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Recent
Developments

EEOC ISSUES GUIDANCE FOR DISABILITY-RELATED INQUIRIES REGARDING CURRENT EMPLOYEES (August 11, 2000)

For the first time, the EEOC has issued [Enforcement Guidance](#) to clarify when employers can lawfully make disability-related inquiries or require medical examinations of current employees without violating the ADA. Under the ADA, an employer's ability to make disability-related inquiries or require medical examinations differs depending on when the inquiry is made -- pre-offer, post-offer or during employment. The EEOC has previously issued guidance on the pre-offer and post-offer stages of this analysis and has now finally provided guidance regarding current employees.

Summary

The ADA provides that employers may only ask current employees disability-related inquiries or seek a medical examination if it is "job-related and consistent with a business necessity." The EEOC's guidance clarifies that this standard will be met when employers have a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform the essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat to his or her own safety or the safety of others due to a medical condition. The EEOC guidance also provides answers to specific questions as to how this standard should be applied.

Details

The EEOC's guidance describes some of the common situations in which an employer may be permitted to ask disability-related questions or request a medical exam, such as: (1) when an employee requests a reasonable accommodation and the nature of the disability or needed accommodation is not known or obvious to the employer; (2) when an employer is aware of an employee's medical condition and has observed performance problems that can reasonably be attributed to the employee's existing condition; or (3) when an employer is given reliable information by a credible third party that an employee has a medical condition that will impair the employee's ability to perform essential job functions or will pose a direct threat. In short, the EEOC's guidance strictly limits employers to only seek health-related information from current employees in very limited circumstances.

Specific Questions Posed and Answered by the EEOC

Q1. How should an employer treat a current employee who applies for a different position in a competitive application process?

A1. The [EEOC's pre-employment inquiry guidelines](#) would apply. This means that the employer would be prohibited from asking disability-related questions or requiring the medical examination before making the individual a conditional offer for the new position.

Q2. May an employer make disability-related inquiries or require a medical examination of an employee based, in whole or in part, on information learned from another person?

A2. Yes, if the information learned is reliable and would give rise to a reasonable belief that the employee's ability to perform the essential job functions will be impaired by the medical condition or that the employee will pose a direct threat to himself or others.

Q3. May an employer ask an employee for documentation if the employee requests a reasonable accommodation?

A3. Yes. If the disability or need for accommodation is not known or obvious, the employer is entitled to know that the employee has a covered disability.

Q4. May an employer ask all employees what prescription medications they are taking?

A4. Generally, no. Only in limited circumstances (e.g., when the medication could impair the employee's ability to perform a job affecting public safety) would an employer be able to demonstrate that such an inquiry is job-related and consistent with business necessity.

Q5. What action may an employer take if an employee fails to respond to an appropriate disability-related inquiry?

A5. If the inquiry is due to performance problems, the employer may discipline the employee for past and future performance problems without considering any need for accommodation. If the inquiry is made because the employee requested an accommodation and then failed to provide information in response to the inquiry, the employer can refuse to provide the accommodation.

Q6. May an employer require that the employee go to a healthcare professional of the employer's choice when the employee requests reasonable accommodation?

A6. Yes, if the employee provides insufficient documentation from his or her treating physician. Before doing so, however, the employer should advise the employee of why the documentation is insufficient and allow the employee the opportunity to provide the missing information in a timely manner. The EEOC also states that the employer should consider consulting with the employee's doctor (with the employee's consent) before requiring the employee to go to a healthcare professional of its choice.

Q7. May an employer require that an employee, who he reasonably believes will pose a direct threat, be examined by an appropriate healthcare professional of the employer's choice?

A7. Yes, but this determination must be based on an individualized assessment of the employee's present ability to safely perform the essential functions of the

job. Any medical examination, however, must be limited to determining whether the employee can perform his or her job without posing a direct threat. The EEOC also warns that employers should be cautious about relying solely on the opinion of their own healthcare professional.

Q8. May an employer require periodic updates when an employee is on an extended leave because of a medical condition?

A8. Yes. If the employee's request for leave does not specify a fairly specific return date, or if the employee needs continued leave beyond what was originally granted, the employer may require the employee to provide periodic updates. If a fixed return date has been granted, the employer cannot require the employee to provide periodic updates. The EEOC does note, however, that employers may call employees on extended leaves to check on their progress or to express concern for their health.

What this means: Supervisors need to be educated on these new rules and, most importantly, on the overall concept that disability-related inquiries should not be made without consulting with a human resources representative. The EEOC's guidelines do give some latitude for such inquiries, but its guidance is not always intuitive. Accordingly, education on these issues is important.

If you have any questions about this or any other topic, please contact Michael Sullivan (msullivan@paulplevin.com) at (619) 744-3655 or Lysha Weston (lweston@paulplevin.com) at (619) 744-3646 at Paul Plevin & Sullivan.

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