

GINA Has Exception for FLMA Medical Certification

As of November 21, 2009, the Genetic Information Non-Discrimination Act (GINA) prohibits employers with 15 or more employees from collecting genetic information, which includes family medical history related to employees or job applicants. Also included is any type of genetic testing of employees or applicants and any form of discrimination in the workplace based on genetic information regardless of how it was obtained.

Under the Family and Medical Leave Act (FMLA), employers have the ability to ask for medical certification and information related to the manifestation of a disease or disorder in the family member of an employee. This new law obviously has raised some concerns.

GINA prohibits both discrimination based on genetic information and acquisition of genetic information by a covered entity. The prohibited discrimination includes failure to hire an individual premising termination or discipline on the employee's genetic information. The act specifically prohibits an employer from requesting, requiring or purchasing genetic information with respect to an employee or an employee's family member.

There are six specific exceptions to this prohibition; two of which relate to DNA analysis for law enforcement purposes. Three relate to information that is inadvertently obtained, previously authorized or publicly available.

The remaining exception refers to information obtained by an employer under FMLA. The exception states that when, in an effort to comply with the provisions of section 103 of the FMLA, (*Section 103 . . . provision requires an employee to provide "medical certification" to the employer to support employee's*

FMLA request) an employer requests or requires from an employee any family medical history (which is considered to be "genetic information" under GINA), such request will be viewed as an exception to GINA's prohibitions.

What This Means For Counties

Counties should not interpret GINA's FMLA exception as an open door to allowing a request for genetic information, when that information is not directly related to the request for FMLA leave.

While GINA is now in effect, the EEOC's final rule has not been issued, the proposed regulations are in the final stages of review. These regulations will provide direction regarding enforcement.

Counties's preparation for that final approval should include updating workplace posters (the EEOC already has issued a revised version of its antidiscrimination poster that includes reference to GINA). Preparation should also include revising handbook and policy manuals to include references to GINA's prohibitions, and generally informing and training supervisors and managers that genetic bias is now prohibited. That training should include the warning that counties may be held liable for retaliation under GINA if they take adverse action against an employee or applicant whose genetic information has been disclosed to the company, even if that disclosure was made through informal communication.

For more information, contact CTSI at 303-861-0507.