

The Employment Counselor

General Counsel, P.C. – Your Legal Partner & Trusted Advisor

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The Hiring Process: ADA Limits What Employers Can Ask and When

Timing is everything when it comes to compliance with the Americans with Disabilities Act (ADA). Employers need to know which questions are appropriate to ask prospective employees and when. Even non-disabled job applicants should not be asked certain medical questions during the interview process.

The ADA, which applies to employers with 15 or more employees, prohibits employers from discriminating against qualified individuals with disabilities in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment. An individual with a disability under the ADA is a person who: 1) has a physical or mental impairment that substantially limits a major life activity; 2) has a record or history of a substantially limiting impairment; or 3) is regarded or treated by an employer as having a substantially limiting impairment.

The protections provided by the ADA are not limited to employees. Job applicants are also offered certain protections. The ADA restricts employers from asking applicants disability-related questions and requiring a medical examination before they extend a genuine and conditional offer to the applicant. These restrictions are in place to ensure that an applicant's disability is not considered before the employer evaluates the prospective employee's non-medical qualifications.

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General Counsel, P.C.

Located in McLean, Virginia, General Counsel, P.C. provides legal representation to businesses and non-profit organizations in Virginia, Maryland, and Washington, D.C. Legal services include: corporate formation; corporate transactions; contract review/negotiation; labor/employment matters; commercial real estate; and state and federal court litigation. In addition, General Counsel, P.C. provides comprehensive estate planning and probate representation.

For Further Information

For assistance related to any of the legal matters discussed within this edition of *The Employment Counselor*, or any other legal matter, please do not hesitate to contact one of General Counsel, P.C.'s attorneys at (703) 556-0411, or via email at info@generalcounselaw.com.

Equal Application of Light-Duty Policies Does Not Violate Pregnancy Discrimination Act

A company's consistent application of its policy regarding light-duty employment tasks was sound enough to defeat a claim of pregnancy discrimination by one of its employees. In *Reeves v. Swift Transportation*, the U.S. Court of Appeals for the Sixth Circuit held that Swift's light-duty policy was pregnancy-blind because it did not discriminate between pregnant and non-pregnant employees.

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FMLA — PROVIDING TIMELY NOTICE TO EMPLOYEES OF DOCUMENTATION REQUIREMENTS IS ESSENTIAL

The United States Court of Appeals for the Fifth Circuit recently issued an opinion in *Lubke v. Arlington* affirming the trial court's finding that the City of Arlington, Texas, violated the Family and Medical Leave Act (FMLA) when it terminated an employee for not providing medical documentation substantiating a need for FMLA leave because the City never requested that he provide such information.

Under the FMLA, a qualified employee may take a total of 12 weeks unpaid leave during a 12-month period for family and health-related matters. An employer may require that the request for leave be supported by written certification from a health care professional. The company must provide notice to its employees regarding their expectations and obligations under FMLA. At the end of the leave period, the employee has the right to be restored to his or her original or equivalent job. In order to qualify for FMLA leave, an employee must have worked a total of 1250 hours during the past 12 continuous months for an employer with 50 or more employees.

In *Lubke*, the Arlington Fire Department restricted its normal and sick leave policies in preparation for Y2K. Lubke was scheduled to work December 31, 1999, through January 1, 2000. On the evening of December 30, Lubke telephoned an answering machine at the fire department stating that he would not be able to report for work the next day because he had to take care of his wife who had flu symptoms and back pain. When he reported to work on January 3, Lubke submitted a standard leave form stating why he was unable to work his scheduled shift and attached a doctor's examination form and three prescription receipts for Ms. Lubke. Before Lubke was able to submit the leave form, a personnel complaint was filed against him for his unscheduled leave. Lubke repeatedly asked his superiors and Human Resources what substantiation was required for FMLA approval, but he did not receive an answer. Lubke was terminated on April 14, 2000. Lubke's wife submitted several letters from doctors documenting her condition and why it was necessary for Lubke to care for his wife. Lubke appealed his termination. The Fire Chief acknowledged that the doctors' letters were adequate but untimely.

The Fifth Circuit affirmed the jury verdict for Lubke. The court pointed to a provision in the FMLA which provides that "if an employer fails to provide notice in accordance with the [FMLA], the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice." The City of Arlington was found in violation of this section when it failed to provide Lubke with notice about what type of certification was required to approve FMLA leave. This failure of notice barred the City of Arlington from sanctioning Lubke for not timely submitting medical documentation for FMLA. The City admitted that, had Lubke submitted documentation earlier in the investigation process, his FMLA would have been approved.

This opinion highlights the importance of complying with the technical aspects of FMLA. Employers must provide their employees notice of the documentation required by the company in order to be approved for FMLA. Failure to do so can bar the company from sanctioning the employee for taking unapproved FMLA leave. For guidance on proper notice of FMLA provisions, please consult legal counsel. ▲



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Swift Transportation hired Reeves as a truck driver in July 2002. During the application process, Reeves confirmed that she could use a dolly to pull freight up to 200 pound or push 100 pounds using brute force. Three months after she commenced employment, Reeves discovered that she was pregnant. Her physician restricted her to light-duty work and instructed her not to lift anything over 20 pounds. Reeves was not eligible for leave under the Family and Medical Leave Act (FMLA) because she was not employed with Swift for at least 12 months as required by the statute. Reeves consistently asked for light-duty work, which included basic office assignments, but was told by superiors that there was no work available. After her last request, Reeves was terminated because Swift did not have work for her. Swift's policy only allowed light-duty work for employees who sustained an injury on the job. There were no exceptions to this policy.

Reeves filed a complaint alleging violation of the Pregnancy Discrimination Act of 1978 (PDA). The PDA, an amendment to Title VII of the Civil Rights Act, requires that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

The district court found and the court of appeals affirmed that the light-duty policy was not a pretext for discrimination because Swift did not make exceptions for non-pregnant employees while enforcing the policy against pregnant employees. The key factor that determined whether an employee qualified for light-duty work was whether the injury was work-related. Pregnancy of an employee is not taken into consideration.

The Sixth Circuit's decision is similar to other circuit court decisions upholding limited light-duty policies. The Fifth and Eleventh Circuits have found that the PDA does not give preferential treatment but only that pregnant employees be treated the same as other employees who were injured off the job.

There is no language in the PDA dictating that pregnant employees be given preferential treatment; only that they be treated the same as other employees. This is in contrast to the Americans with Disabilities Act (ADA)

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which requires reasonable accommodations for qualified employees or applicants with a disability. Although pregnancy is not considered a disability, if a pregnant employee develops a condition that substantially impairs a major life activity, she may be allowed reasonable accommodations under the ADA.

Although pregnant employees are protected from discrimination, they are not entitled to preferential treatment over non-pregnant employees. Any policy put into force by an employer must treat all workers equally and not favor one particular group.

For assistance on developing and implementing workplace policies that may affect pregnant employees, please consult legal counsel. ▲



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Be Careful When Asking Disability Related Questions

Although employers may not ask disability-related questions during the interview process, they may obtain certain information to help evaluate whether an applicant is qualified for the job. Employers may ask applicants:

1. About their ability to perform specific job functions.
2. About their non-medical qualifications and skills such as education, work history and required certifications and licenses.
3. To describe or demonstrate how they would perform job tasks.

An employer cannot ask questions that may elicit information on the disability status of an applicant. For example, an employer may not ask about an applicant's workers' compensation history, whether the applicant will need reasonable accommodation for a job, the number of sick days taken at previous jobs, or any lawful drug use. The answer to any of these questions may reveal a disability of the applicant.

Even Non-Disabled Persons Are Protected from Improper Disability-Related Questions

A decision by the United States Court of Appeals for the Tenth Circuit in *Griffin v. Steeltek* held that a prospective employee need not be disabled to successfully sue for discrimination due to improper medical questions. On the employment application, Steeltek asked applicants if they had ever received workers' compensation or disability income and if they have ever had a physical defect that may prevent them from performing certain job functions. Griffin responded that he had received disability payments due to severe burns on his hand and foot and that he had elbow surgery. At no time during the application process did Griffin claim to be disabled. Although he was told that he was the most qualified applicant and would likely be hired, he was eventually rejected, allegedly because he did not have the two years experience that was required for the job. Griffin was not told that experience was necessary for the position.

Griffin sued Steeltek for discrimination under the ADA. The trial court rejected his claim due to his not being a disabled person. On appeal, the Tenth Circuit held that his non-disabled status did not preclude him from bringing an ADA claim. As the Tenth Circuit noted, the ADA's policy of eliminating disability discrimination is best achieved if all prospective employees who are subjected to illegal medical inquiries are able to sue offending employers instead of limiting that right to people who are actually disabled.

Medical Examinations

At the pre-offer stage, an employer cannot require examinations that seek information about physical or mental impairments or health. The only exception to this rule is for drug testing. The ADA does not protect people who use illegal drugs and does not consider drug testing a medical exam. What constitutes a medical examination, however, is difficult to determine. Factors that will be considered when determining if a procedure or test is medical include:

1. Are health care personnel administering the test?
2. Are the test results interpreted by health care professionals?
3. Is the test designed to reveal a physical or mental impairment or disability?
4. Is the test invasive? Does it require the drawing of blood, urine, or breath?
5. Is medical equipment used for the test?

Only after a conditional offer is made may an employer ask questions about a person's disability and/or require a medical examination. Furthermore, disability-related questions and medical examinations must be required for all applicants, not just those with a disability. All medical tests must be within the scope of the job and be as nondiscriminatory as possible. An employer must keep a person's medical information confidential and separate from his or her personnel file.

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In another case, three rejected job applicants brought suit against American Airlines claiming the airline illegally conducted medical exams too early in the job application process. The United States Court of Appeals for the Ninth Circuit in *Leonel v. American Airlines* found that offers of employment were not real and therefore the medical examinations were premature. The three applicants, who were HIV-positive, interviewed for flight attendant positions with American. After the interview stage, they received conditional offers, contingent upon passing both a background check and a medical examination. Before the background investigation was completed, American sent the applicants to have medical examinations where they filled out questionnaires and submitted blood samples. After the blood tests came back positive for HIV, American withdrew its job offers, citing failure to disclose this information during the medical exam.

It was the sequence of events that the Ninth Circuit found critical in its decision. A "real offer" under the ADA means that the employer must complete all non-medical sections of its application process or show that it could not have done so before issuing the offer. American could not establish that it could have reasonably completed the background check before subjecting the applicant to the medical exam; therefore, the job offers were not real, and the medical exam was premature.

As these two cases demonstrate, it is critical that your company's hiring process focus on the ability of a particular applicant to complete the job, not his/her medical history. If your company requires medical examination, the timing of these tests is important. To ensure that your hiring process is ADA compliant, please consult legal counsel. ▲

CLARIFICATION OF THE "KNOWING AND VOLUNTARY" REQUIREMENT OF OWBPA

The United States Court of Appeals for the Ninth Circuit recently issued an opinion in *Syverson v. International Business Machines Corp.* clarifying the "knowing and voluntary" requirement of the Older Workers' Benefit Protection Act (OWBPA) for waivers of claims and rights under the Age Discrimination in Employment Act (ADEA).

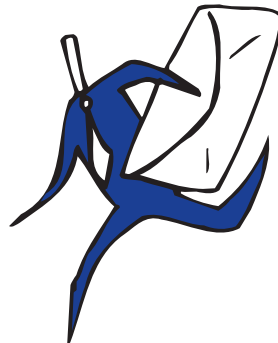
The OWBPA is an amendment to the ADEA that clarifies protections offered to older workers. It applies to departing employees who are at least 40 years of age and in situations where the employer is seeking a release of claims that may fall under the ADEA through a severance or separation agreement. OWBPA requires that any waiver of claims by an employee must be "written in a manner calculated to be understood by the individual or by the average individual eligible to participate."

In January 2001, IBM began a reduction in force and required laid-off employees to sign a general release and a covenant not to sue. The agreement released IBM from all claims, including those that may fall under the ADEA. If violated, the employee would have to pay for all legal costs incurred by IBM in defending against the suit. Language in the agreement also provided that claims based solely on the ADEA were excepted from the provision on the payment of attorney fees.

The plaintiffs brought suit against IBM alleging age discrimination. IBM counterclaimed for breach of agreement and sought attorney fees and costs. The Ninth Circuit reversed the district court's ruling in favor of IBM, stating that language in the agreement was inconsistent and confusing. The court found that the release and covenant not to sue were unclear as to whether employees could pursue age discrimination claims with the EEOC and independently in court. Furthermore, the agreement did not clearly explain the differences between a release (giving up a known right or claim) and a covenant not to sue (abstaining from asserting a present or future right in litigation) and how they relate to potential ADEA claims. By combining the two in the same agreement, the legal distinction between a release and covenant is lost on the average lay person and does not meet the "knowing and voluntary" requirement of the OWBPA.

This decision highlights the importance of release agreements and covenants being written in clear and concise language without any legalese. The average employee that the release is drafted for should be able to understand the plain meaning of the agreement without having to consult an attorney.

It is advised that you consult legal counsel if you draft your own releases concerning ADEA claims to ensure that they meet the "knowing and voluntary" standards set out by the OWBPA. ▲



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