Breakout Sessions – Series 5

EXAMINING YOUR EXAMINATIONS AND INQUIRING ABOUT YOUR INQUIRIES

STRATEGIES FOR LEGALLY COMPLIANT MEDICAL EVALUATIONS

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The Phases of an Employee’s Life and How It Impacts When Employers May Test and the Scope of Testing

Federal courts and the Equal Employment Opportunity Commission (EEOC) segregate disability-related inquiries into three stages: (1) stage 1 – pre-offer; stage 2 – post-offer, before employment begins; and stage 3 – employment.

In stage 1 (pre-offer), the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job, unless the applicant discloses the disability and is seeking an accommodation. At stage 2, post-conditional offer but before employment, an employer may make disability-related inquiries and conduct medical examinations—regardless of whether they are related to the job—as long as it does so for all individuals in the same job category. The primary concern in stage 2 is what an employer does with the information it learns. The EEOC and courts generally take no issue with medical exams and inquiries at this point unless the employer displaces an employee; if that occurs, then the EEOC and courts want to make sure the employee is truly not a qualified individual, meaning he or she cannot perform one or more essential functions of the job even with reasonable accommodation. At stage 3, after employment begins, an employer may make disability-related inquiries and require medical examinations only if they are job-related and consistent with business necessity. This applies both to (a) the decision to conduct the exam or inquiry, and (b) the scope of the exam or inquiry.

Stage 1: Pre-Offer Exams and Inquiries

On its face, the ADA prohibits employers from conducting medical examinations of applicants or from making inquiries into applicants’ medical histories if the inquiry or examination could reveal the existence, nature, or severity of a disability. Note that the ADA makes clear that the protection against medical inquiries and examination applies to all applicants, not just those with disabilities.

Without rising to the level of a medical exam under the ADA, employers are permitted to make pre-employment inquiries into the ability of applicants to perform job-related functions and ask applicants to describe and/or demonstrate via testing how the applicant will be able to perform job-related functions, with or without reasonable accommodation.

If an employer makes pre-offer medical inquiries in violation of 42 U.S.C. § 12112(d), liability attaches “as soon as” the employer conducts the “improper medical examination or asks an improper disability-related question, regardless of the results or response.” In other words, even if someone is not disabled and is hired, the inquiry itself can subject the employer to liability.

Stage 2: Post-Conditional Offer But Pre-Employment Exams and Inquiries

After an employer makes an offer of employment, it may inquire into the applicant’s medical history or require applicants to undergo medical examinations. The EEOC’s Enforcement Guidance on this issue states: “At the post-offer stage, an employer may ask about an individual’s workers’ compensation history, prior sick leave usage, illnesses/diseases/impairments, and general physical and mental health. Disability-related questions and medical examinations at the post-offer stage do not have to be related to the job.” However, “if an individual is screened out because of a disability, the employer must show that the exclusionary criterion is job-related and consistent with business necessity.”
While stage 2 inquiries and/or examinations need not relate to the job, they must be required of all applicants entering the same job category. The job offer, however, must be considered a “real” offer (albeit a conditional one). Courts have interpreted this to require that the employer either complete “all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer.” Under this standard, employers should first process all background checks, drug tests, driving records assessments, etc., before requiring the individual to submit to the medical inquiry/examination. Medical information obtained must be kept confidential and separate from the personnel file.

If an employer withdraws a conditional offer due to the results of a medical exam or inquiry, the employer bears the burden to demonstrate that the reason for the rejection is “job-related and consistent with business necessity” and that no reasonable accommodation exists that would allow the individual to perform the essential functions of the job.

Employers may also lawfully act on the results of medical exams or inquiries if those results objectively demonstrate the candidate poses a direct threat to the health or safety of the individual or others in the workplace. The ADA regulations define “direct threat” to mean:

- a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include: (1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.

In reaching this conclusion, employers must “do more than consider generalized statements of potential harm” and objectively determine that “there is a high probability of substantial harm to the individual.”

**Stage 3: Medical Exams and Inquiries during the Employment Relationship**

Generally, once someone is an employee, an employer’s right to make a medical inquiry or conduct a medical exam is heavily regulated. An employer that conducts an unlawful medical exam of an employee can be sued not only for having violated the ADA’s prohibition against medical exams, but also if it acts upon any information gleaned from the unlawful test. It can also be sued if it acts upon an employee’s refusal to undergo or participate in an unlawful test.

Courts recognize certain instances in which an employer can lawfully make a medical inquiry or conduct a medical exam on current employees. In almost all cases, the employee triggers the employer’s right to test by putting the employer on notice of the impairment. Most commonly, a medical exam is because: (a) the employee gives notice of an impairment and requests an accommodation; (b) the employee gives notice of an impairment, coupled with the employer receiving objective evidence the employee may not be able to perform the job; or (c) the employee has given notice of an impairment, and the employer receives objective evidence the employee may pose a significant risk to health and safety. The following scenarios are commonly recognized to permit a medical exam:
• When an employee seeks an accommodation.\textsuperscript{13}

• When the employer knows of an impairment and sees objective evidence of the inability to perform the job or concern over the employee’s safety or the safety of others.\textsuperscript{14}

• When the employer has objective evidence that the employee may not be able to perform one or more essential function because the employee does dangerous work and has been out on leave for a period of time because of his/her own impairment or the employer comes into other information suggesting the employee may be unable to perform the job.\textsuperscript{15}

• When an employee has a known impairment and doing dangerous work and the impairment could impact the employee’s ability to do the job safely.\textsuperscript{16}

• When the employer discovers information from a lawful medical exam that suggests the employee may not be able to perform one or more essential functions of the job (i.e., the follow-up rule).\textsuperscript{17}

When an impairment is not known, generally, the stakes are raised. An employer trying to justify a medical examination has to demonstrate significantly more objective evidence pointing to the fact that the employee may not be able to perform the job (or do so safely) and/or that the consequences extend to co-workers or the general public. Medical examinations have been found to be valid in the following instances:

• Before any incident occurs when the employee is doing dangerous work (in all of these cases, the employee is performing a job in public safety, or the public at large is a concern because of heavy driving, medical, etc.) and exhibits substantial erratic behavior\textsuperscript{18} that evidences they may be a threat to themselves or others.\textsuperscript{19}

• When the employee does dangerous work and there is evidence of a potential safety threat or some other problem that suggests the employee may not be able to perform a function or do so safely, even if no impairment is known.\textsuperscript{20}

• When an employer has legitimate reasons (based upon objective evidence witnessed while working) to doubt the employee’s ability to perform the job safely (safety of coworkers or others around appears to be relevant).\textsuperscript{21}

• In some cases, if the drop off in performance is bad enough, the employer need not know of an impairment, nor does the employee need to necessarily be performing dangerous work or be a perceived threat to others.\textsuperscript{22}

But in all the instances cited above, knowledge of the impairment and/or evidence that there may be an issue with performance of the functions, or performing them safely, was germane to the employer’s ability to perform the exam.\textsuperscript{23} When there is no knowledge of an
impairment, AND there is no objective evidence of a decline, then medical examinations become highly suspect.\textsuperscript{24}

This is because one of the fundamental tenants of the ADA is to shield employees from having their employers probe for hidden disabilities, particularly when by all appearances, the employee seems capable of performing the job. In the absence of knowledge of an impairment, and in the absence of objective evidence suggesting a work decline or work threat, a medical examination is doing precisely that—hunting for hidden disabilities in an effort to consider disqualification of an employee if discovered.

**ADA Medical Exams and Inquiries Must Be Narrowly Tailored**

Under the ADA, the scope of an employer-initiated medical exam must remain appropriately narrow.\textsuperscript{25} The exam must be no broader than necessary to discover only whether the employee can continue safely fulfilling the essential job functions.\textsuperscript{26} To ensure compliance with this limitation, employers must first identify the essential functions of the job in question.

Essential functions of a position are “functions that bear more than a marginal relationship to the job at issue.”\textsuperscript{27} The EEOC’s regulations provide a list of evidence to consider in determining whether a function is essential:

- The employer’s judgment as to which functions are essential;
- Written job descriptions prepared before advertising or interviewing applicants for the job;
- The amount of time spent on the job performing the function;
- The consequences of not requiring the incumbent to perform the function;
- The terms of a collective bargaining agreement;
- The work experience of past incumbents in the job; and/or
- The current work experience of incumbents in similar jobs.\textsuperscript{28}

“Both the [ADA] statute and regulations indicate that [courts] must give greatest weight to the employer’s judgment” on essential functions.\textsuperscript{29} The employer’s judgment “is the only evidence the statute requires [courts] to consider, absent a written job description” the employer prepared before the plaintiff held the position.\textsuperscript{30} “[T]he inquiry into essential functions is not intended to second guess an employer’s business judgment with regard to production standards . . . nor to require employers to lower such standards.”\textsuperscript{31} This applies to both “qualitative [and] quantitative” production standards.\textsuperscript{32}

**Conclusion**

Employers conduct medical examinations and inquiries for a variety of reasons in furtherance of legitimate business goals. To avoid potential liability associated with such actions, employers must be aware of the different restrictions that apply depending on the stage of employment, and plan accordingly. For post-offer exams and inquiries, employers must always be sure that any decisions based on the results are job-related and consistent with
business necessity. During employment, employers must go one step further—they must be able to show job-relatedness and consistency with business necessity in determining whether to conduct the exam or inquiry and the scope of the exam or inquiry, in addition to justifying any employment actions resulting from the exam or inquiry. Before conducting any of these analyses, employers must first identify the essential functions of the position in question. Because this has been an issue of priority for the EEOC in recent years, employers should evaluate processes, update job descriptions, conduct training, develop appropriate policies, and take similar steps to best position themselves for compliance.
ENDNOTES

1 42 U.S.C. § 12112(d)(2) (“a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability”); 29 C.F.R. § 1630.13(a) (“it is unlawful for a covered entity to conduct a medical examination of an applicant or to make inquiries as to whether an applicant is an individual with a disability or as to the nature or severity of such disability”); see also EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act, available at https://www.eeoc.gov/policy/docs/guidance-inquiries.html (“prior to an offer of employment . . . , the ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job”).

2 See 29 C.F.R. § 1630.14(a); see also Chicago Reg’l Council of Carpenters v. Thorne Associates, Inc., 893 F. Supp. 2d 952, 956 (N.D. Ill. 2012) (finding outside the coverage of the ADA a fitness-for-hire test for drywall laborers that (a) required applicants to lift and carry a 50 pound box between 16 inches and 72 vertically and lift and carry a 100 pound box to a height between 6 inches and 56 inches vertically, and (b) simulated working conditions where workers were required to install sheets of drywall that weigh more than 100 pounds).

3 EEOC v. Grane Healthcare Co., 2 F. Supp. 3d 667, 692 (W.D. Pa. 2014) (holding that even successful job applicants subjected to illegal pre-offer medical exams/inquiries could nevertheless have cognizable ADA claims and suffered harm even if hired, including punitive damages and injunctive relief).

4 29 C.F.R. § 1630.14.


6 Id.

7 Leonel v. Am. Airlines, Inc., 400 F.3d 702, 709 (9th Cir. 2005), opinion amended on denial of reh’g, 411 F.3d 1080 (9th Cir. Apr. 28, 2005).

8 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.10.

9 See 42 U.S.C. § 12112(b); 29 C.F.R. § 1630.10.

10 29 C.F.R. § 1630.15(b)(2).

11 29 C.F.R. § 1630.2(r).

12 Echazabal v. Chevron, 336 F.3d 1023, 1026 (9th Cir. 2003).

13 See, e.g., Complainant v. Donahoe (USPS), 2015 EEOPUB LEXIS 171 (EEOC 2015) (employee sought light duty because of a lift restriction). Similarly in Derbis v. U.S. Shoe Corp., 67 F.3d 294 (4th Cir. 1995), an employee on disability leave presented a return-to-work certificate stating that she could work “as tolerated.” The court said the employer could—despite protests from the employee—ask about her ability to work (including questions about possible accommodations).

14 See, e.g., Neravetla v. Virginia Mason Med. Ctr., 2017 U.S. App. LEXIS 14401 (9th Cir. 2017) (upholding as lawful the referral of a doctor for a medical examination where his “emotional and belligerent behavior” put patients at risk). In Painter v. Illinois Dep’t of Transp., 2017 U.S. App. LEXIS 24600 (7th Cir. 2017), the court held that it was job-related to send a Traffic Safety Division administrative officer for a mental health examination where her behavior was bizarre and unprofessional. In particular, her coworkers complained that she “snapped and screamed at them, gave blank stares and intimidating looks, ranted, constantly mumbled to herself, repeatedly banged drawers in her office,” had mood swings, “growled” at coworkers, was “rude, angry, abrasive, aggressive, and threatening,” and “wrote extensively about coworkers in her log, often making at least one entry per hour.” In James v. Goodyear
whether the industrial operator posed a direct threat to their fitness, 763 F.3d 619 (6th Cir. 2014), the court noted that for public safety, 135 F.3d 1089 (6th Cir. 1998), the court held that the employee’s outbursts outside of work necessarily had incurred scrapes, cuts, and puncture wounds in his job and that he shared cutting to the hospital. “The court noted that the employee’s “outbursts outside of work.” The court noted that the employee’s “outbursts outside of work,

15 In Adair v. City of Muskogee, 823 F.3d 1297, 1307 (10th Cir. 2016), the court held that where a firefighter with a back injury “sought workers’ compensation benefits based on a potential permanent or temporary physical impairment,” it was job related and consistent with business necessity for the City to determine the employee’s lifting capabilities and general physical fitness. In Young v. United Parcel Service, 707 F.3d 437 (4th Cir. 2013), the court stated that where the employer had “objective facts suggesting” that the employee “might have lost the ability to perform central job functions, it had a legitimate reason to seek some verification” that she had “recovered her ability to perform those duties.” In Lyons v. Miami Dade County Fire Rescue Department, 2012 U.S. App. LEXIS 8338 (11th Cir. 2012), the court held that it was job-related and consistent with business necessity to require a fitness for duty exam of a fire code inspector after she suffered a back injury, required periodic assignments to light duty, and got a medical leave of absence for over 7 months for “urgent medical care.” The court held that the employer had a legitimate concern about whether the employee “could perform her job-related duties.”

16 See, e.g., EEOC v. Prevo’s Family Market, Inc., 135 F.3d 1089 (6th Cir. 1998) (holding that the grocery store could require a produce clerk to submit to a medical examination when he disclosed that he had HIV; pointing out that the employee admittedly had incurred scrapes, cuts, and puncture wounds in his job and that he shared cutting utensils which were not always properly cleaned).

17 Muzny v. Potter (USPS), 2005 EEO PUB LEXIS 1774 (EEOC 2005) (the EEOC held that the employer could require a fitness-for-duty examination where “there was substantial evidence” that the employee “had paranoid tendencies based on the agency’s psychiatric and psychological reports”).

18 There is authority to suggest that the aberrant behavior must always be tied to the workplace. In Kroll v. White Lake Ambulance Authority, 763 F.3d 619 (6th Cir. 2014), the court held that an employer’s medical examination of an ambulance employee may not have been job-related and consistent with business necessity despite “ample evidence” of “aberrant emotional behavior,” because such “behavior is relevant to the assessment of whether she was capable of performing her job only to the extent that it interfered with her ability to administer basic medical care and safely transport patients to the hospital.” The court noted that the employee’s “outbursts outside of work hours and not in the presence of patients” might not have impaired her essential functions. Interestingly, the court found it relevant that the supervisor who ordered the exam did not know about the employee’s behavior that did undermine essential functions (refusing to administer oxygen to a patient).

19 In Brownfield v. City of Yakima, 2010 U.S. App. LEXIS 15324 (9th Cir. 2010), the court stated that “prophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employer is engaged in dangerous work.” In these situations, an employer may require a fitness-for-duty “before an employee's work performance declines if the employer is faced with ‘significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job.’” In this case, the court held that the employer could require a psychological examination of a police officer who “exhibited highly emotional responses on numerous occasions,” including swearing at a superior after abruptly leaving a meeting despite a direct order to the contrary,” arguing with a coworker, “losing control” during a traffic stop, and, during an argument with a coworker, stating, “It doesn’t matter how this ends.” The court noted that “although a minor argument with a coworker or isolated instances of lost temper” would not necessarily be a business necessity, the employee’s “repeated volatile responses are of a different character” especially because he was a police officer.

20 In Kroll v. White Lake Ambulance Authority, 763 F.3d 619 (6th Cir. 2014), the court noted that for public safety jobs, “an employer may be justified in requesting a psychological exam on slighter evidence than in other types of
workplaces because employees are ‘in positions where they can do tremendous harm if they act irrationally,’ and thus they pose a greater threat to themselves and others” (citation omitted). However, the court stated that even in these workplaces “a small number of isolated incidents of troubling behavior may not be sufficient to establish that a psychological examination is a business necessity.” In Coffman v. Indianapolis Fire Dept., 578 F.3d 559 (7th Cir. 2009), the court noted that “inquiries into an employee's psychiatric health may be permissible when they reflect concern for the safety of employees and the public at large.” In this case, the court held that sending a firefighter for a fitness-for-duty exam was “job-related and consistent with business necessity” where the department had faced two recent firefighter suicides, “multiple firefighters had expressed concern” that the plaintiff “did not seem like herself,” her supervisor believed she was “suffering from paranoia,” and she had seemed depressed, “withdrawn and uncommunicative with other firefighters.”

21 In Pence v. Tenneco Automotive Operating Co., Inc., 169 F. App’x 808 (4th Cir. 2006), the court held that where the employee allegedly made death threats against co-workers, it was “undoubtedly ‘job related and consistent with business necessity’” to subject the employee to a psychological examination. The court stated that the employer does not need to believe that the employee was “impaired by a medical condition” in order to require such an examination. Likewise, in Manson v. General Motors Corp., 2003 U.S. App. LEXIS 6613 (7th Cir. 2003), the court held that after the plaintiff incited a confrontation in the workplace and announced that he was licensed to carry a gun, the employer lawfully referred him for a psychological examination. The court noted that this “obviously was a legitimate attempt on the part of the employer to determine whether Manson was a danger in the workplace and whether he might assault someone at any time.” In Williams v. Motorola, Inc., 303 F.3d 1284 (11th Cir. 2002), the court noted that the employer could properly require a medical examination in light of the employee’s inability to get along with co-workers, use of profanity to her manager, and her charging at the manager with clenched fists.

22 In Crews v. The Dow Chemical Co., 2008 U.S. App. LEXIS 16291 (5th Cir. 2008), the court held that the employer did not violate the ADA by requiring the employee to take a fitness-for-duty examination where she had been a strong performer, but began to display unusual behavior, including slurred speech, an inability to make organized arguments, and missing meetings. In Ward v. Merck & Co., Inc., 2007 U.S. App. LEXIS 6024 (3d Cir. 2007), the court held that the employer could lawfully require a medical examination where the employee’s performance (including productivity) had significantly declined, and where he had become irritable, terse, and at times, seemingly catatonic.

23 Of note, an employer needs to be intellectually consistent. If an employer is using the threat of health and safety as the basis for performing a medical examination, it is best to take the employee out of work until the examination can be performed. In Wright v. Illinois Department of Children and Family Services, 798 F.3d 513 (7th Cir. 2015), the court stated that, in sending someone to a fitness-for-duty examination, the employer’s burden to meet the “job-related and consistent with business necessity” standard is “quite high.” The court noted that an employer must provide “significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job,” and that the employee’s behavior be more than just “annoying or inefficient.” In this case, the court considered whether the employer lawfully sent a social services case worker, responsible for children’s safety, to a medical examination where it thought she might pose a danger to children. The court held that the evidence undermined the employer’s argument that the examination was job-related and consistent with business necessity because the employer kept the employee in her position (despite its regular practices) while sending her for the examination. In addition, the employer even assigned the employee a new “sensitive” case involving a child at the same time.

24 Even when lawful, conducting a medical exam of an employee is not without risks. The medical exam itself can be evidence that the real motivator for an employment action is an actual or perceived disability. For example, in Dark v. Curry County, 451 F.3d 1078 (9th Cir. 2006), the court held that where the employer sent the employee to a fitness-for-duty examination (instead of immediately terminating him) after he engaged in alleged misconduct, the evidence “suggest[ed] that ‘misconduct’ was a pretext for discrimination on the basis of disability.” On the other hand, in a helpful case for employers, Felix v. Wisconsin Department of Transportation, 2016 U.S. App. LEXIS 12462 (7th Cir. 2016), the court analyzed whether the employer needed to argue “direct threat” where a motor vehicle administrative employee was sent for a fitness-for-duty examination after she had a panic attack in a public area at work, tried to cut her wrists, and was kicking and crying. The court held that, despite the employee’s argument, sending her to a medical examination after the misconduct did not obligate it to argue the direct threat standard (where the exam suggested she could not safely continue in the job) since the employer arguably based its
termination decision on the workplace performance. The court held that choosing to have the employee “evaluated for ongoing risk rather than making its discharge decision solely” based on the misconduct “did not inevitably place this case within the direct threat framework.” The court noted that an employer “may seek a professional assessment of the likelihood of an employee's unacceptable behavior recurring before it decides” (for example, it might learn that the behavior was “an adverse reaction to a particular medication and can be prevented from recurring by switching to a different medication or dosage”). The court stated that “insisting that an employer make an immediate decision to fire an employee based on his unacceptable conduct … without the benefit of a professional opinion as to whether this likely was a one-time incident or something that was bound to recur—would serve neither employer nor employee. Hasty and reactive employment decisions are the last thing the Rehabilitation Act or the ADA were meant to encourage.”

25 James, 354 F. App’x at 249; Conroy v. N.Y. State Dept. of Correctional Servs., 333 F.3d 88, 97-98 (2d Cir. 2003).

26 James, 354 F. App’x at 249; Sullivan v. River Valley Sch. Dist., 197 F.3d 804, 811-13 (6th Cir. 1999); Tice v. Centre Area Transp. Auth., 247 F.3d 506, 515 (3d Cir. 2001).

27 Tyndall v. Nat'l Educ. Ctrs., Inc. of Cal., 31 F.3d 209, 213 (4th Cir. 1994) (citation omitted); see also 29 C.F.R. § 1630.2(n)(1) (“The term essential functions means the fundamental job duties of the employment position[,] which does not include the marginal functions of the position.”).

28 29 C.F.R. § 1630.2(n)(3).

29 Credeur v. Louisiana, 860 F.3d 785, 792 (5th Cir. 2017); see also Adair, 823 F.3d at 1307 (“[T]he employer describes the job and functions required to perform that job,’ and we defer to the employer’s description.” (quoting Mason v. Avaya Commc’ns, Inc., 357 F.3d 1114, 1119 (10th Cir. 2004)); Mulloy v. Acushnet Co., 460 F.3d 141, 147 (1st Cir. 2006) (“In the absence of evidence of discriminatory animus, ‘we generally give substantial weight to the employer’s view of job requirements.’” (quoting Ward v. Mass. Health Research Inst., Inc., 209 F.3d 29, 34 (1st Cir. 2000))).

30 Credeur, 860 F.3d at 792 (emphasis in original); 42 U.S.C. § 12111(8).

31 Credeur, 860 F.3d at 792 (quoting 29 C.F.R. § 1630(n), App.); see also Adair, 823 F.3d at 1307-08; EEOC v. Ford Motor Co., 782 F.3d 753, 762 (6th Cir. 2015); Mulloy, 460 F.3d at 147.

32 Mulloy, 460 F.3d at 147 (quoting 29 C.F.R. § 1630(n), App.).
Examining Your Examinations and Inquiring About Your Inquiries: *Strategies for Legally Compliant Medical Evaluations*

**Presenters**
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Charles L. Thompson, IV (San Francisco)

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**ADA in a Nutshell**

- **Prohibits**
  - Discrimination against qualified individuals with a disability and
  - Retaliation for exercising rights under the statute
  - Medical examinations and inquiries unless legitimate need under Act

- **Requires**
  - Reasonable accommodations for qualified individuals with a disability if no undue hardship to the employer or direct threat of harm
Who is Disabled?

- Physical or mental impairment that substantially limits major life activity
- Pregnant employees?
- Temporary conditions?

AMA: Assume
ADA: Disabled
Always

EEOC Charges – Disability

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- Increase each year since 2008 in percentage
- Nearly double in terms of percentage between 2002 (18.9%) and 2017 (31.9%)
Who is a Qualified Individual?

- ADA protects only qualified individuals
- Qualified individuals are those that can perform ALL essential job functions of the position, WITH or WITHOUT reasonable accommodation

WHAT ARE THE ESSENTIAL FUNCTIONS OF THE JOB?
Essential Functions

- What the incumbent does
- What others do
- Consequences if that function is not done
- Time spent on function
- Employer’s judgment
- Written job descriptions

INDIVIDUALIZED ASSESSMENT
ADA Accommodation Process

- **Trigger:** Employee cites impairment and “barrier” OR need for leave
- **Accommodation within Job**
- **Consider Company Leave and FMLA**
- **Grant ADA Leave if Effective**
- **Consider for Open Positions**
- **Termination**

Medical Exams Under ADA

- Three stages, with different rules:
  - Application / Pre-Offer
  - Post-Offer / Pre-Employment
  - Post-Hire
Application/Pre-Offer Stage

- ADA prohibits all disability-related inquiries and medical examinations, even if they are related to the job, unless the applicant discloses the disability and is seeking an accommodation.

Post-Offer/Pre-Employment Stage

- Employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all employees in the same job category.

- Primary concern is what employer does with the information it learns.
Post-Hire Stage

- Employer may make disability-related inquiries and require medical examinations only if the inquiries are job-related and consistent with business necessity
- Both in *when* we test and *scope* of test

What’s at Risk?

- Claim can allege ADA violation based on:
  - Conducting exam when not permitted
  - Scope of exam
  - Acting on information from unlawful test
  - Acting on applicant/employee refusal to undergo or participate in unlawful test
So Why Do Employers Test?

- Direct costs of WC injuries
  - Medical costs
  - Lost wages
  - Higher premiums

- Indirect costs of WC injuries (1.1 to 4.5 times direct costs)
  - Lost production (worker distraction)
  - Training costs (replacement worker)
  - Loss of skill/efficiency (slowed production)
  - Paperwork
  - Administrative time
  - Loss of morale
  - Legal issues
  - Product replacement
So Why Do Employers Test?

- Saves money
  - OSHA estimates employers spend $1B/week on WC
  - Case study – $6 savings for every $1 spent

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<td>1</td>
<td>91</td>
<td>$6500</td>
</tr>
<tr>
<td>Group 2 (Not Screened)</td>
<td>23</td>
<td>87</td>
<td>$2,073,000</td>
</tr>
</tbody>
</table>

*Group 1: n=110-18 employees who did not pass the screen
Group 2: n=110

Structuring ADA-Compliant Exams

- Ensure proper basis for testing
  - When employee seeks accommodation
  - When employer knows of impairment and sees objective evidence of inability to perform job or concern over employee’s safety or safety of others
  - When employee does dangerous work and has been out on leave for a period of time because of his/her own impairment or employer comes into other information suggesting the employee may be unable to perform the job
Structuring ADA-Compliant Exams

- Ensure proper basis for testing
  - When employee has known impairment and doing dangerous work and impairment could impact the employee’s ability to do the job safely
  - When employer discovers information from lawful medical exam that suggests employee may not be able to perform one or more essential functions of the job (i.e., the follow-up rule)

Prophylactic Exams

- Lawful only when
  - Employee is in a position affecting public safety, and exam is narrowly tailored to address specific job-related concerns, and we are testing only for impairments that could prevent the employee from performing his or her job now
  - When another law, such as OSHA or the DOT, requires the test or makes the test necessary for compliance
    - Not so fast . . .
Structuring ADA-Compliant Exams

- Ensure proper scope of exam
  - Exam must be no broader than necessary
  - Restricted to discovering only whether the employee can continue safely fulfilling the essential functions of the job

- Objective information about position
  - Work site assessment
  - Assess essential functions

- Subjective information about employee’s duties
  - What the incumbent does
  - What others do
  - Consequences if that function is not done
  - Time spent on function
  - Employer’s judgment
  - Written job descriptions
Examining Your Examinations and Inquiring About Your Inquiries: *Strategies for Legally Compliant Medical Evaluations*

**Presenters**
Lucas J. Asper (Greenville), Caroline Larsen (Phoenix)

**Moderator**
Charles L. Thompson, IV (San Francisco)