

COMPARISON OF THE CONFIDENTIALITY REQUIREMENTS OF HIPAA, ADA, AND FMLA

HIPAA

ADA

FMLA

- Privacy Rule applies only to the “covered entities,” defined as a health plan, a health care clearinghouse, or a health care provider.¹
- The HIPAA Privacy Rule does not apply to a covered entity when it is acting as an employer.²
- Under the Privacy Rule, the health care provider is permitted to disclose protected health information directly to the patient.
- “[I]f the employee has the health care provider complete the medical certification form or a document containing the equivalent information and personally requests a copy of that form to take or send to the employer, the HIPAA Privacy Rule does not and should not impede the disclosure of the protected health information.”³
- “If the employee asks the health care provider to send the completed certification form or medical information directly to the employer or the employer’s representative, however, the HIPAA Privacy Rule will require the health care provider to receive a valid authorization from the employee before the health care provider can share the protected medical information with the employer.”⁴

- Employers are prohibited from conducting medical examinations and making inquiries of an employee or an applicant to determine whether the individual has a disability or the nature of such disability.⁵
- Employers are permitted to make inquiries of an employee or an applicant to determine the individual’s ability to perform job-related functions.⁶
- Medical examinations are prohibited as to current employees “unless such examination or inquiry is shown to be job-related and consistent with business necessity.”⁷
- Post-offer employee entrance medical examinations are permitted. The offer of employment may be contingent on the results of such examination as long as all entering employees are required to undergo the exam, regardless of disability. Medical information acquired during the exam must be maintained in separate medical files and treated as a confidential medical record. Employers may inform supervisors as to necessary restrictions on the duties of the employee and necessary accommodations. If appropriate, safety personnel may be informed if the disability might require emergency treatment.⁸

- Although employees do not have to provide their medical records, employers are permitted to obtain medical information to determine that requested leave qualifies as FMLA leave.
- Employers have a statutory right to require “sufficient medical information” to support an employee’s request for FMLA leave for a serious health condition. If an employee fails to provide such information upon request, the employee will not qualify for FMLA leave.⁹
- To be sufficient, a medical certification should state the following: the date the condition commenced; the probable duration of the condition; “appropriate medical facts” regarding the condition; a statement that the employee is needed to care for a covered family member or a statement that the employee is unable to perform the functions of his or her position; dates and duration of any planned treatment; and a statement of the medical necessity for intermittent leave or leave on a reduced schedule and expected duration of such leave.¹⁰
- If the employer has reason to doubt the validity of the medical certification, the employer, at its own expense, may require the employee to obtain a second opinion and, if the employee’s health care provider’s certification and the second opinion certification conflict, a third opinion certification.¹¹
- DOL has created an additional form (Form WH-380) for employees and their families to use in obtaining medical certifications.¹²

¹ 45 C.F.R. § 160.102(a), 160.103 (2007).

² 67 Fed. Reg. 53192 (2002).

³ 73 Fed. Reg. 7914 (2008).

⁴ *Id.*

⁵ 42 U.S.C. § 12112(d)(2)(A), (4)(A) (2006).

⁶ 42 U.S.C. § 12112(d)(2)(B), (4)(B)

⁷ 42 U.S.C. § 12112(d)(4)(A)

⁸ 42 U.S.C. § 12112(d)(3)

⁹ 73 Fed. Reg. 7914 (2008) (citing Wage and Hour Opinion Letter FMLA2005-2-A (Sept. 14, 2005)).

¹⁰ 29 U.S.C. § 2613(b).

¹¹ 29 C.F.R. § 825.307 (2006).

¹² 29 C.F.R. § 825.306 (2006).



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