Pre-Employment Medical Inquiries

Effects on Employers' Pre-Hire Practices

Employers use a variety of screening devices in the order they prefer:

- Application for Employment
- Background Checks
- Direct Aptitude Tests
- Drug and Alcohol Tests
- Medical Examinations
- Pencil & Paper Tests
- Personal Interview
- Psychological Inquiries

The EEOC, now supported by a federal appeals court, would require that employers request and consider information obtained during medical examinations only during the last-step of the pre-hire process. Also, under this ruling employers may not obtain such information or schedule an examination until all other pre-hiring screens are completed.

It may be time for you to consider restructuring your company's pre-employment application process.

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Medical Inquiries Must Be Last in Sequence

Recently, the U.S. Court of Appeals for the Ninth Circuit, the federal appellate court covering several western states including California, held that an employer violated the ADA by requiring applicants to complete a pre-employment physical before background checks and other non-medical inquiries had been completed. The court reasoned that the ADA prohibits medical inquiries or consideration of medical information until after a "real" job offer has been made. The court relied upon statements made by the U.S. Equal Employment Opportunity Commission (EEOC) in its ADA Technical Assistance Manual and in an Enforcement Guidance issued several years ago. The case is *Leonel v. American Airlines Inc.*, decided on March 4, 2005.

Employer Rescinded Conditional Job Offers

In this case, the applicants received conditional offers of employment; the offers required them to undergo a background check, drug test, and medical examination. The applicants failed to disclose their HIV-positive status. During the medical examination, a blood sample was obtained and its analysis revealed in a number of applicants elevated "mean corpuscular volumes" ("MCVs"). The employer's medical expert noted that there is a significant correlation between elevated MCV levels and various conditions such as alcoholism, HIV, seizure disorders, sickle cell disease and liver disorder, among others. Based on the medical report, the employer rescinded its offers of employment, citing the applicants' failure to disclose information.

The employees brought suit contending, among other things, that the medical examinations were in violation of California and federal laws, specifically that the ADA required that medical examinations and related medical information be obtained and considered only after all other steps of the pre-hire process had been completed. A federal district court granted summary judgment in favor of the employer. The Ninth Circuit reversed on the ADA violation issue and remanded the case to the district court for further proceedings.

"Real" Job Offers

According to EEOC guidelines on the subject, a job offer is "real" only if all non-medical components of the application process have been completed or it is shown that they could not reasonably have been completed before issuing the offer.

The EEOC's ADA Technical Assistant Manual on the Employment Provisions of the ADA, Section 6.4, states:

> The ADA recognizes that employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. The ADA requires only that such examinations be conducted as a separate, second step of the selection process, after an individual has met all other job pre-requisites. The employer may make a job offer to such an individual, conditioned on the satisfactory outcome of a medical examination or inquiry, providing that the employer requires such an examination or inquiry for all entering employees in a particular job category, not merely individuals with known disabilities, or those whom the employer believes may have a disability.

An enforcement guidance issued by the EEOC in 1995, entitled Pre-employment Disability-related Questions and Medical Examinations, noted that at the post-offer stage an employer may ask disability-related questions and perform medical examinations and that the job offer may be conditioned on the results of post-offer disability-related questions or medical examinations. However, the Commission advanced the concept of a "real job offer," which it described as follows:

> Since an employer can ask disability-related questions and require medical examinations after a job offer, it is important that the job offer be real. A job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer. Of course, there are times when an employer cannot reasonably obtain and evaluate all of non-medical information at the pre-offer stage. If an employer can show that it is the case, the offer would still be considered a real offer.

One example of a situation where an employer cannot reasonably obtain and evaluate all non-medical information at the pre-offer stage includes cases where an employee requests that a current employer not be contacted until the potential employer makes a conditional job offer. This exception, presumably, would be construed narrowly under the Ninth Circuit's decision.

For Your Consideration

The decision by the Ninth Circuit would require employers not only to consider the results of a medical or psychological examination as the last step in the pre-hire process, it would not permit employers to obtain such information or schedule the examination until all other pre-hiring screens had been completed.

If this interpretation becomes accepted by other federal courts, particularly if courts in Minnesota adopt this rule, it will impact the manner in which your company conducts its pre-employment process. Because the Ninth Circuit's decision is based in part on statements contained in EEOC guidelines, which apply nationally, it is worth considering and, to the extent possible, structuring your company's pre-employment application process accordingly.

Why Structure the Pre-Employment Screening Process?

"Congress and the California legislature both have determined that job applicants should not be required to undergo medical examinations before they hold real offers of employment. American —even if well-intentioned— cannot avoid the mandate simply because it believes doing so will be more convenient for its applicants."

–U.S. Court of Appeals for the Ninth Circuit in Leonel v. American Airlines, Inc.

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