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## DISABILITY EMPLOYMENT LAW CONFERENCE

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*25<sup>TH</sup> Anniversary of the Americans with Disabilities Act*

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*A charitable event benefiting Oklahomans with disabilities and Oklahoma employers by offering practical strategies for successfully employing people with disabilities in compliance with disability employment laws.*

**[How to Make Lawful Medical Inquires and Exams]**

Elaine Turner/Hall Estill

Elaine R. Turner began her legal career with Hall Estill in 1989 and practices Labor & Employment Law representing employers. Ms. Turner regularly counsels and advises employers on compliance with federal, state and local employment laws and has successfully defended employment litigation cases and administrative proceedings for over two decades. She is a frequent speaker on Employment Law and conducts employment-related seminars, speeches and programs for employees, managers, supervisors and staff. She is frequently interviewed by local media to provide her legal opinion on employment law topics.

Ms. Turner was recently named Best Lawyers' 2016 Oklahoma City Employment Law-Management "Lawyer of the Year". She serves on Hall Estill's Board of Directors and has an AV Preeminent rating through Martindale-Hubbell. She has been recognized as an Oklahoma Super Lawyer and Top 25 Oklahoma Female Super Lawyer for Employment Litigation: Defense; was recipient of the The Journal Record's 2006 Leadership in Law Award; is ranked in Labor & Employment Law by Chambers USA; and annually selected as a Best Lawyer in America in Employment Law-Management.

Ms. Turner serves as the Competition Chairperson for Special Olympic in Oklahoma County, a position she has held since 1996. She has also served as an Oklahoma Special Olympics Sports Director in two different events. Ms. Turner was also honored to serve as a Unified Partner on Team USA at the Special Olympics World Games in Ireland in 2003, where her teams earned two gold medals. She was recently named 2015 Oklahoma Special Olympics Volunteer of the year.

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# **How to Make Lawful Medical Inquiries and Medical Examinations**

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**OFFICE OF CIVIL RIGHTS ENFORCEMENT  
DISABILITY EMPLOYMENT LAW CONFERENCE**

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## **How to Make Lawful Medical Inquiries and Medical Examinations**

Federal and some state laws are very clear regarding when an employer can and cannot require applicants and employees to undergo medical inquiries and exams. The Americans With Disabilities Act (“ADA”) provisions concerning disability-related inquiries and medical examinations reflect Congress' intent to protect the rights of applicants and employees to be assessed on merit, while protecting the rights of employers to ensure that individuals in the workplace can efficiently perform the essential functions of their jobs. The following is an overview pertaining to when an employer may lawfully require an applicant or employee to undergo a medical inquiry or exam. As a cautionary note, it is impossible to discuss all possible issues and factual scenarios that employers may be presented with when dealing with employee health issues. Employers are encouraged to consult with the company’s labor and employment attorney when presented with circumstances that are not clear.

### **DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES**

Title I of the ADA places limitations on when an employer can make disability-related inquiries or require medical examinations. In this regard, the ADA states:

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.14(c).

The ADA sets standards for such inquiries and medical examinations at three different stages of employment: pre-offer, post-offer and during employment. Prior to an employment offer being made, the ADA prohibits **all** disability related inquiries and medical examinations, even if related to the position for which the individual is being considered. After an individual has been given a conditional job offer, but before he/she begins working, 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 entering employees in the same job category.” Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at pp. 2-3. See also 42 U.S.C. §12112(d)(3); 29 C.F.R. §1630.14(b). Significantly, however, if an individual is denied a position because of a disability, the employer must show that the exclusionary criterion is job-related and consistent with business necessity. 42 U.S.C. §12112(b)(6); 29 C.F.R. §1630.10; 29 C.F.R. §1630.14(b)(3). After employment begins, disability-related inquiries may only be made and medical examinations may only be required if job-related and consistent with business necessity. 42 U.S.C. §12112(d)(4)(A); 29 C.F.R. §1630.14(c).

## **WHAT IS A DISABILITY-RELATED INQUIRY**

As defined by the Equal Employment Opportunity Commission (“EEOC”), a disability-related inquiry is a question or series of questions that is likely to elicit information about an individual’s disability. Enforcement Guidance: Preemployment Questions and Medical Examinations, at p. 4.

Disability-related inquiries may include:

- Asking an employee whether he/she has or ever had a disability or how he/she became disabled or inquiring about the nature or severity of an employee’s disability;
- Asking an employee to provide medical documentation regarding his/her disability;
- Asking an employee’s co-workers, family members, medical providers or anyone else about the employee’s disability;
- Asking about an employee’s genetic information;
- Asking about an employee’s prior workers’ compensation history;
- Asking whether the employee has taken or is taking prescription drugs or medications; and
- Asking an employee a broad question about his/her impairments that is likely to elicit information about a disability.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at pp. 3-4.

EEOC examples of questions that are not disability-related inquiries and are, therefore, permissible are set out below:

- Asking generally about an employee’s well being (e.g. how are you?);
- Asking an employee about non-disability related impairments (e.g. How did you break your leg?);
- Asking an employee whether he/she can perform job functions;
- Asking an employee whether he/she has been drinking alcohol;
- Asking an employee about his/her current illegal use of drugs;

- Asking a pregnant employee how she is feeling or when is her baby due; and
- Asking employees to provide a name and phone number for a person to contact in case of a medical emergency.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at pp. 3-4.

### **WHAT IS A MEDICAL EXAMINATION?**

A medical examination is a procedure or test that seeks information about an individual's physical or mental impairments or health. Enforcement Guidance: Preemployment Questions and Medical Examinations, at p. 15. The EEOC has identified the following factors to be considered in determining whether a test or procedure is a medical examination:

1. Whether the test is administered by a health care professional;
2. Whether the test is interpreted by a health care professional;
3. Whether the test is designed to reveal an impairment or physical or mental health;
4. Whether the test is invasive;
5. Whether the test measures an employee's performance of a task or measures his/her physiological responses to performing the task;
6. Whether the test normally is given in a medical setting; and
7. Whether medical equipment is used.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at p. 4.

As set forth in its Enforcement Guidance, the EEOC has determined that the following tests and procedures are medical examinations:

- Vision tests conducted and analyzed by an ophthalmologist or optometrist;
- Blood, urine, and breath analyses to check for alcohol use;
- Blood, urine, saliva, and hair analyses to detect disease or genetic markers;
- Blood pressure screening and cholesterol testing;

- Nerve conduction tests;
- Range-of-motion tests that measure muscle strength and motor function;
- Pulmonary function tests;
- Psychological tests that are designed to identify a mental disorder or impairment; and
- Diagnostic procedures such as x-rays, CAT scans, and MRIs.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at p. 5.

Also according to the EEOC, the following procedures and tests are generally not considered to be medical examinations:

- Tests to determine the current illegal use of drugs;
- Physical agility tests, which measure the employee’s ability to perform actual or simulated job tasks;
- Physical fitness tests which measure an employee’s performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical;
- Tests that evaluate an employee’s ability to read labels or distinguish objects as part of demonstration of the ability to perform actual job functions;
- Psychological tests that measure personality traits such as honesty, preferences, and habits; and
- Polygraph examinations.

Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at p. 5.

**WHAT IS “JOB-RELATED AND CONSISTENT WITH BUSINESS NECESSITY”?**

A disability-related inquiry or medical examination is “job-related and consistent with business necessity” when the employer “has 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.” Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at p. 6. Additionally, such inquiries and examinations

will be job-related and consistent with business necessity if made or taken to investigate a request for reasonable accommodation if the disability or need for accommodation is not known or obvious to the employer. Also, if an employer receives “reliable information” from a credible third party that an employee has a medical condition or the employer has observed symptoms indicating that the employee may have a medical condition that will impair his/her ability to perform his/her essential job functions, an inquiry or examination may be job-related and consistent with business necessity. Id. at pp. 6-7.

## **HIRING**

As it relates to inquiries and examinations, potential employers have to navigate many pitfalls in the hiring process. Thus, the hiring process will be broken down into two phases in this presentation:

Phase I: Prior to making a job offer; and

Phase II: After a conditional job offer is made.

### ***PHASE I - PRIOR TO MAKING A JOB OFFER***

Before an applicant walks through the door, employers can take certain steps to minimize its risk of being sued. Employers should begin by drafting a written job description of the position that it is seeking to fill. A written job description is not required under the law, but can be used to establish that no discrimination was present in a hiring decision. In written job descriptions, employers should do two things: (1) define the essential functions of the job; and (2) clearly indicate specific factors necessary for job performance, such as weight lifting requirements, frequent travel, long or unusual work shifts, exposure to the elements, fast-paced or stressful work environment. Please note, however, that employers must be vigilant when implementing written job descriptions, ensuring that they are thorough, accurate and remain current.

During interviews, keep in mind the following guidelines which apply equally to brand new applicants and existing employees who are being considered for a new position:

**MEDICAL INQUIRIES AND EXAMINATIONS** - During this stage, employers may not make any medical inquiry or conduct any physical medical examination. You may ask questions about the ability of the applicant to perform specific job functions and may, within certain limitations, ask the applicant to describe or demonstrate how he or she would perform these functions.

**WORKERS' COMPENSATION HISTORY** - In making your decision to hire, an applicant's previous injury or prior worker's compensation claim generally cannot serve as a basis for refusal to hire the person.

**SPECIFIC INQUIRIES** - At this pre-offer stage, the person doing the interviewing should **not** do any of the following:

- Ask whether an applicant has a disability;
- Inquire about an applicant's worker's compensation history or whether the applicant has ever filed a workers' compensation claim;
- Use any application form that makes inquiries into the medical history of a job applicant;
- Ask an applicant how he or she became disabled or about the prognosis of the applicant's disability;
- Ask an applicant or employee how often he or she will require leave or use leave because of the disability (this includes pregnancy or alcoholism);
- Require an applicant to take a pre-offer medical examination;
- Administer a pre-employment test to an applicant with a disability in such a manner that it requires the use of the applicant's impaired skills unless the skills in the test are necessary to perform the essential functions of the job;
- Refuse to hire an applicant with a disability because the applicant's disability prevents performance of marginal or peripheral functions of the job;
- Refuse to hire an applicant because of the applicant's relationship with another individual with a disability; or
- Require drug tests.

Even though employers may not ask disability-related questions or require medical examinations prior to making an offer of employment, employers may do a wide variety of other things to evaluate whether an applicant is qualified for the job. This includes the following:

- Employers may ask about an applicant's ability to perform specific job functions. For example, an employer may state the physical requirements of a job and ask if an applicant can satisfy these requirements.
- Applicants may be asked to describe or demonstrate how they would perform job tasks.

ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, at pp. 2-3.

## ***PHASE II - AFTER A CONDITIONAL JOB OFFER IS MADE***

After a conditional offer of employment is made, employers have some authority to make inquiries and require examinations of the job candidate. As set out earlier, after an individual has been given a conditional job offer, but before he/she begins working, 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 entering employees in the same job category.” Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at pp. 2-3. See also 42 U.S.C. §12112(d)(3); 29 C.F.R. §1630.14(b). Significantly, however, if an individual is denied a job because of a disability, the employer **must** show that the exclusionary criterion is job-related and consistent with business necessity. 42 U.S.C. §12112(b)(6); 29 C.F.R. §1630.10; 29 C.F.R. §1630.14(b)(3).

### **MEDICAL INQUIRIES AND EXAMINATIONS**

Employers may make a conditional job offer which only becomes effective on the satisfactory result of a post-offer medical examination or medical inquiry if this is required of all new employees in the same job category. This includes questions about prior sick leave usage, illnesses/diseases/impairments, and general physical and mental health. Employers who make such inquiries or require such examinations must require the same inquiry/examination of all entering employees in the same job category. However, if, after making the basic inquiry/examination additional information is needed about a particular job candidate, additional medical information may be requested of that candidate. Enforcement Guidance: Preemployment Questions and Medical Examinations, at p. 21 & 23.

Under certain circumstances, you may be able to require an applicant to undergo a pre-employment psychological test. According to the EEOC, a psychological test is a medical test if it provides evidence indicating whether the applicant has a diagnosable mental disorder or impairment, or ascertains the applicant's general psychological health. If, however, that same psychological test determines such things as the applicant's personal tastes and habits, the test is likely to be a prohibited medical exam. In using any such test, make sure a health care professional administers the test. “Health care professional” has been defined to include doctors, nurses, psychologists and other mental health professionals, and physical and occupational therapy professionals.

If an employer decides not to hire an individual based on the results of a medical examination or inquiry which reveals a disability, the reason(s) for not hiring the person must be job related and consistent with business necessity. This would include determining that the potential employee would pose a "direct threat" in the workplace. A direct threat has been defined as "a significant risk of substantial harm to the health or safety of the employee or others." Employers must also determine that the direct threat cannot be eliminated or reduced through reasonable accommodation. Significantly, you cannot simply assume that such a threat exists; employers must be able to establish through objective, medically supportable methods that there is significant risk that substantial harm could occur in the workplace. Employers must also show that no reasonable accommodation was available that would enable the individual to safely

perform the essential job functions, and that accommodation would impose an undue hardship. Employers cannot refuse to hire an applicant with a disability who is currently able to perform essential job functions simply due to speculation that the disability may cause a risk of future injury.

## **WORKERS' COMPENSATION HISTORY**

After a conditional job offer is made, a prospective employee's worker's compensation history may be asked about in a medical inquiry or medical examination, but only if such inquiry is made of all such persons in the same job category. Similarly, employers may not require a potential employee to have a medical examination because a response to a medical inquiry shows a previous on-the-job injury **unless** all applicants in the same job category are required to have an examination. Additionally, employers may not base employment decisions on speculation that an applicant may cause increased workers' compensation costs in the future.

Employers may elect to not hire an individual and may elect to terminate an employee if the individual poses a significant risk of substantial harm to the health or safety of the individual or others. This is only true, however, if the risk cannot be eliminated or reduced by reasonable accommodation. Employers may also refuse to hire or fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her condition or workers' compensation history.

## **AFTER EMPLOYMENT BEGINS**

### **MEDICAL INQUIRIES AND EXAMINATIONS**

After employment begins, employers may make medical inquiries or require medical examinations only if those inquiries and examinations are job related and justified by business necessity. Job related, justified business necessities include situations where there is evidence of job performance problems or safety problems, other federal laws require medical actions, a need to update current fitness to perform a particular job and voluntary examinations that are part of employee health programs. Employers can also make such inquiries or require examinations if reliable information is received from a credible person giving rise to a reasonable belief that the employee's ability to perform essential job functions will be impaired or that he/she will pose a direct threat due to a medical condition. Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at p. 8.

Employers generally cannot require all employees to identify prescription medications that they are taking. However, under limited circumstances, it may be job-related and consistent with business necessity to require employees in public safety positions to report what medications they are taking that may affect his/her ability to safely perform essential job functions. Employers must demonstrate that an employee's inability or impaired ability to perform essential job functions will result in a direct threat. Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act (ADA), at p. 9. Significantly, employers may require medical examinations by an appropriate health care

professional, who is selected by the employer, when it is reasonably believed that the employee poses a direct threat. *Id.* at p. 11.

If an employee refuses to respond to a disability-related inquiry or participate in a medical examination, the actions that an employer may take will depend upon the circumstances. The EEOC has provided two hypothetical scenarios in this regard. In the first example, a clerical employee's work product deteriorates over a period of time, containing numerous errors. During this same timeframe, the employer observes behavior indicating that the employee is having difficulty with his/her eyesight. The employee refuses employer's request that the employee go to see the company doctor for a related medical examination. The EEOC instructs that the employee can be disciplined, but the discipline should be focused on the employee's performance problems, as opposed to the refusal to undergo the medical examination. *Id.* at pp. 9-10.

In another hypothetical scenario, an accounting employee requests an ergonomic chair due to reported back pain. Because the employee's possible disability and need for reasonable accommodation are not obvious, the employer can request documentation from the employee's treating physician that describes the nature, severity, and duration of impairment, limitations on activities, and substantiates why an ergonomic chair is needed. If the employee fails or refuses to provide the requested documentation, or the documentation does not establish that the employee has a disability, the employer does not have an obligation to provide the chair. *Id.* at p. 10.

Employers may also require employees to provide documentation establishing the need for medical leave. However, employers must have a policy or practice of requiring all employees, with or without disabilities, to provide such documentation. *Id.* at p. 12. During the medical leave, an employer may not request a periodic update of the employee's progress **if** the employee has requested a fixed period of leave and has not requested additional leave. However, if the request for leave does not specify a return date or if the employee needs additional leave, employers may require a periodic update relating to the employee's condition and estimated return date. *Id.*

When it is time for the employee to return to work, employers can make disability-related inquiries and require medical examinations if there is a reasonable belief that the employee's present ability to perform essential job functions is impaired or the employee poses a direct threat. However, the inquiry or examination must be limited to assessing the employee's ability to work. As noted by the EEOC, this will usually limit the inquiry to the specific medical condition for which the medical leave was taken. *Id.*

## **WORKERS' COMPENSATION HISTORY**

You may not discharge a person who is otherwise satisfactorily performing his or her job simply because of that person's workers' compensation history. Nor can an employer terminate You may discharge an individual who is not currently able to perform the essential job functions without posing significant risk of substantial harm to the health or safety of the individual or others, if the risk cannot be eliminated or reduced by reasonable accommodation You may also fire a person who knowingly provides a false answer to a lawful post-offer inquiry about his/her

condition or workers' compensation history.

**CONCLUSION**

This presentation is intended to provide employers with a general overview of issues associated with disability-related inquiries and medical examinations. As is no doubt quite clear from this presentation, managing applicant and employee health issues in the workplace is complicated and very fact specific. The courts have made clear that ADA issues must be determined on a case by case basis depending upon the medical conditions and how such conditions impact the applicant or employee. For these reasons, employers are cautioned to consult with their labor and employment counsel when faced with such issues.