Confidential Medical Information in the Employee Leaves and Disability Context

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This practice note provides guidance on meeting medical recordkeeping and confidentiality requirements under the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and the Health Insurance Portability and Accountability Act (HIPAA).

The FMLA

The FMLA allows employers to obtain a significant amount of medical information regarding employees and their family members in connection with requests and approvals for FMLA leave.

Employers must maintain the medical information and, in some cases, medical histories contained in medical certifications, recertification, and other paperwork created for purposes of the FMLA as confidential medical records. *29 C.F.R. § 825.500(g)*. In doing so, they must keep such information in separate files/records from the usual personnel files. Id.

Where the medical records include information covered by the Genetic Information Nondiscrimination Act of 2008 (GINA), employers must maintain this information in accordance with the confidentiality requirements of Title II of GINA. *29 C.F.R. § 825.500(g)*; *29 C.F.R. § 1635.9*. See *Genetic Information Nondiscrimination Act (GINA) Employment Discrimination Prohibitions*.

The ADA and GINA

Similarly, under the ADA, employers must maintain medical information and records in conformance with ADA confidentiality requirements. *42 U.S.C.S. § 12112(d)(3)(B)*; *29 C.F.R. § 1630.14*.

Title I of the ADA provides that employers must maintain information regarding the medical condition or history of an applicant or employee on separate forms, they must keep the information in separate medical files, and they must treat the information as a "confidential medical record." *29 C.F.R. § 1630.14(b)(1)*, *(c)(1)*, *(d)(4)(i)*. Employers may ask employees who request an accommodation under the ADA to provide medical documentation of the disability and work restrictions from health care providers.

To the extent that employers obtain employee genetic information covered by GINA in connection with the ADA's interactive process, such information must be kept separate from personnel files and treated as a confidential medical record in the same manner as medical information obtained under the ADA. *29 C.F.R. § 1635.9*.

Both the ADA and GINA provide limited exceptions to the confidentiality requirement. The ADA allows access and disclosure when:

(1) Supervisors and managers need to know what restrictions have been placed on the employee and what accommodations are being made;

(2) First aid and safety personnel might be required to perform emergency treatment on the employee; and
(3) Government officials are investigating employer compliance with the FMLA and other laws.

29 C.F.R. § 1630.14(b)(1), *(c)(1)*, *(d)(4)(i)*; see also *29 C.F.R. § 1635.9(b)* (exceptions to GINA confidentiality requirement).

The ADA and GINA do not specifically state that employee medical and genetic information be encrypted or password protected if employers maintain the employee medical information electronically. However, you should advise employers to require such security features to ensure the confidentiality of this information as required by the ADA and GINA.

HIPAA

Employers also should ensure that they comply with Health Insurance Portability and Accountability Act (HIPAA).

HIPAA's "Privacy Rule" requires employers to obtain authorization from an employee when protected health information (PHI) will be used for purposes other than treatment, payment, or health plan operations. *45 C.F.R. § 164.508*. Employers can avoid HIPAA requirements by requesting medical information and PHI directly from employees instead of an employee's health care provider or health plan.

Where not possible or practical for employers to obtain medical information directly from employees, employers should obtain a HIPAA-compliant release from employees which would allow employers to request and receive employee medical information directly from health care providers. See *29 C.F.R. § 825.306(e)*. For example, when employers request second or third medical opinions as permitted under FMLA regulations, employers expect and have the right to receive the medical report. See *29 U.S.C.S. § 2613(c)–(d)*; *29 C.F.R. § 825.306(b)–(c)*. Also, when employers engage in the interactive process under the ADA, a company representative may need to contact and obtain information from a health care provider and/or a workers' compensation carrier. See *29 C.F.R. §§ 1630.14*, *1630.2(o)(3)*. In each of these examples, you should advise the employer to obtain a HIPAA-compliant release from the employee for the employer to receive medical information from the health care provider.

A HIPAA-compliant authorization must specifically include:
(1) A description of the PHI or medical information sought;
(2) Describe the purpose and how the employer will use and disclose the information (for example, to determine whether a reasonable accommodation can be made for a disabled employee);
(3) Identify the people authorized to use or disclose the information;
(4) Identify the person to whom the health care provider may make the disclosure; and
(5) Contain an expiration date.

45 C.F.R. § 164.508(c). For a HIPAA-compliant release form, see *HIPAA Authorization for Request for Accommodation*.

To ensure that only those individuals who "need to know" about an employee's health and medical condition have access to this information, you should advise and help employers to establish protocols for maintaining separate files for such information and for limiting the information requested and obtained to information required to address the particular circumstances.

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