

EZRA T. CLARK, III
Attorney
Direct Line: 480-844-0039
Facsimile Line: 480-844-0035
E-mail: etc@clarkfirm.com



63 East Main Street, 5TH Floor
Mesa, Arizona 85201

MAILING ADDRESS
P.O. Box 31036
Mesa, Arizona 85275-1036

EMPLOYER NEWSLETTER
NOVEMBER 2009

TIME TO REVIEW YOUR POLICIES TO COMPLY WITH RECENT CHANGES TO FEDERAL LAW:

Two (2) significant changes to federal law become effective this month:

I. Amendments to the Family and Medical Leave Act (FMLA)

On October 28, 2009, President Obama signed into law the National Defense Authorization Act for 2010 ("NDAA"). The NDAA is enacted each fiscal year to approve the budget and expenditures of the United States Department of Defense. This year, the NDAA contains two expansions of the exigency and caregiver leave provisions for military families under the Family and Medical Leave Act (FMLA)¹:

1. Caregiver Leave: Employees could previously take up to 26 weeks of unpaid leave to care for a family member (spouse, child, parent or next of kin) who is an active service member currently undergoing treatment for a serious injury sustained on active duty. Now, that leave has been expanded to allow leave to care for a veteran family member undergoing medical treatment, recuperation or therapy for a serious injury or illness that was sustained any time during the five (5) years preceding the treatment.
2. Exigency Leave: Employees could previously take up to 12 weeks of unpaid leave for qualifying exigencies relating to a reservist family member's call to active service; that leave has now been expanded to provide exigency leave benefits to the family of a member of any armed service on active duty.

These changes to the law became effective immediately when the law was signed.

Recommendation:

In response to these specific changes, employers should update their FMLA policies and educate managers and supervisors of the additional circumstances under which FMLA may be available. We expect the U.S. Department of Labor will issue new regulations and revise its FMLA poster. However, that will probably take several weeks or months. In the meantime, employers are expected to comply with these expansions of the FMLA and notify their employees accordingly. Please let us know if we can assist you in reviewing and updating your policies and forms.

¹ The FMLA requires employers with 50 or more employees within a 75-mile radius to provide up to 12 weeks of unpaid leave to "eligible employees" to care for their own or a family member's "serious health condition." In January 2008, President Bush signed the NDAA for 2008, adding two new qualifying circumstances for which eligible employees may take FMLA leave: (1) "qualifying exigency leave" and (2) "military care giver leave" – together known as "leave to care for a covered service member."



II. New EEOC poster to comply with GINA:

The Genetic Information Nondiscrimination Act (GINA) takes effect November 21, 2009. Stated simply, GINA prohibits employers from discriminating based on genetic information.

Recommendations:

If you don't already have one, print off a poster from the EEOC's website: http://www.eeoc.gov/employers/upload/eeoc_self_print_poster.pdf. The poster describes all of the federal laws prohibiting job discrimination based on race, color, sex, national origin, religion, age, equal pay, disability and genetic information.

The EEOC requires covered employers to post the revised workplace notices. Failure to properly post the workplace notices may expose your business to fines up to \$10,000.

In addition to posting the new EEOC poster, you should also consider the following:

- Add appropriate language to your EEO and anti-discrimination policies stating that you do not discriminate on the basis of genetic information.
- Review your employment applications and employee questionnaires to make sure you are not intentionally or inadvertently requesting information about an applicant's/employee's family medical history.
- If you need to get information about a family member's illness for purposes of determining whether a request for leave qualifies for Family and Medical Leave Act, make sure it is limited to only what you need to know to make the determination.
- Determine whether incoming medical information you receive on an employee contains genetic information.
- Make sure you treat any medical information as you would a confidential medical record for ADA purposes (maintained in a separate confidential medical file with proper limitations on disclosure).
- Make sure appropriate policies and procedures are in place to prevent inadvertent disclosure of genetic information when responding to a litigation discovery request, like a subpoena. Consider obtaining a protective order before disclosing or releasing any medical information concerning your employees.
- Be aware that genetic information is included as "protected health information" for HIPAA purposes and should be treated accordingly.