering the language of the DOL's "model" FMLA forms so that they do not request information that must be excluded from such requests. Employers should update their notices and forms regarding the change to exigency leave above.

Our management clients should work closely with us in developing, reviewing and approving the forms, policies and procedures so that they will be able to preserve and fully take advantage of their rights under the FMLA regulations while they also fully comply with the rules.