

## Reminder: Include GINA "Safe Harbor" Language in FMLA Forms

By [Martha Zackin](#) on January 24, 2012

Employers with 50 or more employees in 20 or more workweeks in the current or preceding calendar year, including joint employers and successors to covered employers, must comply with the Family and Medical Leave Act ("FMLA"). The FMLA requires covered employers to comply with various notification requirements, and allows employers to obtain medical certifications from employees requesting leave. The Department of Labor ("DOL") has authored various [form notices and certifications](#), which employers may choose to use.

The DOL-drafted forms expire on January 31, 2012. New forms, which have been submitted to the United States Office of Management and Budget, are not likely to be approved before the old forms expire. Nevertheless, under the law, expired forms may continue to be used while new forms are awaiting approval.

**But** – and this is important – the soon-to-expire forms do not include the "safe harbor" language under the [Genetic Information Nondiscrimination Act](#), which tells employees and their medical providers that they should not provide "genetic information" when responding to a request for certification.

GINA [regulations](#) define "genetic information" to mean information about:

- (i) An individual's genetic tests;
- (ii) The genetic tests of that individual's family members;
- (iii) The manifestation of disease or disorder in family members of the individual (family medical history);
- (iv) An individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; or
- (v) The genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

The specific "safe harbor" language that should be included with any request for FMLA certification (or any request for medical information) to employees or their medical providers is 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 may be obtained by an employer without violating GINA when it requests family medical history to comply with the certification provisions of the FMLA, state or local family leave laws, or pursuant to a policy that permits the use of leave to care for a sick family member and that requires all employees to provide information about the health condition of the family member to substantiate the need for leave. In this circumstance, the above-quoted “safe harbor” language is not required (but may be included).

This is not a change in the law. However, given the questions that have come up regarding the use of expired DOL forms, we thought it was an opportune time to remind our readers of GINA, and how to best protect themselves from inadvertent violations.