

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

Posted by Jeff Nowak January 04, 2012

In a flurry of activity at the end of 2011, several employers contacted me to determine whether the DOL notice and certification forms still were valid, even though they contain an expiration date of December 31, 2011. In short, employers may continue to use the DOL's FMLA forms, although consider our suggestions below before using these standard DOL forms.

### Why did the DOL's FMLA forms expire?

Under the [Paperwork Reduction Act of 1995](#), the DOL is required to submit its FMLA forms to the [Office of Management and Budget \(OMB\)](#) for approval, so that OMB can ensure the information request and the time spent responding to the request is minimized. *[Insert your own sarcastic comment about the efficiency of the federal government here.]* OMB approved the DOL's FMLA forms in late 2008 around the time the new FMLA regulations took effect. As a result, the forms were approved for three years, which is the maximum time period allowed. Upon expiration of the forms (in this case, on December 31, 2011), the DOL may continue to use the forms while it seeks renewal of OMB's approval, which it has done [in this instance](#).

The image shows a scan of the DOL FMLA certification form. The title is 'Certification of Health Care Provider for Family Member's Serious Health Condition (Family and Medical Leave Act)'. It is issued by the U.S. Department of Labor, Division of Family Leave, and includes the WHD logo. The form is divided into two main sections: 'SECTION 1: For Completion by the EMPLOYEE' and 'SECTION 2: For Completion by the EMPLOYER'. Section 1 includes instructions for the employee to provide information about the family member's health condition and the care needed. Section 2 includes instructions for the employer to provide information about the employee's work schedule and the need for leave. The form contains several checkboxes and text boxes for providing specific details, such as the employee's name, date of birth, and the family member's name and relationship. It also includes a signature line for the employer and a date field.

### Even if employers can continue to use the DOL's FMLA forms, *should* they use them?

Ahem, this really is the more important question. In a nutshell, we encourage employers to proceed with caution. At a minimum, keep the following in mind and make appropriate changes in 2012 and beyond:

1. **Add the GINA safe harbor provision to your FMLA notices and forms.** Under the Genetic Information Nondiscrimination Act (GINA), employers requesting medical certification or fitness for duty certification must instruct health care providers not to collect or provide any genetic information. Therefore, employers should *strongly* consider adding language to their FMLA medical certification forms for an employee's serious health condition and when an employee is seeking to care for a family member with a serious health condition. And to avoid any further procrastination, I am even giving you the new language you should use. Here it is:

## 2. 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.

*Note:* This language should be added to the FMLA medical certification form or other written documentation that accompanies the form, and should be used when a fitness for duty certification is requested. I also recommend that employers also use the above language in *any* correspondence to a health care provider where the employer is requesting medical information (e.g., to support a request for an ADA accommodation).

- 3. Consider adapting the DOL's "model" FMLA forms to suit your needs.** As my colleague [Bill Pokorny](#) shared in a prior [post](#), the DOL's "model" FMLA forms fall short in several respects. To name a few: 1) the medical certification forms do not request all of the information that employers may require, such as information regarding an employee's work restrictions; 2) 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 3) because the DOL's forms are designed as a "one-size-fits-all" solution, they include extraneous information that will not apply to all or even most employers, and do not reflect individual employers' policies and procedures. Additionally, 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

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operation" language originally used).

However, changing the language of the DOL's model FMLA forms should be done carefully. At a minimum, we encourage you to update your notices and forms regarding the change to exigency leave above. Either way, we strongly encourage employers to work closely with their employment attorneys to develop forms, policies and procedures that fully take advantage of their rights under the FMLA regulations while also fully complying with the rules.

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