

Insight

IN-DEPTH DISCUSSION

June 16, 2015

DOL Issues Updated FMLA Notices and Forms Addressing GINA "Safe Harbor" Language Requirements

BY CASEY KURTZ

The U.S. Department of Labor (DOL) recently issued new versions of the agency's template Family and Medical Leave Act (FMLA) notices and certification forms, which have been approved for use for the next three years. The new forms—some of which the DOL has substantively revised—include the following:

- WH-380-E Certification of Health Care Provider for Employee's Serious Health Condition;
- WH-380-F Certification of Health Care Provider for Family Member's Serious Health Condition;
- WH-381 Notice of Eligibility and Rights & Responsibilities;*
- WH-382 Designation Notice:*
- WH-384 Certification of Qualifying Exigency for Military Family Leave;*
- WH-385 Certification for Serious Injury or Illness of Current Servicemember—for Military Family Leave; and
- WH-385-V Certification for Serious Injury or Illness of a Veteran for Military Caregiver Leave.

The forms, which are now approved through May 31, 2018, are available through the [DOL's webpage](#).

GINA's Safe Harbor

Each form bears the new 2018 expiration date, but the more notable changes relate to the DOL's decision to add Genetic Information Nondiscrimination Act (GINA) "safe harbor" language to the medical certification forms (WH-380-E, -380-F, -385 and -385-V). Under GINA's implementing regulations, employers that request medical information from an employee should warn the employee and relevant healthcare provider(s) not to provide "genetic information" in response to the employers' requests. If an employer provides sufficient warning, its receipt of genetic information in response to the request will be deemed inadvertent and, therefore, not a violation of GINA. GINA also excuses as inadvertent the receipt of genetic information in response to medical information requests that are *not likely to result in* the employer obtaining genetic information.

The GINA regulations include sample safe harbor language that employers can use when requesting information about an employee's own medical 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.

29 C.F.R. §1635.8(b)(1)(i)(B).

Before the DOL issued these updated forms, most employers used this or similar safe harbor language when seeking FMLA medical certifications.

GINA and the FMLA Forms

To address GINA's inadvertent disclosure provisions, the DOL updated the WH-380-E medical certification form, which relates to an employee's request for leave due to his/her *own* serious health condition, to include the following safe harbor language. This provision is noticeably truncated when compared to GINA's sample language:

Do not provide information about genetic tests, as defined in 29 C.F.R. §1635.3(f), genetic services, as defined in 29 C.F.R. §1635.3(e), or the manifestation of disease or disorder in the employee's family members, 29 C.F.R. §1635.3(b).

In the family care medical certification forms (Forms WH-380-F, -385 and -385-V), the DOL appropriately excludes from the safe harbor language the admonition not to disclose the "manifestation of disease or disorder in the employee's family members." This phrase is also known as "family medical history" under GINA, and is classified as the one type of "genetic information" that employers are permitted to request/require of employees under GINA, in limited contexts such as when administering an employee's request for FMLA family care leave. The DOL's safe harbor language in the family care certification reads as follows:

Do not provide information about genetic tests, as defined in 29 C.F.R. § 1635.3(f), or genetic services, as defined in 29 C.F.R. §1635.3(e).

Employers also may notice that the updated medical certification forms do not include the *specific* instructions (included in GINA's sample safe harbor provision) not to disclose: (1) "the fact that an individual or an individual's family member sought or received genetic services"; and (2) "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." Apparently, the DOL considers the omitted language either to be encompassed by the more general instruction not to "provide information about ... genetic services," or to be superfluous because the relevant certifications are unlikely to result in the disclosure of the *specific* type of genetic information (relating to a fetus or embryo). However, the agency did not release any guidance or commentary explaining the reasoning behind these omissions.¹

The DOL also revised the certification forms to include in the employer instructions section a comment that "genetic information" as defined by GINA that is received in response to the certification must be kept confidential, in accordance with GINA's requirements.

What Should Employers Do?

Employers should ensure they are using the most up-to-date and compliant FMLA notification and certification forms, even where there are no substantive changes, and consult with knowledgeable legal counsel as needed regarding GINA's safe harbor protections. In addition, employers using their own, customized versions of FMLA administrative forms, or those that must also comply with state family and medical leave laws, should compare their forms against the updated FMLA forms and consult with counsel to ensure both federal and state law requirements are met.

* The DOL did not make any substantive changes to these forms; it only changed the expiration date.

¹ It should be noted that the Equal Employment Opportunity Commission (EEOC)—and not the DOL—enforces GINA. To date, the EEOC has not formally taken a position as to whether or not the DOL's "safe harbor" language would satisfy GINA.