



WOODEN & McLAUGHLIN LLP

Attorneys At Law

## **HR Alert (Expansion of Disability Laws)**

November 2, 2009

Clients and Friends:

Set forth below is a summary of recent changes relating to the ADA and FMLA, as well as new obligations under GINA, impacting covered employers.

### **Proposed ADA Regulations**

The EEOC proposed regulations to implement the ADA Amendments Act of 2008. The public may comment on the proposed regulations until November 23, 2009. The proposed regulations may be downloaded at <http://edocket.access.gpo.gov/2009/pdf/E9-22840.pdf>. Select highlights include:

- *Disability* is a physical or mental impairment that substantially limits one or more major life activities; a record of such an impairment; or being regarded as having such an impairment.
- An impairment is a disability if it substantially limits (something less than prevents or even significantly restricts) at least one major life activity (a term which includes, without limitation, major bodily functions) as compared to most people in the general population. The comparison may be made using a **common-sense standard, without resorting to scientific or medical evidence.**
- With the exception of ordinary eyeglasses or contact lenses, **mitigating measures that reduce or eliminate the impact of an impairment may not be considered in determining whether an individual has a disability.**
- An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.
- In **regarded as** cases, employees need not prove the employer regarded the impairment as substantially limiting a major life activity.
- An actual (or record of) impairment may substantially limit a major life activity **even if it lasts, or is expected to last, fewer than six months.**
- The EEOC provides a non-exhaustive list of conditions that “will consistently meet the definition of disability.”

The practical effect is a significant expansion of individuals covered by the ADA. Thus, the primary focus will shift from whether the individual is covered to discrimination and reasonable accommodations.

### **Expansion of FMLA**

President Obama recently signed into law the FY2010 National Defense Authorization Act. That law **expands the FMLA’s exigency leave benefits to include family members of active duty service members and expands the FMLA’s caregiver leave provisions to include certain veterans.**

The Department of Labor may update the FMLA regulations and certification forms. In the meantime, attached are redlined changes to the Military Family Leave section of a generic FMLA Leave policy.\*

### **GINA Takes Effect Soon**

Title II of the Genetic Information Non-Discrimination Act of 2008 (“GINA”) takes effect November 21, 2009. The EEOC revised its “Equal Employment Opportunity is the Law” poster to include information about GINA. The revised poster may be downloaded at [http://www.eeoc.gov/self\\_print\\_poster.pdf](http://www.eeoc.gov/self_print_poster.pdf). A supplement may be downloaded at [http://www.eeoc.gov/gina\\_supplement.pdf](http://www.eeoc.gov/gina_supplement.pdf). For convenience of the readers, attached are redlined changes to a generic EEO policy.\*

GINA generally prohibits employers from asking about family medical histories, even during post-offer, pre-employment medical exams (there is an exception for purposes of FMLA certification of the serious health condition of a family member). Moreover, genetic information (which includes family medical histories) must be maintained in a confidential file separate from the personnel file. **Consider storing health insurance application information relating to dependents and FMLA documentation relating to the serious health condition of a family member in a confidential file separate from the employee’s personnel file.**

Please do not hesitate to contact either one of us, or your preferred Wooden & McLaughlin contact, with questions or if you would like us to help train your management teams on these changes. On behalf of our Employment and Labor Law Group, we appreciate the opportunity to be of service to you.

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**\*Because different fact scenarios may create different legal obligations, this HR Alert does not constitute legal advice. The attached policies are merely intended to illustrate possible considerations for employers as they determine how to update their own policies. Please consult an attorney for advice about any specific matter.**

## Sample (Highlighted) Changes to Select Section from Generic FMLA Policy

### Military Family Leave

Eligible team members with a spouse, son, daughter, or parent on covered active duty or call to covered active duty in the Armed Forces may use their 12-week leave entitlement to address certain qualifying exigencies. Qualifying exigencies may include attending certain military events, arranging for alternative childcare, addressing certain financial and legal arrangements, attending certain counseling sessions, and attending post-deployment reintegration briefings.

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Eligible team members may take up to 26 weeks of leave to care for a covered service member during a single 12-month period. A covered service member is:

- a current member of the Armed Forces (including a member of the National Guard or Reserves) who has an injury or illness for which the service member is undergoing medical treatment, recuperation, or therapy; or is in outpatient status; or is on the temporary disability retired list: (i) that was incurred in the line of duty on active duty in the Armed Forces (or that existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and (ii) that may render the service member medically unfit to perform his or her duties; or
- a veteran who, within five (5) years of being a member of the Armed Forces (including a member of the National Guard or Reserves) is undergoing medical treatment, recuperation, or therapy for a qualifying injury or illness: (i) that was incurred by the member in the line of duty on active duty in the Armed Forces (or existed before the beginning of the member's active duty and was aggravated by service in the line of duty on active duty in the Armed Forces) and (ii) that manifested itself before or after the member became a veteran.

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**(Note: There may be circumstances when military family leave under this policy runs concurrently with military family leave provided by Indiana State law (see section VII. D.))**

**\*This modified, generic policy does not contain legal advice. It is merely intended to illustrate possible considerations for employers as they determine how to update their own policies. Please see an attorney for advice about updating any particular policy.**

## **Equal Employment Opportunity**

\_\_\_\_\_ is committed to providing equal employment opportunities for all applicants and employees without regard to race, sex, age, color, religion, national origin, disability, [genetic information](#), uniformed service status, or any other legally protected class or status in full compliance with all applicable federal, state and local laws. In addition, we will reasonably accommodate: (i) religious practices and (ii) otherwise qualified individuals with disabilities that we know about, in full compliance with applicable laws. This policy applies to all employees and applicants for employment and to all phases of employment, including but not limited to recruiting, hiring, promotion, demotion, transfer, discipline, rates of pay or other forms of compensation, and termination of employment.

If you believe that you or any other individual is not being treated in accordance with our commitment to equal employment opportunity, please report your concerns right away so that we may take appropriate steps to address them. You should immediately report your concerns to \_\_\_\_\_. If you believe that all of these individuals are involved in a violation of this policy, please promptly report your concerns directly to \_\_\_\_\_. All reports will be handled promptly and as confidentially as practicable.

We will take immediate and appropriate corrective action (which may include unpaid suspension or termination) if we determine that a violation of this policy has occurred. No one making a report or participating in the process (for example, by providing information relating to complaints) will be subjected to retaliation of any kind for doing so.

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