

LEGISLATIVE BRIEF

Brought to you by New England Employee Benefits Co., Inc.

DOL Updates 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. The model FMLA forms are available on the DOL's [FMLA webpage](#).

The DOL recently updated many of its model FMLA forms to reflect changes to the law that became effective since the forms were last revised in early 2009. Employers that use the model forms should start using the DOL's updated models. Employers that have developed their own forms should review the DOL's updated models to make sure their own forms contain the necessary information.

UPDATED NOTICES

On Feb. 6, 2013, the DOL issued a [final rule](#) under the FMLA to implement and interpret the FMLA's military family leave provisions and special leave rules for airline flight crew members. The final rule becomes effective on **March 8, 2013**. In connection with the final rule, the DOL updated its model FMLA poster and some of its model FMLA notices.

The DOL also removed its forms from the text of the FMLA regulations, which should make it easier for the DOL to make changes to the model forms in the future.

However, the DOL did not update its medical certification for an employee's serious health condition form to include language recommended by the U.S. Equal Employment Opportunity Commission (EEOC) to prevent the disclosure of genetic information, as required by the Genetic Information Nondiscrimination Act of 2008 (GINA).

Employers that use the DOL's model FMLA notices should start using the following updated model notices:

- [Notice of FMLA Eligibility and Rights and Responsibilities](#) (Form WH-381);
- [Certification of Qualifying Exigency for Military Family Leave](#) (WH-384); and
- [Certification for Serious Injury or Illness of a Covered Servicemember](#) (WH-385).

The DOL also created a new model notice for covered servicemembers who are veterans ([Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave - WH-385-V](#)). Employers should start using this notice when military caregiver leave becomes effective for family members of veterans on March 8, 2013.

MODEL POSTER

The DOL updated its [model poster](#) to include the statutory military family entitlements and to mention that special eligibility requirements apply to airline flight crew employees. The model FMLA poster describes military caregiver leave for a veteran, which becomes effective on March 8, 2013. According to the DOL, employers may start using the new FMLA poster immediately, or may use the old FMLA poster through March 7, 2013.



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The following are a few basic reminders regarding the FMLA poster:

- Employers covered by the FMLA are required to display the poster in a prominent place where it can be readily seen by employees and applicants;
- The poster must be displayed even if the employer does not have any employees who are eligible for FMLA leave; and
- Covered employers with eligible employees must include the poster in any written guidance to employees, such as an employee handbook, that explains other employee benefits or leave rights (if such written guidance exists) or distribute a copy of the poster to each new employee upon hiring.

GINA REQUIREMENTS

Title II of GINA, which applies to employers with 15 or more employees, prohibits employers from discriminating against employees or applicants based on 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 employee 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 form for an employee's health condition. However, the DOL's model certification form for an employee's serious health condition does not contain this GINA language.

GINA's safe harbor language provides 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.

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