

LAW WATCH

00-22

A Legal Newsletter from Foley & Lardner

AUG. 11, 2000

The Equal Employment Opportunity Commission (the "EEOC") recently provided guidance on the legality of disability-related inquiries and medical examinations of employees under the Americans with Disabilities Act of 1990 (the "ADA"), expanding upon guidance already provided regarding such inquiries at the pre-offer and post-offer stages of employment. Specifically, the EEOC has interpreted key words and phrases under the ADA, which provides that employers cannot make **disability-related inquiries** or require **medical examinations** of current employees, unless the examination or inquiry is **job-related and consistent with business necessity**.

What Is A Disability-Related Inquiry?

The EEOC first explained that a "**disability-related inquiry**" is a question (or questions) that is likely to elicit information about a disability. Consistent with its earlier guidance, the EEOC takes the position that disability-related inquiries may include: (1) asking an employee **whether he/she has a disability, how he/she became disabled** or inquiring about the nature or severity of an employee's disability; (2) asking an employee to **provide medical documentation** regarding his/her disability; (3) **asking a third person** about an employee's disability; (4) asking about **an employee's genetic information**; (5) asking about an **employee's workers' compensation history**; (6) asking an employee **questions concerning prescription drugs** he/she is currently taking or has taken in the past; and

EEOC PROVIDES GUIDANCE ON DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS UNDER THE AMERICANS WITH DISABILITIES ACT

Executive Summary

Action: On July 27, 2000, the Equal Employment Opportunity Commission provided guidance on disability-related inquiries and medical examinations of employees under the Americans with Disabilities Act.

Impact: Employers can use this guidance to better understand what may constitute a disability-related inquiry or a medical examination under the Americans with Disabilities Act, and when such inquiries or examinations are appropriate.

Effective Date: Immediately.

(7) asking an employee broad questions **regarding his/her impairments**.

Similarly, the EEOC determined questions that are not likely to elicit information about a disability may include the following: (1) asking an employee about his/her well being; (2) asking an employee who looks tired or ill whether he/she is feeling well;

(3) asking an employee who is coughing or sneezing whether he/she has a cold or allergies; (4) asking how an employee is doing after the death of a loved one or the end of a marriage/relationship; (5) asking an employee questions regarding non-disability-related impairments; (6) asking an employee whether he/she can perform job functions; (7) asking an employee whether he/she has been drinking or is currently using drugs; (8) asking a pregnant employee **whether she is feeling well or when her baby is due**; and (9) asking an employee for information concerning **who to contact in case of an emergency**.

What Is A Medical Examination?

The EEOC also explained that a "medical examination" is a procedure or test that seeks information regarding an individual's physical or mental impairments or health. The EEOC's new guidance provides that the following factors should be used when determining whether a test or procedure is a "medical examination:" (1) whether the test is administered and/or interpreted by a health care professional; (2) whether the test is designed to reveal an impairment or physical or mental health condition; (3) whether the test is invasive; (4) whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task; (5) whether the test is normally given in a medical setting; and (6) whether medical equipment is used.

Applying the factors above, the EEOC determined that medical ex-

aminations may include vision tests, **blood pressure screening, cholesterol testing**, nerve conduction tests, pulmonary function tests, psychological tests designed to identify a mental disorder or impairment, diagnostic procedures (x-rays, CAT scans, and MRI), and blood, urine, saliva or breath analyses designed to detect alcohol use or genetic markers. Examples of tests and procedures that **are not** generally considered medical examinations were also provided, which include **tests to detect the current use of illegal drugs, physical agility or physical fitness tests** designed to **measure an employee's ability to perform job tasks**, tests that evaluate an employee's ability to read labels or distinguish objects, **psychological tests that measure traits for honesty, preferences and habits**, and **polygraph examinations**.

What Disability-Related Inquiries or Medical Examinations Are Job-Related and Consistent with Business Necessity?

Unlike job applicants (who may be required to undergo standard post-offer physicals), current employees are insulated from an employer's disability-related inquiries and medical examinations unless they are "job-related and consistent with business necessity." The EEOC explains that an employer must have a **reasonable belief, based on objective evidence**, that: (1) **an employee's ability to perform essential job functions will be impaired** by a medical condition; or (2) an employee will pose a direct threat due to a medical condition. It is important to note, however, that even though the EEOC suggests that the phrase "direct threat" relates to the health and safety of the disabled employee and others, the Ninth Circuit Court of Appeals determined in *Echazabal v. Chevron USA, Inc.* that the direct threat defense only relates to the health and safety of others in the workplace. The EEOC further provided that **if a request for reasonable**

accommodation is made and the disability or need for accommodation is not known or obvious, **disability related inquiries and medical examinations** that follow **may be job-related and consistent with business necessity** because an employer is entitled to know whether an employee has a covered disability that requires reasonable accommodation.

According to the EEOC, this standard can also be met when an employer knows of an employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the condition. An employer may also be given reliable information from a credible third party that an employee has a medical condition. Further, the employer may observe symptoms that indicate an employee has a medical condition that will impair or restrict his/her ability to perform essential job functions or will pose a direct threat.

The EEOC also explained that **employers are generally not entitled to ask employees what prescription medications they are taking**, as such an inquiry is not job-related and consistent with business necessity. Employees who affect public safety, however, may be required to report when they are taking prescriptions that affect their ability to perform essential functions. Under these circumstances, an employer may show that the employees' impaired ability to perform an essential function of their position will result in a direct threat.

If an employee fails to respond to a disability-related inquiry or submit to a medical examination that is job related and consistent with business necessity, **any discipline should only focus on past, present and future performance problems**. For any disability that is not obvious, an employer can also refuse to provide the accommodation requested.

What Scope and Manner of Disability-Related Inquiries and Medical Examinations Are Acceptable?

Although an employer may request that an employee provide sufficient documentation that he/she has an ADA disability and needs a reasonable accommodation, the EEOC provided that **an employer cannot seek unrelated documentation**. For instance, **requesting an employee's complete medical record is too broad** because it likely contains information that is unrelated to the disability at issue and the need for accommodation. **Appropriate documentation: (1) describes the nature, severity, and duration of the employee's impairment**, the activity or activities that the impairment limits, and the extent that the impairment limits the employee's ability to perform the required activity or activities; and (2) substantiates why the requested reasonable accommodation is needed.

Significantly, the EEOC's guidance makes clear that an employer can request that an employee be examined by an appropriate health care professional of the employer's choice if insufficient information is provided by the employee's treating physician to substantiate an ADA disability or the need for a reasonable accommodation. Likewise, an employer can make such a request if it reasonably believes the employee poses a direct threat, but the examination must be limited to this inquiry. **If either occurs, as under the Family and Medical Leave Act, the employer must pay all related costs**. Before making this request, however, the employer should give the employee an opportunity to provide the missing information in a timely manner or consult with the employer's physician (with the employee's consent). Additional information or exams should not be requested if sufficient information has been provided, though, as this may be considered retaliation.

Other Acceptable Disability-Related Inquiries and Medical Examinations

According to the EEOC, an employer can require that an employee provide a physician's note or another explanation to substantiate his/her use of sick leave **if it has established a policy or practice for all employees to provide such documentation.** Moreover, an employer can require periodic updates of his/her condition if a specific return date is not provided by the employee. If an employee seeks to return to work following a leave for a medical condition, the employer can also make disability-related inquiries or require that the employee submit to a medical examination when the employer has a reasonable belief the employee will not be able to perform essential job functions or will pose a direct threat.

Moreover, periodic examinations of employees affecting public safety may be performed when the examinations are narrowly tailored to address specific job-related concerns. Employers can also perform periodic testing of employees who return to work from an alcohol rehabilitation program if, based on objective evidence, the employer believes the employee will pose a direct threat in the absence of periodic testing.

Finally, the EEOC guidance provides that Employee Assistance Counselors can ask employees questions related to problems and medical or physical conditions, questions necessitated by federal law or regulation, and make inquiries or request examinations that are part of a voluntary wellness program, if the information is kept separate from personnel records.

If you have questions regarding this new EEOC guidance, please contact **Bob Wenbourne** in our Sacramento office, **Charles Price** in our Chicago office, **Kevin Hyde** in our Jacksonville office, **Rick Albert** in our Los Angeles office, **Michael Auen** in our Madison office, **Tom Pence** or **Bud Bobber** in our Milwaukee office, **Dick DuRose** in our Orlando office, **Lynn Goodfellow** in our San Diego office, **Larry Arnold** or **Greg McClune** in our San Francisco office, **Paul Monsees** in our Washington, D.C. office, or the member of the firm who normally handles your legal matters.

Law Watch is a review of recent legal developments prepared by the law offices of *Foley & Lardner*.

The information reported should not be construed as legal advice, nor utilized to resolve legal problems.

CHICAGO, IL
330 North Wabash Avenue
Chicago, IL 60611-3608
Tel - (312) 755-1900

DENVER, CO
1999 Broadway
Denver, CO 80202
Tel - (303) 294-4400

JACKSONVILLE, FL
200 Laura Street
Jacksonville, FL 32202-3527
Tel - (904) 359-2000

LOS ANGELES, CA
2029 Century Park East
Los Angeles, CA 90067-3021
Tel - (310) 277-2223

MADISON, WI
150 East Gilman Street
Madison, WI 53703-1441
Tel - (608) 257-5035

MILWAUKEE, WI
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
Tel - (414) 271-2400

ORLANDO, FL
111 North Orange Avenue
Orlando, FL 32801-2386
Tel - (407) 423-7656

SACRAMENTO, CA
300 Capitol Mall
Sacramento, CA 95814-4338
Tel - (916) 443-8005

SAN DIEGO, CA
402 West Broadway
San Diego, CA 92101-3542
Tel - (619) 234-6655

SAN FRANCISCO, CA
One Maritime Plaza
San Francisco, CA 94111-3404
Tel - (415) 434-4484

TALLAHASSEE, FL
300 East Park Avenue
Tallahassee, FL 32301-1596
Tel - (850) 222-6100

TAMPA, FL
100 North Tampa Street
Tampa, FL 33602-5804
Tel - (813) 229-2300

WASHINGTON, D.C.
3000 K Street
Washington, DC 20007-5109
Tel - (202) 672-5300

WEST PALM BEACH, FL
777 South Flagler Drive
West Palm Beach, FL 33401-6163
Tel - (561) 655-5050

Recent issues of *Law Watch* are also available on our web site at:

www.foleylardner.com

Check out **Publications and Resource Center**, then select **Law Watch**. You may wish to bookmark this page and refer to it frequently.

You may also subscribe to *Law Watch* and have it delivered electronically to your e-mail address by visiting our website. To advise us of an address correction, please call (800) 400-7757.

