MEDICAL INQUIRIES AND EXAMINATIONS OF JOB APPLICANTS

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"Job Applicant Screening: How to Assess Applicants Effectively and Lawfully"

Introduction

Employers may desire to seek health-related information from applicants to determine whether an individual applying for a job is capable of safely performing required tasks, to eliminate drug users, and to record any pre-existing injuries or limitations (in case the employee later files a workers' compensation claim and alleges that the injury or limitation was work-related).

Notwithstanding an employer's desire for medical information under any of the foregoing circumstances, there are many limitations on the employer's ability to obtain it. The scope of permissible applicant inquiries depends upon the phase of hiring at which the information is sought (*i.e.*, pre-offer, post-offer), and the reason for the inquiry. Even an innocent inquiry about an applicant's physical or mental condition could potentially violate state or federal laws.

A. Medical Inquiries and Examinations Under Disability Law

The Equal Employment Opportunity Commission (EEOC), which enforces the Americans with Disabilities Act, has issued a number of helpful guidances addressing the topic of pre-employment medical inquiries and examinations:

- Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), referred to as the "EEOC Guidance."[1]

- Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA), referred to as the "EEOC Q&A."[2]

- ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (1995), referred to as the "EEOC PreEmployment Guidance."[3]

1. Pre-Offer Inquiries and Examinations

The Americans with Disabilities Act[4] (applicable to employers with 15 or more employees) and Oregon's parallel state law[5] (applicable to employers with six or more

[1] http://www.eeoc.gov/policy/docs/guidance-inquiries.html.
[2] http://www.eeoc.gov/policy/docs/qanda-inquiries.html.
[3] http://www.eeoc.gov/policy/docs/preemp.html.

employees) both regulate medical inquiries and medical examinations of job applicants. Before making an offer of employment, no medical inquiries or examinations are permissible, even if they are job-related: "* * * 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."[6]

(a) *What is a disability-related inquiry?*

According to the EEOC, a disability-related inquiry is a question "that is likely to elicit information about a disability, such as asking employees about: whether they have or ever had a disability; the kinds of prescription medications they are taking; and, the results of any genetic tests they have had."[7] Disability-related inquiries may include the following (note that although the examples refer to "employees," the examples apply to job applicants as well):[8]

- asking an employee whether s/he has (or ever had) a disability or how s/he 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-worker, family member, doctor, or another person about an employee's disability;
- asking about an employee's genetic information;
- asking about an employee's prior workers' compensation history;
- asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee's taking of such drugs or medications; and,
- asking an employee a broad question about his/her impairments that is likely to elicit information about a disability (*e.g.*, What impairments do you have?).

(b) *Questions that are not disability-related inquiries*

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4 42 USC 12101 *et seq.*
5 ORS 659A.103 *et seq.*; OAR 839-006-0200 *et seq.*
6 29 CFR 1630.13; *see also* ORS 659A.133(1); OAR 839-006-0242(1).
7 EEOC Q&A Question No. 1; 29 CFR 1630.13.
8 EEOC Guidance B(1) (footnotes omitted). The EEOC Guidance was issued prior to the ADA Amendments Act, which broadened the definition of "disability." Accordingly, a number of these examples of permissible questions may be outdated. For example, less severe or shorter term conditions may now qualify as disabilities, such as allergies or a complications relating to pregnancy. http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

Conversely, according to the EEOC, the following are not disability-related inquiries and thus are permissible[9]:

- asking generally about an employee's well-being (*e.g.*, How are you?), asking an employee who looks tired or ill if s/he is feeling okay, asking an employee who is sneezing or coughing whether s/he has a cold or allergies, or asking how an employee is doing following the death of a loved one or the end of a marriage/relationship;

- asking an employee about nondisability-related impairments (*e.g.*, How did you break your leg?);[10]

- asking an employee whether s/he can perform job functions;

- asking an employee whether s/he has been drinking (but not about drinking habits such as how much the employee drinks);

- asking an employee about his/her current illegal use of drugs (but not about past drug addiction);

- asking a pregnant employee how she is feeling or when her baby is due; and,

- asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency."

- A covered entity may make pre-employment inquiries into the ability of all applicants to perform job-related functions, and/or may ask applicants to describe or to demonstrate how, with or without reasonable accommodation, the applicants will be able to perform job-related functions.[11]

- Stating the attendance requirements of the job and asking if the applicant can meet them.[12]

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9 EEOC Guidance B(1) (footnotes omitted). The EEOC Guidance was issued prior to the ADA Amendments Act, which broadened the definition of "disability." Accordingly, a number of these examples of permissible questions may be outdated. For example, less severe or shorter term conditions may now qualify as disabilities, such as allergies or a complications relating to pregnancy. http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm.

10 But note that under ADA Amendments Act, an Employer may not discriminate based upon an actual or perceived impairment, whether or not the impairment limits or is perceived to limit a major life activity (except for transitory and minor impairments). Thus focusing on or asking about ANY impairments post-ADA Amendments Act may be unwise. 29 CFR 1630.2(l).

11 EEOC PreEmployment Guidance, p. 4. In addition, if the employer does not ask all applicants to demonstrate, they may ask a single applicant to do so if the employer has a reasonable belief the applicant will not be able to perform a job function because of a known or obvious disability (e.g. the applicant's disability is apparent – such as use of a wheelchair, or the applicant disclosed the disability). *Id.* at p. 5.

12 EEOC PreEmployment Guidance, p. 7. The employer can ask how many days an applicant was absent from his last job but cannot ask how many days the employee was out sick in their last job however, as this gets at the severity of illness. *Id.*

In addition, it is permissible to ask all applicants if they need reasonable accommodation for the hiring process and, if an employee requests accommodation and the disability is not obvious, the employer may ask for documentation of the disability and functional limitations.[13]

(c) *What is a medical examination?*

The EEOC defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health."[14] The EEOC lists the following factors that should be considered to determine 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 is normally given in a medical setting; and, (7) whether medical equipment is used.[15]

The following are all considered medical examinations under the ADA:[16]

- vision tests conducted and analyzed by an ophthalmologist or optometrist;[17]
- blood, urine, and breath analyses to check for alcohol use;
- blood, urine, saliva, and hair analyses to detect disease or genetic markers (*e.g.*, for conditions such as sickle cell trait, breast cancer, Huntington's disease);
- blood pressure screening and cholesterol testing;
- nerve conduction tests (*i.e.*, tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);
- range-of-motion tests that measure muscle strength and motor function;
- pulmonary function tests (*i.e.*, tests that measure the capacity of the lungs to hold air and to move air in and out);
- psychological tests that are designed to identify a mental disorder or impairment;
- diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).

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13 EEOC PreEmployment Guidance, p. 5.
14 EEOC PreEmployment Guidance, p. 13.
15 EEOC PreEmployment Guidance, p. 13.
16 EEOC Guidance B(2).
17 Because uncorrected vision and hearing tests have been controversial, they are addressed in greater detail in applicable regulations. 29 CFR 1630.10(b); OAR 839-006-0200.

(d) *What is not considered a medical examination?*

The following procedures and tests are generally are not considered medical examinations under the ADA:[18]

- tests to determine the current illegal use of drugs;
- physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and 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 (*e.g.*, measuring heart rate or blood pressure);
- tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;
- psychological tests that measure personality traits such as honesty, preferences, and habits;
- polygraph examinations.

However, the fact that the foregoing tests are not considered medical examinations does not mean that they are permissible. Many states have laws prohibiting various kinds of testing. For example, Oregon law prohibits polygraph examinations, psychological stress tests, and other forms of "lie detector" testing.[19]

(e) *Asking if applicant can perform job functions, asking about accommodations.*

To determine whether an applicant (including an existing employee applying for a new job) is qualified for a particular position, the ADA and Oregon disability law permit employers to conduct limited inquiries into an individual's ability to perform specific job-related functions.[20] The employer may ask whether the individual can, with or without reasonable accommodation, perform the job functions or ask the individual to demonstrate how, with or without reasonable accommodation, he or she will be able to perform the job functions. [21] Generally, if any applicant is to be asked, then all applicants should be asked. In such cases, the employer should provide the applicant with a job description or list of job functions.

If the employer "could reasonably believe that an applicant will need reasonable accommodation to perform job functions" either because of obvious disability, disclosed disability, or disability known to employer, the employer can ask just this applicant if they will need reasonable accommodation and the nature of the accommodation.[22] However, the EEOC

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18 EEOC Guidance B(2).
19 *See* ORS 659A.300.
20 29 CFR 1630.14(a).
21 EEOC PreEmployment Guidance, p.4.
22 EEOC PreEmployment Guidance, p. 6.

notes that it will carefully scrutinize instances where employers learn of such accommodations at this stage of the hiring process and then do not extend an offer.[23]

2. Post Offer/Pre-Employment

Under both the ADA and Oregon law, once an employer extends a conditional job offer, but before the applicant starts work, the employer may make medical inquiries and examinations, provided it does so for all starting employees in the same job category.[24] Pre-employment medical examinations need not be job-related and consistent with business necessity. However, these post-offer medical examinations and inquiries may NOT seek genetic information, including family medical history (see GINA discussion below).

(a) *What is a bona fide job offer?*

There has been litigation regarding what qualifies as a bona fide "job offer" such that the ability to conduct a medical examination is triggered. *See Leonel v. American Airlines*, 4500 F3d 702 (9th Cir. 2005). In *Leonel*, the Ninth Circuit Court of Appeals held that despite providing a "conditional job offer", American Airlines improperly required medical information before completing other critical non-medical components of the hiring process. Specifically, American Airlines had not completed employment verification and criminal history checks before requiring medical information. "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." [25] American Airlines argue that because it did not look at the medical information until the other parts of the hiring process had been completed, it did not violate the prohibition. The court rejected this position, holding that it did not matter when the employer actually looked at the information. The statute clearly prohibited collecting it prior to an offer.

(b) *Information must be kept confidential; Employer must pay*

All information obtained from applicant medical inquiries or examinations must be collected and maintained on separate forms and in separate files and must be treated as a confidential medical record (subject to limited exceptions).[26]

If an Oregon employer requires a pre-employment medical evaluation, it must pay for it.[27]

(c) *How employers can use this information*

The employer can use the information to determine if the individual is able to do the job. If the results of the examination are used as a screening mechanism, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions must not be possible with reasonable accommodation.[28] For example, the fact that an

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23 EEOC PreEmployment Guidance, p. 6 note 7.
24 ORS 659A.133(3); OAR 839-006-0242. 42 U.S.C. § 12112(d)(3).
25 EEOC PreEmployment Guidance, p.17.
26 ORS 659A.133(3)(b); 29 CFR 1630.14(b)(1).
27 ORS 659A.306; OAR 839-006-0242(4).
28 29 CFR 1630.14(b)(3).

applicant has an impairment that limits lifting to 35 pounds should not be used to disqualify the applicant from a job that requires lifting only up to 10 pounds. Finally, an employer that withdraws a job offer based on a medical examination should be able to show that the individual was unable to perform the essential functions of the position with reasonable accommodation, if necessary or that the individual posed a direct threat (and no accommodation could remove the threat).[29]

3. Drug and Alcohol Testing

Tests for illegal drugs are not considered medical examinations under the ADA or Oregon law.[30] Private employers may, therefore, administer drug tests to insure that applicants are not under the influence or currently engaging in the illegal use of drugs.

(a) Medical Review Officers

An applicant who tests positive for illegal drug use may be asked about lawful drug use or possible explanations for the positive result other than the illegal use of drugs. Although the ADA does not require the use of an independent intermediary for this inquiry, most employers use a Medical Review Officer (MRO) or other qualified personnel to determine if a "dirty" drug test is explained by a lawful prescription. If the test is due to lawful drug use, the test is reported as negative to the employer.

(b) Evolving Status of Marijuana

Additional concerns exist when an applicant tests positive for marijuana and claims its use was authorized by state law. The Oregon Supreme Court held in *Emerald Steel Fabricators, Inc. v. Bureau of Labor and Industries*[31] that because marijuana is still illegal under federal law, an employer who terminated an employee for current medical marijuana use did not violate state disability law. The Court held that despite having a medical marijuana card, the employee was a current user of illegal (under federal law) drugs and therefore unprotected by the state disability law if terminated on that basis. After that case, the Oregon Bureau of Labor and Industries has apparently conceded that while medical use is permitted in Oregon, the law does not require an employer to accommodate an employee's disability through the medical use of marijuana.[32] Measure 91, effective July 1, 2015, legalized recreational marijuana in Oregon. However, the measure stated that "this Act may not be construed: (1) To amend or affect in any way any state or federal law pertaining to employment matters."[33] It appears that the legalization of recreational marijuana in Oregon has not changed the analysis under *Emerald Steel*, at least as of yet.

(c) Alcohol Testing

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29 *See* 29 CFR 1630.14 B(3); 29 CFR 1630.15.
30 29 CFR 1630.16(c); OAR 839-006-0242.
31 348 Or 159, 230 P3d 518 (2010).
32 *See* Oregon Bureau of Labor and Industries Civil Rights Laws: A Handbook for Oregon Employers 2012 Ed. p. 101.
33 Control, Regulation and Taxation of Marijuana and Industrial Hemp Act. SECTION 4. www.oregon.gov/acc/marijuana/documents/measure91.pdf.

Unlike tests for illegal drugs (which are not considered medical examinations under disability laws), alcohol tests are considered medical examinations, and thus are prohibited pre-offer. Although federal law permits alcohol tests post offer, Oregon law prohibits the use of a breathalyzer except in limited circumstances.[34]

4. Federal Contractors: Request to Self-Identify as "Disabled"

Asking applicants to self-identify as disabled pursuant to legally mandated or voluntary affirmative action programs does not violate the ADA's prohibitions on medical inquiries. Such requests must be voluntary, the information kept confidential, and used only for purposes of the affirmative action program.[35]

B. Inquiries Under the Genetic Information Non Discrimination Act

The Genetic Information Nondiscrimination Act of 2008 ("GINA"), prohibits employers from asking for "genetic information"; nor may the employer discriminate against an applicant or employee based upon such information.[36] The prohibition against gathering genetic information, unlike general medical inquiries under the ADA (which can be made post-offer/pre-employment), continues under GINA at all times, including after an offer of employment.

1. Definition of genetic information.

The regulations define genetic information as information about:[37]

(i) An individual's genetic tests;

(ii) The genetic tests of that individual's family members;

(iii) The manifestation of disease or disorder in family members of the individual (family medical history);

(iv) An individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member of the individual; or

(v) The genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual and the genetic information of any embryo legally held by the individual or family member using an assisted reproductive technology.

Excluded from the definition of genetic information is information about the sex or age of the individual, the sex or age of family members, or information about the race or ethnicity of the individual or family members that is not derived from a genetic test.[38]

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34 ORS 659A.300.
35 EEOC Q&A at p. 11.
36 42 USC 2000ff–1(a).
37 29 CFR 1635.3(c) (1).

2. Prohibition on obtaining genetic information.

GINA prohibits an employer from requesting genetic information of an individual or the individual's family member. This prohibits "making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information."[39] Specifically prohibited by regulation are ". . . conducing an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information."[40]

An employer that inadvertently obtains genetic information does not violate GINA.[41] However, if the employer asks for medical information in an otherwise permissible manner and obtains genetic information without having instructed the provider not to provide genetic information, the employer will generally not be able to assert that the receipt of Genetic Information was "inadvertent." The regulations suggest providing the following instruction to sources asked to provide medical or health related information:[42]

> *The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services.*

Examples of inadvertent acquisition include when genetic information is provided in response to casual conversation between a supervisor and employee, such as a general health inquiry (*e.g.*, "How are you?" or "Did they catch it early?" asked of an employee who was just diagnosed with cancer); where a supervisor overhears a discussion of such information.[43]

Employers should make sure their post-offer/pre-employment medical examinations and inquiries do not seek genetic information. In a recent (April 2014) letter to a law enforcement

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38 29 CFR 1635.3(c)(2).
39 29 CFR 1635.8(a).
40 29 CFR 1635.8(a).
41 29 CFR 1635.8(b)(1).
42 29 CFR 1635.8(b)(1)(i)(B).
43 29 CFR 1635.8(b)(1)(i)(D).

agency responding to the agency's request for clarification of its obligations under GINA, the EEOC noted that the agency's standard medical history form violates GINA because it asks "[h]ave you, or any of your immediate family (father, mother, sister and/or brother) ever had any of the following" [listing a number of medical conditions].[44]

(3) Genetic Information Under Oregon Law.

It is an unlawful employment practice for an employer (employing one or more employees) in the State of Oregon, to seek to obtain, to obtain or to use genetic information of an employee or a prospective employee, or of a blood relative of the employee or prospective employee, to distinguish between or discriminate against or restrict any right or benefit otherwise due or available to an employee or a prospective employee.[45]

[44] http://www.eeoc.gov/eeoc/foia/letters/2014/gina_ada_medical_history_4_21.html.
[45] ORS 659A.303(1).