

Labor & Employment Update

New Ninth Circuit Ruling Impacts Medical Exams and Inquiries for Prospective Employees

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A March 4, 2005 9th Circuit decision held that under the Americans with Disability Act (ADA), pre-employment medical examinations must be conducted at the very last stage of the hiring process.

In this case, Leonel v. American Airlines, Inc., the plaintiffs, all of whom were HIV positive, applied for flight attendant positions with American Airlines. After the interview process, the airline made offers to all three plaintiffs, contingent upon passing a background check and a medical examination. However, before American Airlines performed the background checks, it had the applicants submit to a pre-employment medical examination where they were required to fill out medical history questionnaires and give blood samples. Even though the questionnaire asked if the applicants had any blood disorders or HIV and warned that failure to make full disclosure would result in revocation of the offer, all three applicants failed to disclose their HIV positive status. When American Airlines obtained the medical examination results, which included blood-test results indicating that the plaintiffs were taking HIV-related medication, it rescinded all three offers because the plaintiffs had failed to disclose that they had HIV.

The 9th Circuit held that the ADA prohibits medical exams and inquiries until after the employer has made a “real” offer, i.e., when it has completed all non-medical aspects of its application process before performing any medical testing. The court held that American Airlines did not make “real” offers to the plaintiffs because the offers were contingent on the outcome of the non-medical background checks as well as the medical examinations. Further, because American Airlines had not considered all non-medical information, i.e., the background checks, before making its offers, the court concluded that American Airlines did not have the right to inquire into the plaintiffs’ medical status and could not penalize them for failing to disclose their medical conditions at a time when it had no right to obtain that legally protected information.

The court rejected the airline’s argument that it could withdraw its conditional offers based on the applicants’ “willful omissions,” stating that the airline had no right to ask the applicants for medical information in the first place and, therefore, could not withdraw its conditional offers on this basis.

This decision means that employers should conduct pre-employment medical examinations last. No post-offer/pre-hire medical exam should be performed until all other non-medical conditions have been satisfied, such as background checks. Even if the employer doesn’t evaluate the medical information until after non-medical contingencies have been lifted, the court held that an employer still violates the ADA if it requests the medical information before making a determination on the non-medical conditions.

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Note: This case, which arose in California, also involved the question of whether American Airlines' testing of blood samples violated the right to privacy guaranteed by the California Constitution. The Court acknowledged that an applicant does not have a reasonable expectation of privacy in the mere drawing of blood. The Court continued, however, that an applicant does have a reasonable expectation that an employer will not retrieve private medical information "by performing blood tests outside of the ordinary or accepted medical practice regarding general or pre-employment medical exams." The Court held that because American Airlines failed to provide notice regarding the medical tests that would be run, an issue of fact remained as to whether American Airlines violated the plaintiffs' right to privacy. Therefore, for employers doing business in California, it will be important to provide full disclosure of and obtain written consent for all medical tests. In performing any medical exam, employers in California should fully disclose the nature of the exam, tests to be performed and obtain written consent from the applicant. The 9th Circuit said that absent such express consent, an employer may face liability in connection with any subsequent privacy claim brought by an applicant.

In light of this decision, medical exams should occur as the last step of the hiring process and employment application forms may require modification.

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