



Medical Exams and Inquiries under the Americans with Disabilities Act Amendments Act of 2008

Presented by the
Federal Employment Law Training Group, LLC



Ernest C. Hadley & Gary M. Gilbert



Hadley@feltg.com | Gilbert@feltg.com | 508.349.3777

Americans with Disabilities Act

- ADA provisions incorporated into Rehabilitation Act include:
 - Restrictions on preemployment and postemployment medical inquiries and examinations.
 - Confidentiality provisions.
 - Provisions apply to everyone regardless of whether they are an individual with a disability.



42 USC §12112(d)

Americans with Disabilities Act

- ADAAA did not amend the medical exam and inquiry provisions or the confidentiality provision of the ADA.
- But, and this is a big but, changing the definition of what it means to be an individual with a disability changed what medical information an agency can seek in a request for accommodation or direct threat determination.



Important Resources

- No, not me and Gary, but:
 - *Enforcement Guidance: Preemployment Disability Related Questions and Medical Examinations (Preemployment Guidance)*
 - *Enforcement Guidance: Disability-Related Inquiries and Medical Examination of Employees under the ADA (Disability Guidance).*

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Disability Inquiries & Medical Examinations

- The proscription against disability related inquiries is not restricted to individuals with disabilities but rather applies to all employees and applicants for employment regardless of whether they have a disability.
- Discrimination under the ADA includes violating the exam and inquiry or confidentiality provisions.

42 USC § 12112(d)



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But, I Meant Well

- In ADA violation of confidentiality case, the motive for making the disclosure is not relevant, nor is disparate treatment.
 - Supervisor violated ADA by disclosing complainant's medical condition to coworkers even though supervisor's intent was to explain to coworkers why complainant might act the way he did.



Campbell v. Postmaster General,
EEOC Appeal No. 0120073829 (2010)



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Disability Inquiries & Medical Examinations

- There is no intent requirement in complaints that an agency has violated the disability-related inquires and exams provisions.
- Though complaints can be converted into intent offenses.

See, e.g. Stenken v. Postmaster General,
EEOC Appeal No. 0120055305 (2007)
(complainant alleged she was ordered to submit to
psychological exam based on sex and retaliation)



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Disability Inquiries

- Disability inquiries include such things as:
 - asking an applicant or employee if s/he has a disability or how s/he became disabled or about the nature or severity of a disability,
 - asking for medical documentation regarding a disability,
 - asking about an employee's genetic information,



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Disability Inquiries

- Disability inquiries also include
 - asking about an employee's prior workers' compensation history,
 - asking about current or previous use of prescription drugs or medications, or monitoring an employee's taking of such drugs or medications; and,
 - asking an employee a **broad** question that is likely to elicit information about a disability (*e.g.*, Do you have any medical conditions?).

Disability Guidance, Ques. 1



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Medical Examinations

- Medical examinations include:
 - Vision tests by optometrist or ophthalmologist
 - Blood, urine and breath tests for alcohol use
 - Blood pressure or cholesterol screening
 - Range-of-motion tests for strength or motor function
 - Pulmonary function tests



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Medical Examinations

- Medical examinations also include:
 - Psychological tests to identify mental disorder or impairment,
 - Diagnostic procedures, such as x-rays, CAT scans, MRI's.

Disability Guidance, Ques. 2



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Medical Examinations

- Medical examinations do not include:
 - Tests to determine current illegal drug use
 - Physical agility tests
 - Tests to evaluate employee's ability to read labels or distinguish objects if related to actual job functions
 - Psychological tests to measure traits such as honesty, preferences or habits
 - Polygraph examinations.

Disability Guidance, Ques. 2



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Disability Inquiries & Medical Examinations

Dividing the world into three parts:

- Before an Offer of Employment is Made
- After a Conditional Offer of Employment
- After an Employee begins Working



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Preemployment Stage

- Prior to a conditional offer of employment, an employer "shall not conduct a medical examination or make inquiries of an applicant" as to whether he or she is an individual with a disability or the nature or severity of a disability.



42 USC §12112(d)(2)



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Preemployment Stage

- An employer may not require an applicant to take a medical examination before an offer of employment.
- An employer can, however, ask an applicant for employment questions about his/her ability to perform job-related functions, as long as the questions are not phrased in terms of a disability.

Preemployment Guidance, Pre-Offer Stage



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Preemployment Stage

- An employer:
 - Can ask whether an applicant can perform job functions, including whether they can be performed with or without reasonable accommodation.
 - Can ask an applicant to describe or demonstrate how job functions would be performed, including any needed accommodations, as long as all applicants in the job category are asked.



Id.

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Preemployment Stage

- When a disability is known because it is obvious or voluntarily disclosed, an employer may ask a particular applicant to describe or demonstrate how he or she would perform a particular job function.



Id.

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Preemployment Stage

- Example: An individual with diabetes applying for a receptionist position voluntarily discloses that she will need periodic breaks to take medication. The employer may ask the applicant questions . . . such as how often she will need a break and how long the breaks must be . . . The employer may not ask any questions about the underlying condition.



Id.

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Preemployment Stage

- An employer can state the attendance requirements for the job and ask if the applicant can meet them.
- An employer can ask about attendance at previous jobs because there may be many nondisability-related reasons for absences, *e.g.*, applicant had a day care problem.



Id.

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Preemployment Stage

- An employer may not inquire about the use of sick days because that may result in disclosure of a disability.
- Can ask about leave patterns, *e.g.*, “How many Mondays or Fridays were you absent last year on leave other than approved vacation leave?”



Id.

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Preemployment Stage

- Voluntary disclosure of disability is not violation.
 - Employee disclosed she was terminated from previous employment because she became ill.
 - Further inquiries about the particulars of the termination resulted in applicant disclosing a thyroid condition.



McCloud v. Secretary of Treasury,
EEOC Appeal No. 01A51104 (2006)

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Preemployment Stage

- An employer may not ask about an applicant's workers' compensation history as that is an inquiry that is likely to elicit information about a disability.

Preemployment Guidance, Pre-offer Stage



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Preemployment Stage

- An employer can ask generally about an applicant's well being:
 - How are you?
 - Asking applicant who looks ill or tired if she is feeling okay;
 - Asking applicant who is sneezing or coughing if he has a cold or allergies.



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Preemployment Stage

- An employer can also ask:
 - Non-disability related questions, e.g., "How did you break your leg?"
 - A pregnant woman about how she is feeling or when she is due;
 - Whether an applicant has been drinking;
 - Whether an applicant has been illegally using drugs;
 - To provide a contact in case of medical emergency.

Disability Guidance, Ques. 1



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Preemployment Stage

- While an employer can ask about illegal use of drugs, an employer cannot ask an applicant about the lawful use of drugs.
- Doing so can have dire consequences.



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Preemployment Stage

- Federal air marshal applicant was asked to list current medications.
- Listed only Prilosec.
- In response to random drug testing, he disclosed he might test positive for another medication.
- He did test positive for the presence of amphetamines.



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Preemployment Stage

- He had been taking Adderall for ADD, which contains amphetamines.
- Removed for falsification of his employment application.
- Relying on EEOC Guidance, the Board reversed.

Evans v. Department of Homeland Security,
107 MSPR 484 (2007)



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Preemployment Stage

- At the preemployment stage, an employer cannot require examinations that seek information about physical or mental impairments or health.

Preemployment Guidance, What is a Medical Exam?



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Preemployment Stage

- Factors in determining whether test or procedure is a medical exam:
 - Is it administered by a health care professional or someone trained by a health care professional?
 - Are the results interpreted by a health care professional or trainee?
 - Is it designed to reveal a physical or mental impairment?



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Preemployment Stage

- Factors (con't.):
 - Is the employer trying to determine applicant's physical or mental health or impairments?
 - Is it invasive? For example, drawing blood, urine or breath.
 - Does it measure performance of a task or physiological response to task?
 - Is it normally given in a medical setting and is medical equipment used?



Id.
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Preemployment Stage

- Example: If an employer gives a psychological test that is intended to identify whether applicants have characteristics that can lead to anxiety, depression or other disorders, it is a medical exam.
- If the test is designed to measure only things like honesty, tastes and habits, it is not a medical exam.



Id.

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Preemployment Stage

- Example: A test intended to determine an applicant's ability to read labels or distinguish objects is not a medical exam.
- An analysis of vision by an ophthalmologist or optometrist is a medical exam.



Id.

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Conditional Offer Stage

- An employer may condition an offer of employment on the results of medical inquiries or a medical or physical examination.
- The employer must first have made a job offer before it may ask questions about the applicant's health, or about an applicant's disability or require a medical examination.



42 USC § 12112(d)(3)

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Conditional Offer Stage

- Any requests for medical information must be made to all applicants in any particular job category.
 - *i.e.* all applicants must be asked the same questions and must be required to take the same examination.

Id.



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Conditional Offer Stage

- Information collected about a medical condition or medical history must be kept in separate medical files and be disclosed only:
 - To supervisors and managers as to work restrictions and necessary accommodation;
 - First aid personnel who may render treatment; and
 - Government officials investigating ADA compliance.

Id.



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Conditional Offer Stage

- A job offer is “real” or conditional:
 - 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 non-medical information at the pre-offer stage. If an employer can show that was the case, the offer would still be considered a real offer.

Preemployment Guidance, Post-Offer Stage



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Conditional Offer Stage

- Obviously, the results of such inquiries may result in a legitimate need for additional information.
- Thus, after obtaining any initial medical information from all individuals in a job category who received job offers, an employer may ask specific applicants for more medical information if it is related to the previously obtained medical information.



Id.
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Conditional Offer Stage

- Information collected through medical exams may be shared with decisionmakers, but only to the extent they have a need to know:
 - So they can make employment decisions consistent with the ADA; and
 - Determine reasonable accommodations for the individual.



Id.
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Conditional Offer Stage

- Examples:
 - An employer may share the information with a health care professional to determine if reasonable accommodation is possible.
 - An employer cannot share the information with someone who is evaluating an applicant's references.



Id.
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Postemployment Stage

- The Rehabilitation Act and the ADA limit the extent to which an employer may make disability-related inquiries and require medical examinations of employees.



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Postemployment Stage

- Generally, disability-related inquiries and medical examinations may only be made after employment if they are **job-related** and **consistent with business necessity**.

42 USC 12112(d)(4)(A); 29 CFR 1630.13(b), 14(c)



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Postemployment Stage

- It job-related and consistent with business necessity when an employer “has a reasonable belief, based on objective evidence that:
 - (1) employee's ability to perform essential job functions is impaired by a medical condition; or
 - (2) an employee will pose a direct threat due to a medical condition.”

Disability Guidance, Ques. 5



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Postemployment Stage

- An employer that reasonably believes an employee poses a direct threat to himself or others may seek information necessary to determine whether the employee can safely perform the essential functions of the job or work without posing a direct threat.
- The inquiry must be limited and the employer may not request an employee's complete medical records because they are likely to contain information unrelated to whether the employee poses a direct threat.



42 USC 12113(b)

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Postemployment Stage

- The burden is on the employer to show that its disability-related inquiries and requests for examination are job-related and consistent with business necessity.



Id.

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Postemployment Stage

- “[T]his standard may be met when an employer knows about a particular employee’s medical condition, has observed performance problems, and reasonably can attribute those problems to the medical condition.”



Id.

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Postemployment Stage

- Example:
 - For the past two months, Sally, a tax auditor for a federal government agency, has done a third fewer audits than the average employee in her unit. She also has made numerous mistakes in assessing whether taxpayers provided appropriate documentation for claimed deductions. When questioned about her poor performance, Sally tells her supervisor that the medication she takes for her lupus makes her lethargic and unable to concentrate.



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Postemployment Stage

- Example (con't.):
 - Based on Sally's explanation for her performance problems, the agency has a reasonable belief that her ability to perform the essential functions of job will be impaired because of a medical condition. Sally's supervisor . . . may make disability-related inquiries (*e.g.*, ask her whether she is taking a new medication and how long the medication's side effects are expected to last) . . .



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Postemployment Stage

- Example (con't.):
 - . . . or the supervisor may ask Sally to provide documentation from her health care provider explaining the side effects of the medication of Sally's ability to perform her job.

Id.



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Postemployment Stage

- Contrasting example:
 - Six months ago, a supervisor heard a secretary tell her co-worker that she discovered a lump in her breast and is afraid that she may have breast cancer. Since that conversation, the secretary still comes to work every day and performs her duties in her normal efficient manner.



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Postemployment Stage

- Contrasting example (con't.):
 - In this case, the employer does not have a reasonable belief, based on objective evidence, that the secretary's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to the medical condition. The employer, therefore, may not make any disability-related inquiries or require the employee to submit to a medical examination.



Id.

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Postemployment Stage

- Employee ordered to undergo psychiatric exam after:
 - Told his supervisor to shut up;
 - Stated he was leaving work due to stress and was afraid of what he might do;
 - Stated he might hurt somebody or "could do the ultimate to somebody."

Hightower v. Postmaster General,
EEOC Appeal No. 0120070560 (2008)
(exam warranted)



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Postemployment Stage

- Employee was required to take fitness for duty exam where:
 - Employee demonstrated “signs of depression” during meeting;
 - Employee had a “temper tantrum” during a discussion.

Cerge v. Secretary of Homeland Security,
EEOC Appeal No. 0120060363 (2007)
(exam not warranted)



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Postemployment Stage

- An employer should treat an employee who *applies* for a new job as an **applicant** for the new job.
 - EEOC Guidance provides that where a current supervisor has medical information regarding an employee who is applying for a new job, s/he may not disclose that information to the person interviewing the employee for the new job or to the supervisor of that job.
 - Door opens after conditional job offer.

Disability Guidance, Ques. 4



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Postemployment Stage

- An employee who is noncompetitively reassigned or temporarily detailed to another position and then returned to his/her regular job is not an applicant.
- Thus, an employer may not make disability related inquiries or require medical exams unless they are job-related and consistent with business necessity.

Id.

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Postemployment Stage

- It may be job-related and consistent with business necessity to make disabilities-related inquiries or exams of an employee who requests reasonable accommodation.
- But the ADAAA has impacted significantly on what that now means.



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