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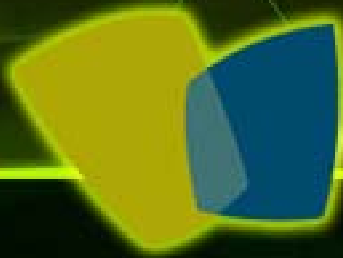

Employee Relations Legal Update, Ideas & Trends

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- Introductions
- Discussion Topics
  - FMLA
  - ADA/ADAAA Update
  - I-9 Update
  - Genetic Information Nondiscrimination Act (GINA)
- Q&A

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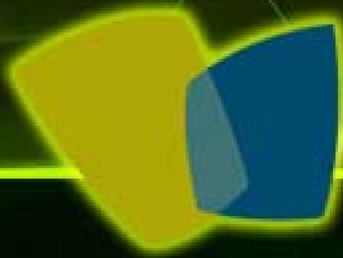

Mastering the New FMLA Regulations

Challenges & Opportunities

- Two new categories of leave
- New forms, and more of them
- Many new rules for administration & enforcement

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Best Practices

- Policy revisions
- Administration Do’s & Don’ts
- Controlling improper use of FMLA
- Reducing legal risks

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New Leave Categories

- Active Duty Leave
- Injured Service Member Leave

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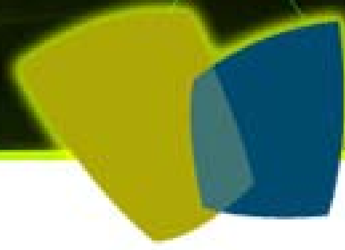

Injured Service Member Leave

- An eligible employee can take up to **26 weeks** of leave in a single 12 month period of time
- To care for a covered service member with a serious illness or injury if the employee is a spouse, son, daughter, parent or **"next of kin"** of the covered service member

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“Covered Service Member”

A person who is a member of the armed forces, National Guard or Reserves and is undergoing medical treatment, recuperation or therapy, is otherwise in outpatient status, or is otherwise on the temporary disability retired list, for a serious injury or illness incurred in the line of duty or active duty that may render the service member medically unfit to perform the duties of the service member’s office, grade, rank or rating.

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Calculation of the 12-Month Period

The "single 12-month period" in which up to 26 weeks of leave may be taken must be measured from the date the caregiver leave begins forward, regardless of the method used to calculate the 12-month period for other types of FMLA leave.

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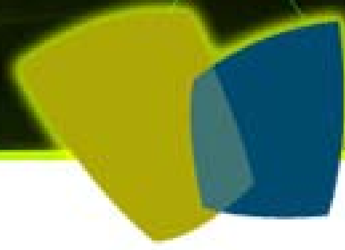

Administering Military FMLA Leaves

- “Next of Kin” means nearest blood relative
- Medical certification can be required. New DOL form
- Must be combined with other FMLA leaves with the 12-month period for no more than a combined total of 26 weeks

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Active Duty Leave Requirements

- An eligible employee can take up to 12 weeks of leave during a 12-month period
- Because of 8 “qualifying exigencies”
- Arising out of the employee’s spouse, son, daughter or parent who is in the National Guard or Reserves being on active duty or called to active duty in the Armed Forces

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NOTE

- Not available to family members of soldiers in the regular armed forces
- Not available in cases where the call to duty comes from a state

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The New FMLA Regulation Wrinkles

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The New FMLA Poster

- Required for covered employers (even if no eligible employees)
- Conspicuous locations/legible print
- Where employees AND applicants can see it
- Electronic posting is acceptable under certain conditions
- Foreign language translations may be required depending on your workforce

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- Must include in your handbook a “general notice” explaining the FMLA’s provisions and providing information concerning the procedures for filing complaints of violations of the FMLA with the DOL.29 C.F.R. §825.300 (a)
- If no handbook, then the “general notice” must be given to each employee upon hiring

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To meet this requirement employers may duplicate the text of the DOL poster or may use another format so long as the information provided includes, **at a minimum**, all of the information contained in that notice.

29 C.F.R. §825.300(a)(4)

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Best Practices for Meeting this Requirement

- Update your policy to include specifics regarding new types of leave
- Update your policy to include new administration requirements
- Update your policy to include employee obligations and time frames
- Update your policy to include the consequences of employees failing to meet their obligations
- Include in your handbook a copy of the DOL poster

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New FMLA Administration Rules & Best Practices

THE WAY IT USED TO WORK

- Employer learned of an absence and if it might be covered by FMLA, then within 2 business days
- Employer issued specific written notice provisionally designating the leave as FMLA and a medical certification form
- Employee had 15 days to return certification
- No contact by employer with HCP *(Health Care Professional)*

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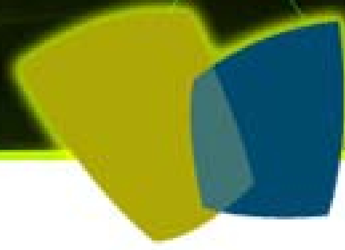

The New FMLA Administration Process

THE WAY IT WORKS NOW

- Employer learns of an absence and if it might be covered by FMLA or an employee requests FMLA then, **within 5 business days**,
- Employer issues Eligibility and Rights and Responsibilities Notice AND appropriate Certification Form

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Eligibility and Rights and Responsibilities Notice

NOTE: If an employee requests FMLA and is not eligible, the employer must provide at least one reason why the employee is not eligible.

29 C.F.R. §825.300(b)

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The Way It Works Now

- An employee has **15 calendar days** to return the completed certification form
- If an employee never returns the certification form, the absence is not covered by the FMLA. 29 C.F.R. §825.313(a)
- If certification is returned, employer must issue Designation Notice within **5 business days absent extenuating circumstances**

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The Way It Works Now

- The Designation Notice will either designate the leave as FMLA or not FMLA **OR**
- The Designation Notice will advise the employee that the certification is not sufficient and advise the employee how to cure any deficiency
- Employee has **7 calendar days** to cure any deficiency

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When is a Certification Deficient?

- It is incomplete if one or more of the applicable questions has not been answered
- It is insufficient if the information provided is vague, ambiguous, or non-responsive

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The Way It Works Now

- If employee cures deficiency with further information, employer has 5 business days to issue Designation Notice designating leave as FMLA or not
- If the employee does not cure the deficiency, the leave is not covered by the FMLA

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The Way It Works Now

- Can you contact the HCP under the new regulations at any time in the administration process? **YES!**

- When can you contact the HCP?

  After giving the employee an opportunity to cure any deficiency in the original certification and after receiving the employee's authorization.

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The Way It Works Now

Who can contact the HCP?

- A human resources professional
- A leave administrator
- A management official
- However, under no circumstances may the employee's direct supervisor contact the HCP

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What Information Can You Seek?

- Clarification and authentication of the medical certification
- Authentication means providing the HCP with a copy of the certification and requesting verification that the form was completed and/or authorized by the HCP
- Clarification refers to understanding the handwriting or the meaning of a response.
- No additional medical information can be requested

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An Unclear Certification – Consequences

- If an employee chooses not to provide authorization for the employer to contact the HCP
- And the employee does not otherwise clarify the certification
- Then the employer may deny the taking of FMLA leave

The new regulations make it clear that it is the employee's responsibility to provide sufficient information for the employer to determine if the leave qualifies for FMLA protection and the anticipated timing and duration of the leave.

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An Unclear Certification – Consequences

Employees must also inform the employer if the requested leave is for a reason for which FMLA leave was previously taken or certified.

"Calling in 'sick' without providing more information will not be considered sufficient notice to trigger an employer's obligations under the Act".

29 C.F.R. §825.303(b)

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An Unclear Certification – Consequences

"An employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying. Failure to respond to reasonable employer inquiries. . . May result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying."

29 C.F.R. §825.303(b)

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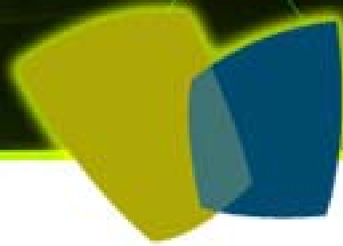

The Return to Work–The Way It Works Now

- Employers may also still require that an employee provide a fitness for duty certification before reinstating the employee following an FMLA leave for the employee's own serious health condition.
- This rule must be part of a uniformly-applied policy.
- An employer may now require that the fitness for duty certification specifically address the employee's ability to perform the essential functions of the employee's job.

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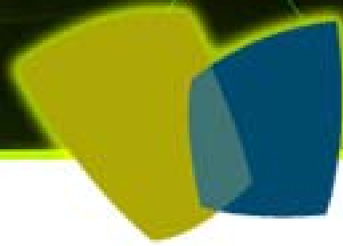

The Return to Work–The Way It Works Now

- To require this an employer must provide an employee with a list of essential job functions no later than with the Designation Notice and must inform the employee of this requirement.

Employers may contact the HCP for the purposes of authentication and clarification of the fitness for duty certification under the same rules as previously discussed. However, employers cannot delay the employee's return to work while contact with the HCP is being made.

Note: No DOL form for this type of certification.

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The Return to Work–The Way It Works Now

- Do employees use up their 12-weeks of FMLA entitlement while on a "light duty" assignment?
- How are reinstatement rights affected by "light duty" assignments?

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The Return to Work–Light Duty New Regs

- Time spent performing “light duty” work does not count against an employee’s FMLA entitlement
- Reinstatement rights are not affected by a light duty assignment

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What about Fitness for Duty & Intermittent Leave

- Employers can request a fitness for duty certification up to once every 30 days if reasonable safety concerns exist regarding the employee's ability to perform his/her duties based on the serious health condition for which they are taking intermittent leave.
- Must inform the employee of this requirement at the time of the Designation Notice.

Reasonable safety concerns means a reasonable belief of significant risk of harm to the individual employee or others.

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New Rules for Determining What Is and What Is Not a Serious Health Condition

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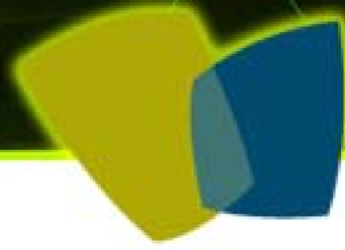

Remember That a Serious Health Condition Can Be Either

- Inpatient care **OR**
- Continuing treatment by a health care provider which encompasses a number of different types of situations such as chronic conditions, long-term conditions, and lengthy periods of incapacity accompanied by treatment by a health care provider

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Old Rules for One Form of Continuing Treatment as SHC *(Serious Health Condition)*

- More than three consecutive calendar days of incapacity + treatment two or more times by an HCP

OR

- More than three consecutive calendar days of incapacity + treatment one time by an HCP which results in a regimen of continuing treatment under the supervision of an HCP

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- Continuing Treatment by an HCP (Option 1)
    - More than three consecutive calendar days of incapacity + treatment two or more times by a an HCP **within 30 days of the first day of incapacity**; and
    - Must be an **in-person** visit to HCP; and
    - The first visit to HCP must take place **within seven days of the first day of incapacity**.

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New Rules–Continuing Treatment as SHC

- Continuing Treatment by an HCP (Option 2)
  - More than three consecutive calendar days of incapacity + treatment one time by a an HCP; and
  - Must be an **in-person** visit to HCP; and
  - The visit to the HCP must take place **within seven days of the first day of incapacity**; and
  - The visit to the HCP must result in a regimen of continuing treatment under supervision of HCP.

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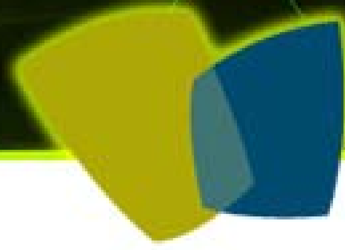

Old Rules – Chronic Condition as SHC

- Any period of incapacity caused by SHC; and
- Requires periodic visits for treatment by an HCP; and
- Continues over an extended period of time; and
- May cause episodic rather than a continuing period of incapacity.

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New Rules – Chronic Condition as SHC

- Any period of incapacity caused by SHC; and
- Requires periodic visits for treatment by an HCP **at least twice a year**; and
- Continues over an extended period of time; and
- May cause episodic rather than a continuing period of incapacity.

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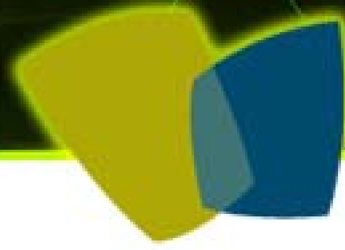

Intermittent Leave for Planned Medical Treatment

Employees who must take intermittent leave for planned medical treatment must make a "reasonable effort" to schedule the treatment so that it will not unduly or unnecessarily disrupt the employer's operations.

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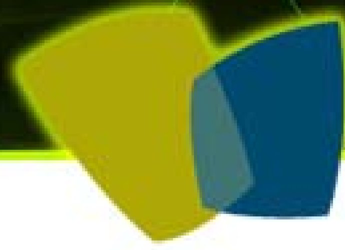

Perfect Attendance Awards

You may count FMLA leave absences against perfect attendance awards if you also count other types of leave (sick leave, vacation, PTO, etc.) against the attendance award.

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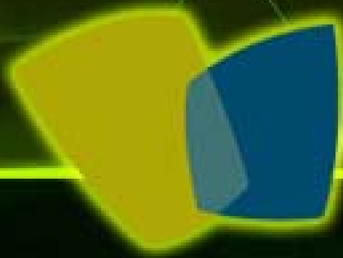
- **Issue:** 2 months ago, you re-hired an employee who had been away from the company for 1 year. Prior to this break in service, she had worked for your company for 2 years. The employee is now requesting leave under the FMLA. Must you count the 2-year employment period preceding the break in service to determine whether she is an “eligible employee” under the FMLA?
- **Answer:** In this case, yes. The 12 months an employee must have been employed by the employer to be an eligible employee need not be consecutive months. However, employment periods prior to a break in service of 7 years or more generally do not need to be counted, except where:

MISC. QUESTION (cont'd)

- The employee's break in service is occasioned by the fulfillment of his or her National Guard or Reserve military service obligation. The time served performing the military service also must be counted in determining whether the employee has been employed for at least 12 months by the employer, or
- A written agreement, including a collective bargaining agreement, exists concerning the employer's intention to rehire the employee after the break in service (e.g., for purposes of the employee furthering his or her education or for childrearing purposes).

DOL Reg. §825.110(b)(l) and (2)



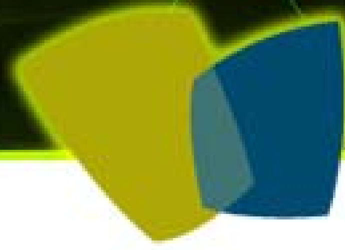
Americans with Disabilities Act

ADA Accommodations Update

- As a general rule, there is a responsibility for an individual with a disability to inform the employer that an accommodation is needed.
- A Federal court has recently carved out an exception to the rule if the disability is obvious.

ADA Example

You recently have hired a pharmacy assistant who's movements & speech are notably slow due to cerebral palsy. The individual has 2 years of experience with another local pharmacy where he received prescriptions and dispensed prescription drugs without incident.

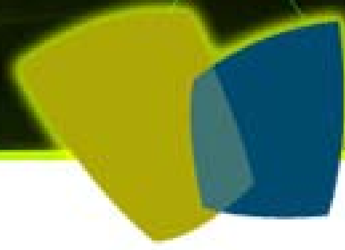


ADA Example

- The individual's supervisor is displeased however with his performance.
- The supervisor believes that the individual is too slow and appears to have difficulty matching customer's names with their prescriptions.

- Given that the individual has never asked for an accommodation for his disability, can the individual be transferred to another department without engaging in an interactive accommodation process?

- The American with Disabilities Statute requires accommodation of “known” disabilities not just disabilities for which accommodation has been requested.
- The employer has a duty to reasonably accommodate an employee’s disability if the employer knows or reasonably “should have known” that the employee is disabled.



ADA Amendment Act of 2008 (ADAAA)

Effective January 1, 2009

Currently, under the ADA of 1990, disability is defined as:

- A physical or mental impairment that substantially limits one or more major life activities.
- A record of such an impairment.
- Being regarded as having such an impairment.

ADA Amendment Act of 2008 (ADAAA)

Effective January 1, 2009

While the ADAAA retains the ADA's existing definition of "disability", it amends the ADA to further clarify and define 3 critical terms within the definition which ultimately allows more employees to be covered.

Major Changes to the Act

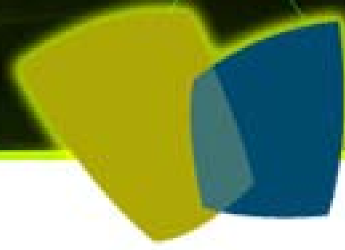
- Redefines the term “substantially limits”. According to the revised regulations, employers can be certain that the EEOC will take an expansive approach when interpreting the definition. The ability to perform a major life activity will be measured against the average person’s ability.

Major Changes to the Act

- Expands the definition of “major life activities” to include activities such as caring for oneself, performing manual tasks, seeing, eating, breathing, learning, reading, concentrating & working , & the operation of major bodily functions such as functions of the immune system, normal cell growth, bowels, digestive, brain, bladder, circulatory, endocrine & reproductive system.

Major Changes to the Act

- Clarifies & broadens the scope of potential liability for 'regarding an individual as disabled'.
- Cannot consider mitigating measures, such as medications or assistive devises, when assessing whether an individual has a disability. The amendment excludes ordinary glasses or contact lenses.

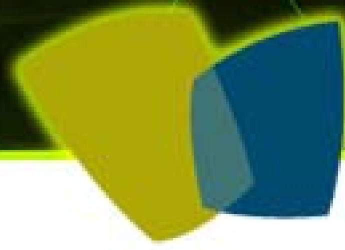


Major Changes to the Act

- Clarifies that an impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active (e.g., diabetes, epilepsy, lupus).

How to Comply with the ADAAA

- Review your employment policies on disabilities & reasonable accommodation.
- Review your job descriptions and update where appropriate. They should accurately state essential job function. Avoid using universal job descriptions.
- Revisit reasonable accommodation requests, if any, that have been denied because you determined that the employee did not satisfy the ADA's definition of the term 'disability'.



How to Comply with the ADAAA

- Train your managers who deal with accommodation requests on the changes in the law, given that more employees will be eligible for ADA protection. If there is any doubt about whether the impairment constitutes a disability under the law, it is advisable to consult with an HR professional or legal counsel.

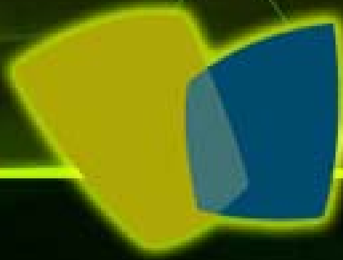
How to Comply with the ADAAA

- Managers should also be trained on the changes to the ADA's definition of a person who is 'regarded as' disabled which now may make it possible for just about anyone with a non-temporary impairment to bring the discrimination claim under the law. Denigrating comments about employees' physical appearance or physical & mental abilities are now more likely to give rise to liability.

How to Comply with the ADAAA

- Understand the legal risks associated with the discipline & termination of an individual who is 'regarded as disabled' under the law. It is important to dot your "I"s and cross your "T"s to ensure you have appropriate documentation and support for your termination and disciplinary actions.

Although the ADA Amendment Act has changed the ADA and the way courts will interpret the law, good common sense policies and practices such as promoting a respectful work environment and being open-minded and thoughtful when employees request reasonable accommodations will continue to help employers comply with the law and avoid liability.



GENETIC INFORMATION NONDISCRIMINATION ACT (GINA)

GINA

- May 21, 2008 GINA signed into law.
- Genetic testing typically involves a test, examination or analysis that is used to identify the presence, absence or alteration of a gene or chromosome. These tests can determine whether employees or applicants are sensitive to certain chemicals or environmental conditions that may be present in the workplace. They can also identify which individuals are likely to develop medical conditions in the future, such as miscarriages or cancer, by locating chromosome abnormalities.

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- **Example:** A pre-placement health examination, which was conducted after an offer of employment and included testing for sickle cell trait, did not violate the ADA rights of workers who tested negative because the information was not used to discriminate against them. Unlike examinations conducted at any other time, employment entrance examinations need not be job-related or consistent with business necessity. The ADA only guarantees the confidentiality of the information gathered and restricts the use to which an employer may put the information.

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- **Example:** An applicant's genetic profile reveals an increased susceptibility to colon cancer. The applicant is currently asymptomatic and may never in fact develop colon cancer. After making the applicant a conditional offer of employment, the employer learns about the applicant's increased susceptibility to colon cancer. The job offer is withdrawn because of concerns about the applicant's productivity, insurance costs, and attendance. The employer is treating the applicant as having an impairment that substantially limits a major life activity. Accordingly, the applicant is covered by the third part of the definition of "disability".

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- **Example:** Clerical and administrative workers at a research institution operated under contract with the Department of Energy were required to submit to pre-placement health examinations after offers of employment, but prior to assumption of job duties. During the course of the examinations the workers provided blood and urine samples, which were tested for syphilis, sickle cell trait and pregnancy. Only black employees were tested for sickle cell trait and only women were tested for pregnancy.

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GINA

- GINA makes it illegal for an employer, employment agency, labor organization, or training program to discriminate against an individual or deprive an individual of employment opportunities because of genetic information. GINA would also make it illegal for group health plans and health insurers to deny coverage to healthy individuals or charge them higher premiums based solely on genetic predisposition to a disease. This becomes effective November 21, 2009.

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I-9 UPDATE

- The U.S. Citizenship & Immigration Services (USCIS) has delayed the implementation of the revised I-9 form until April 3, 2009. The interim rule, previously scheduled for implementation on February 2, 2009 includes the following changes:
  - Expired identification documents are not acceptable for the revised Form I-9, including U.S. passports and all List B documents used to establish identity. Only unexpired documents can be used.
  - The USCIS has narrowed the list of acceptable identity and employment authorization documents employers can accept from new hires. Three documents have been removed from List A and three documents have been added to List A. Refer to the revised I-9 Form for a list of acceptable documents.

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Availability of the Revised Form I-9

(for use after 4/2/09)

- The proposed revised Form I-9 is available online from the USCIS website (www.uscis.gov). Use of the revised form before 4/3/09 could subject employers to fines. Employers should continue to use the June 5, 2007 edition of the I-9 Form until 4/3/09.

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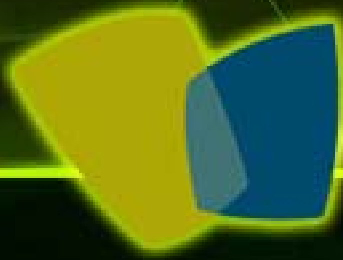

Questions & Answers

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