

LEGISLATIVE BRIEF

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Status of the DOL's Model FMLA Forms

To administer leaves under the Family and Medical Leave Act (FMLA), employers must provide certain notices to employees, such as notice designating whether a requested leave will qualify as FMLA leave. Employers may also require that employees provide certifications to substantiate their eligibility for certain types of FMLA leave.

The Department of Labor (DOL) has provided model notices and certifications to help employers administer FMLA leaves. The DOL's model FMLA forms are optional; employers may decide to customize the DOL's model forms or create their own FMLA forms.

Issues with the model forms' expiration dates have led to some confusion. This Higginbotham Legislative Brief clarifies the current status of the DOL's model FMLA forms.

TYPES OF MODEL FORMS

The DOL's FMLA forms include:

- A notice of FMLA eligibility and rights and responsibilities (Form WH-381);
- An FMLA designation notice (Form WH-382);
- A health care provider's certification form for an employee's serious health condition (WH-380-E);
- A health care provider's certification form for a family member's serious health condition (WH-380-F);
- A certification of qualifying exigency for military family leave (WH-384); and
- A certification for serious injury or illness of a covered servicemember (WH-385).

In addition, the DOL has provided a model FMLA poster, which is available in both English and Spanish, for employers to post in the workplace.

The DOL's model FMLA forms are available at: www.dol.gov/whd/fmla/index.htm.

CURRENT STATUS

The DOL's model forms were prepared in 2008 after statutory and regulatory changes were made to the FMLA. However, because the model forms have not been updated in over three years, there have been issues with the forms' expiration date. Also, the model forms do not contain the most recent legislative updates to the FMLA's military family leave provisions, and the certification forms do not contain safe harbor language regarding the Genetic Information and Nondiscrimination Act (GINA).

Expiration Date

The model forms contain an expiration date in the upper right corner. When the DOL created these forms, it had to submit them to the federal Office of Management and Budget (OMB) for approval. The OMB approved the forms for three years, which was the maximum time period allowed. The forms originally expired on Dec. 31, 2011.

Status of the DOL's Model FMLA Forms

As the forms were expiring, the DOL re-submitted them to the OMB for renewal. According to the DOL, the model forms were still valid when they were pending renewal, and employers could continue to use them.

At first, the forms' expiration date was extended until Jan. 31, 2012. It was later extended again until Feb. 29, 2012. Most recently, the expiration date was revised to **Feb. 28, 2015**.

Military Family Leave

The DOL's model forms do not incorporate the legislative changes made in 2009 to the FMLA's military family leave entitlements. Due to the 2009 changes, qualifying exigency leave is available to members of the **Regular Armed Forces** who are called to duty in a foreign county, in addition to members of the National Guard or Reserves. Also, military caregiver leave is available to family members of covered servicemembers with a serious injury or illness that was incurred **or aggravated** in the line of duty on active duty in the Armed Forces.

GINA

Title II of GINA, which applies to employers with 15 or more employees, prohibits employers from discriminating against employees or applicants on the basis of **genetic information**. "Genetic information" includes information about an individual's genetic tests and the genetic tests of an individual's family members, as well as information about the manifestation of a disease or disorder in an individual's family members (that is, family medical history).

Under GINA, employers may not request genetic information, subject to a handful of narrow exceptions. As one of these exceptions, GINA permits employers to request family medical history as part of the certification process for FMLA leave (or leave under similar state or local laws or pursuant to an employer policy), where an employee is asking for leave to care for a family member. This exception does not apply when an employee is asking for leave because of his or her own serious health condition. In addition, employers do not violate GINA if they inadvertently acquire genetic information.

Employers that request medical information as part of the FMLA leave certification process should include safe harbor language regarding GINA's restrictions on collecting genetic information. This safe harbor language protects employers in the event they receive genetic information. This statement could be contained in a separate notice to the health care provider, or it could be included in the FMLA certification forms. However, the DOL's model forms do not contain this GINA language.

WHAT SHOULD EMPLOYERS DO NOW?

At this point, it is not clear when the DOL will update its model FMLA forms.

On Feb. 15, 2012, the DOL issued proposed regulations on the FMLA's military family leave provisions. In the regulations' preamble, the DOL noted that it intends to update its model FMLA forms for the FMLA's statutory changes. The DOL may wait to provide these updated forms until it issues final regulations on the FMLA's military family leave provisions. Because the proposed regulations were just released, it is unlikely that the DOL will issue final regulations anytime soon.

In the meantime, employers may continue to use the DOL's model FMLA forms. However, because the forms do not contain the most recent legislative changes to the FMLA and because they do not contain GINA's safe harbor language, employers should consider revising the forms before using them. Also, because the model forms were drafted in a "one size fits all" manner, customizing the forms will allow employers to include information on their own leave policies and procedures.

Higginbotham will continue to monitor FMLA developments and will provide updated information as it becomes available.

This Higginbotham Legislative Brief is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

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