

# Legal Briefings

## Disability Related Questions and Medical Exams

Prepared by Equip for Equality<sup>1</sup>

### I. Introduction

The Americans with Disabilities Act (ADA) is unique among non-discrimination laws as it places restrictions on when employers can seek disability-related information and require medical examinations. This statutory requirement is critical to achieving a fundamental goal of the ADA—ensuring that applicants and employees are judged on their qualifications and merit and not on their disability. Through a review of the statutory and regulatory requirements, along with notable case law and settlement agreements, this Legal Brief explores the current state of the law regarding the ADA's application to disability inquiries and medical examinations.

### II. The Rules and Their Statutory Framework

The ADA seeks to balance the rights of employees to keep their disability and medical information private with the rights of employers to have the information necessary to determine whether an individual can perform his job.

To balance these rights, the ADA divides the employment process into three distinct stages: (1) pre-employment, including the job application and interview, up until an employee receives a conditional job offer; (2) post-conditional job offer, but before the individual starts a job; and (3) during an individual's employment.<sup>2</sup> For each stage, the ADA assigns certain rules about what type of information employers may request.

The first stage, often called the “pre-offer” stage, is the most restrictive for employers. Before extending a conditional job offers, employers are prohibited from asking questions about disability or imposing medical examinations, with limited exceptions, which will be discussed in Section IV.<sup>3</sup> As a policy matter, this stage is the most restrictive because it seeks to ensure that employers do not consider an applicant’s disability before assessing their qualifications.

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<sup>1</sup> This legal brief was written by Barry C. Taylor, Vice President of Civil Rights and Systemic Litigation, and Rachel M. Weisberg, Staff Attorney and Manager, Employment Rights Helpline with Equip for Equality, the Illinois Protection and Advocacy Agency (P&A). The authors would like to thank PILI Fellows Ross Kloeber, Lauren Rushing, and Michelle Smit for their valuable assistance. Equip for Equality is providing this information under a subcontract with the Great Lakes ADA Center.

<sup>2</sup> Americans with Disabilities Act, 42 U.S.C. §12112(d)(2).

<sup>3</sup> 42 U.S.C. §12112(d)(2)(although “a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability,” it may “make pre-employment inquiries into the ability of an applicant to perform job-related functions”).

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During the second stage, commonly referred to as the “post-offer” stage, an employer may ask disability-related questions or require medical examinations so long as this is done for “all entering employees” within that same job category.<sup>4</sup> Moreover, the ADA prohibits employers from using information learned in a manner that violates the ADA.

This protection is a critical; historically, if an employee with a disability was forced to share information about his disability during the interview or application process, and then did not receive an offer of employment, there was no way to know whether the individual did not get the job because of a disability or because of a wide-range of other reasons. Now, if an employer seeks to withdraw a conditional job offer after learning about an individual’s disability, the employee knows exactly why the job offer has been withdrawn and can challenge the determination as a potential violation of the ADA. **See *LeoneL v. American Airlines, Inc.*, 400 F.3d 702, 709 (9th Cir. 2005)** (“When medical considerations are isolated … applicants know when they have been denied employment on medical grounds and can challenge an allegedly unlawful denial.”).

Finally, during the third stage, or the “employment” stage, employers are permitted to ask disability-related questions or require medical examinations of their employee so long as they are job-related and consistent with business necessity.<sup>5</sup>

Regardless of the stage in which disability and medical information is collected, such information must be maintained in confidence.<sup>6</sup> Each of these stages, as well as the ADA’s confidentiality requirements, will be discussed in detail below.

## III. What is a Disability-Related Inquiry and a Medical Examination

Before delving into the ADA’s rules and how they have been interpreted, it is important to understand what the ADA refers to when it references disability-related inquiries and medical examinations. For instance, is a drug test a medical exam? What about a psychiatric assessment or a personality test? Are questions about how someone is feeling or why someone hasn’t been to work considered disability inquiries?

### A. Medical Examination

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<sup>4</sup> 42 U.S.C. §12112(d)(3).

<sup>5</sup> 42 U.S.C. §12112(d)(4).

<sup>6</sup> 42 U.S.C. §12112(d).

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The phrase “medical examination” is not defined in the ADA’s statute or regulations, but it is explained, in depth, in various guidance documents from the Equal Employment Opportunity Commission (EEOC), the federal agency charged with enforcing the employment provisions (Title I) of the ADA. According to the EEOC, a medical examination is a procedure or test that seeks information about an individual’s physical or mental impairments.<sup>7</sup>

The EEOC provides a non-exhaustive list of tests that are generally considered to be medical examinations, including: vision tests conducted or analyzed by an ophthalmologist or optometrist; blood, urine, and alcohol tests checking for alcohol use; tests for genetic markers; blood pressure screening; range-of-motion tests that measure muscle strength; and diagnostic procedures, such as x-rays.

The EEOC identifies seven factors used to evaluate whether any particular test is a medical examination, including whether the test: (1) is administered by a health care professional; (2) is interpreted by a health care professional; (3) is designed to reveal an impairment of physical or mental health; (4) is invasive; (5) measures an employee’s performance of a task or measures his/her physiological responses to performing the task; (6) normally is given in a medical setting; and (7) requires medical equipment.<sup>8</sup>

Certain tests generally fall outside the scope of the term “medical examination,” such as tests for illegal drugs and polygraph examinations.<sup>9</sup> Other tests vary based on how the type of information captured. For instance, physical agility tests that measure only an employee’s ability to do an actual job or a simulated job task is not a medical examination, while a physical agility test that also measures heart rate or blood pressure may be.

Psychological tests may or may not be a medical examination, depending on what they include. According to the EEOC, psychological tests that “are designed to identify a mental disorder or impairment” are medical exams, while such tests that “measure personality traits such as honesty, preferences, and habits” are not.<sup>10</sup> This is an important issue, as more and more employers now administer “personality” tests ostensibly to obtain information about job applicants, such as honesty and temperament, as a way to determine whether the person would be a good hire.

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<sup>7</sup> EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), 7/27/2000, [www.eeoc.gov/policy/docs/qanda\\_inquiries.html](http://www.eeoc.gov/policy/docs/qanda_inquiries.html) (last accessed 8/21/2018) (EEOC Employee Guidance); EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations, 10/10/1995, [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html) (last accessed 8/21/2018) (EEOC Pre-employment Guidance).

<sup>8</sup> EEOC Employee Guidance at Question 2.

<sup>9</sup> *Id.*; See also 29 C.F.R. §1630.16(c)(“a test to determine the illegal use of drugs is not considered a medical examination”).

<sup>10</sup> EEOC Employee Guidance at Question 2.

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The most prominent case addressing the issue of whether a personality test is a medical test under the ADA is *Karraker v. Rent-A-Center*, 411 F.3d 831 (7th Cir. 2005).<sup>11</sup> In *Karraker*, a group of current and former employees filed a class action alleging that the employer's policy requiring employees seeking management positions to take the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA. Management applicants that had a certain score on the MMPI were automatically excluded from consideration. The plaintiffs alleged that the MMPI could identify conditions such as depression, paranoia, schizoid tendencies and mania. The trial court found that the test did not violate the ADA because it was used for "vocational" purposes to predict future job performance and compatibility rather than for "clinical" purposes.<sup>12</sup> The plaintiffs appealed and the Seventh Circuit reversed and held that the MMPI is a test designed to diagnose mental impairments, and has the effect of hurting the employment prospects of people with mental illness, and thus, it is an improper medical examination that violates the ADA. The court held it was not dispositive that the employer did not use a psychologist or other health care professional to interpret the test. Rather, who interprets the test results is only one of seven factors identified by the EEOC that a court should consider when determining if a test is a medical examination under the ADA. The court further stated that "the practical effect of the use of the MMPI is similar no matter how the test is used or scored--that is, whether or not RAC used the test to weed out applicants with certain disorders, its use of the MMPI likely had the effect of excluding employees with disorders from promotions."<sup>13</sup>

Similarly, relying on the EEOC's seven factor test, the Sixth Circuit, in *Kroll v. White Lake Ambulance Authority*, 691 F.3d 809 (6th Cir. 2012) ("Kroll I"), concluded that mandatory psychological counseling could be considered a medical examination under the ADA.<sup>14</sup> In *Kroll I*, an emergency medical technician was required to undergo "psychological counseling" after she was accused of several emotional outbursts. Although the Court lacked detailed information about the counseling at issue, it explained that because the counseling was administered by a psychologist, the encounter could have been both administered and interpreted by a health-care provider. It also found sufficient facts to suggest that the requirement be designed to reveal a mental-health impairment, especially in light of the employer's concerns that the employee was "suffering from depression, to the point of suicidal ideation."<sup>15</sup>

## B. Disability Inquiry

According to the EEOC, a disability-related inquiry is a question that is likely to elicit information about an individual's disability, even if it is not explicitly about disability.<sup>16</sup>

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<sup>11</sup> *Karraker v. Rent-A-Center*, 411 F.3d 831 (7th Cir. 2005).

<sup>12</sup> *Id.* at 836.

<sup>13</sup> *Id.* at 836-837.

<sup>14</sup> *Kroll v. White Lake Ambulance Authority*, 691 F.3d 809 (6th Cir. 2012) (Kroll I).

<sup>15</sup> *Id.* at 819.

<sup>16</sup> EEOC Employee Guidance at Question 1.

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The following examples are questions that are likely to elicit disability-related and are thus, defined as disability-related inquiries:<sup>17</sup>

- Have you ever had or been treated for any of the following conditions or diseases (followed by a list)?
- Have you ever been hospitalized?
- Have you ever been treated for a mental disorder?
- How many days were you absent from work last year due to illness?
- Do you have any known physical disabilities?
- Are you taking any medications?
- Have you ever been treated for alcoholism or drug addiction?
- Do you have any physical or mental impairments that would affect your job performance?
- Have you ever filed a workers' compensation claim?<sup>18</sup>

On the other hand, questions that generally ask about an individual's well-being are typically not considered disability-related inquiries.<sup>19</sup> This issue was also discussed in *EEOC v. Thrivent Financial for Lutherans*, 700 F.3d 1044 (7th Cir. 2012). In this case, after an employee did not show up for work, his employer sent him an email asking him what was going on. The employee responded by disclosing his disability. The court noted that this question was not a disability-related inquiry (and the EEOC ultimately conceded this point) because the employer had no reason to suspect employee's absence was due to a medical condition.

There is limited case law, and what does exist, is conflicting, about what constitutes a disability inquiry. In *Conroy v. N.Y. State Department of Correctional Services*, 333 F.3d 88, 93-95 (2d Cir. 2003), the Second Circuit found that requiring employees returning from leave to provide a doctor's note following a sick leave with a "brief general diagnosis" that is "sufficiently informative" to allow the employer to "make a determination concerning the employee's entitlement to leave or to evaluate the need to have an employee examined by [employee health services] prior to returning to duty" constitutes a disability-related inquiry, as it "may tend to reveal a disability."<sup>20</sup> See also *EEOC v. Dillard's Inc.*, 2012 WL 440887, at \*5 (S.D. Cal. Feb. 9, 2012) (finding Dillard's attendance policy, which required employees returning from any health-related absence to submit a doctor's note stating "the nature of the absence (such as migraine, high blood pressure, etc...)" and "the condition being treated" to constitute a disability-related inquiry because it "may tend to reveal a disability.")

<sup>17</sup> EEOC Pre-employment Guidance at FN 10 ("Sometimes, applicants disclose disability-related information in responding to an otherwise lawful pre-offer question. Although the employer has not asked an unlawful question, it still cannot refuse to hire an applicant based on disability unless the reason is job-related and consistent with business necessity.").

<sup>18</sup> ADA Compliance Guide, ¶200 EMPLOYER BASICS, 2004 WL 5038116 (2018).

<sup>19</sup> EEOC Employee Guidance at Question 2.

<sup>20</sup> *Conroy v. N.Y. State Dep't of Corr. Servs.*, 333 F.3d 88, 93-95 (2d Cir. 2003).

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Compare that conclusion to the one reached in *Lee v. City of Columbus*, 636 F.3d 245, 253–59 (6th Cir. 2011), where the Sixth Circuit reviewed a city policy requiring employees returning to regular duty following sick leave, injury leave, or restricted duty to submit a doctor's note stating “the nature of the illness” and confirmation that the employee is “capable of returning to regular duty.”<sup>21</sup> Criticizing the *Conroy* decision, the Sixth Circuit held that requiring employees to disclose the nature of their illness when returning from sick leave did not violate the Rehabilitation Act, stating that the prohibition has “has unnecessarily swept within the statute’s prohibition numerous legitimate and innocuous inquiries that are not aimed at identifying a disability.”<sup>22</sup>

## IV. Stage One / Pre-Offer

### A. General Rule

The general rule during the pre-offer period is that employers are prohibited from conducting medical examinations or making disability-related inquiries.<sup>23</sup> One clear example of an improper pre-employment inquiry is from *EEOC v. Grisham Farm Products, Inc.*, 191 F. Supp. 3d 994 (W.D. Mo. 2016), where the employer required all job applicants to complete a pre-offer health history form which inquired about 27 different health conditions, “including everything from allergies to epilepsy to breast disorder to heart murmur to sexually transmitted diseases to depression to varicose veins and beyond.”<sup>24</sup>

Ensuring that employers do not ask impermissible questions during the pre-offer stage has been a priority enforcement area for the EEOC, as well as the U.S. Department of Justice (DOJ), which handles ADA cases involving public employers. The EEOC recently entered into consent decrees with employers who perform medical exams and pose medical questions prior to extending a conditional job offer. For instance, in *EEOC v. Consolidated Edison Co. of New York*, 17-cv-7390 (S.D.N.Y. Consent Decree, 11/9/2017), the EEOC alleged that ConEd performed medical exams of applicants without first giving them a conditional job offer.<sup>25</sup> As part of the settlement, ConEd agreed to revise its policies so that it no longer required medical examinations before extending written job offers, and also paid monetary damages. In *EEOC v. Strataforce*, 1:17-cv-4104 (S.D. Ind. Consent Decree, 11/13/2017), the EEOC challenged the company’s requirement that applicants complete a pre-offer health questionnaire that asked a number of disability-related

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<sup>21</sup> *Lee v. City of Columbus*, 636 F.3d 245, 253–59 (6th Cir. 2011).

<sup>22</sup> *Id.* at 254.

<sup>23</sup> 42 U.S.C. § 12112(d)(2)(A); see e.g., *EEOC v. Grisham Farm Prods.*, 191 F. Supp. 3d 994 (W.D. Mo. 2016).

<sup>24</sup> *EEOC v. Grisham Farm Prods.*, 191 F. Supp. 3d 994, 997 (W.D. Mo. 2016).

<sup>25</sup> *EEOC v. Consolidated Edison Co. of New York*, 17-cv-7390 (S.D.N.Y. Consent Decree, 11/9/2017).

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questions. In resolving this case through a consent decree, the company will revise its policies as well as provide notice to applicants of their rights under the ADA.<sup>26</sup>

In 2015, the DOJ—which, through a memorandum of understanding with the EEOC handles all ADA employment litigation against state and local governments—entered into settlement agreements with nine different public entities on this issue.<sup>27</sup> As one illustrative example, the job application for the City of Fallon, Nevada asked “[a]re you now receiving or have you ever received any benefits or payments to you or your doctor for any job related injury? If yes, when and where did this occur.”<sup>28</sup> The DOJ found the City engaged in a pattern or practice of discrimination by requiring applicants to disclose this type of information prior to making a conditional job offer, and entered into a settlement resolving the issue.

There is some disagreement among the courts about whether individuals who were subjected to impermissible pre-employment inquiries, but who suffered no concrete adverse employment action as a result, can bring a claim under the ADA. The court in *EEOC v. Grane Healthcare Co., 2 F. Supp. 3d 667 (W.D. Pa. 2014)*, concluded that they could, explaining that the ADA’s restrictions are intended to provide prophylactic protection against discrimination.<sup>29</sup> In this case, Grane required applicants to complete forms listing their medications, undergo physical examinations, and complete forms detailing their medical history. Grane argued that even if this conduct was impermissible, some prospective employees had suffered no injuries. The court rejected this defense and explained that employers cannot “erode” the prohibition “by procuring detailed medical information about applicants for employment and contending, at the end of the day, that such information has never been used to the detriment of those applicants.”<sup>30</sup> Otherwise, it would be relatively easy for an employer to “concoct a plausible reason for not hiring” a particular applicant.<sup>31</sup> The court enjoined Grane from violating the ADA’s prohibition against pre-employment offer examinations and inquiries.

## B. Exceptions

The EEOC and the courts have identified limited exceptions to this general rule.

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<sup>26</sup> EEOC Press Release, Strataforce Settles EEOC Disability Discrimination Lawsuit, 11/14/2017, [www.eeoc.gov/eeoc/newsroom/release/11-14-17.cfm](http://www.eeoc.gov/eeoc/newsroom/release/11-14-17.cfm) (last accessed 8/29/2018).

<sup>27</sup> DOJ Press Release, Ensuring Access to Jobs for People with Disabilities, 5/12/2015, [www.justice.gov/archives/opa/blog/ensuring-access-jobs-people-disabilities](http://www.justice.gov/archives/opa/blog/ensuring-access-jobs-people-disabilities) (last accessed 8/29/2018).

<sup>28</sup> Settlement Agreement between the United States of America and the City of Fallon, NV, 2/3/2015, [www.ada.gov/fallon\\_nv\\_sa.html](http://www.ada.gov/fallon_nv_sa.html) (last accessed 8/29/2018).

<sup>29</sup> *EEOC v. Grane*, 2 F. Supp. 3d 667, 692 (W.D. Pa. 2014) (quoting 42 U.S.C. § 12101(b)(2) and finding Congress sought “to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities”).

<sup>30</sup> *Id.* at 692.

<sup>31</sup> *Id.*

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## Reasonable Accommodations to Application Process

Employers may ask applicants whether they need any reasonable accommodations for the application process,<sup>32</sup> such as whether applicants need a test in a modified format or an American Sign Language interpreter for an interview. Of course, employers may not ask the applicant whether he requires a reasonable accommodation for the job, as that question is likely to elicit whether the applicant has a disability, as only people with disabilities are entitled to reasonable accommodations.<sup>33</sup>

In a 2015 settlement between the ***United States Department of Justice (DOJ) and the City of DeKalb***, the City was found to have violated the ADA by asking on job applications, “Do you have any physical or mental conditions, which may impair your ability to perform the duties of the position(s) for which you are applying?” Yes\_\_\_\_ No\_\_\_\_\_. If yes, please state the condition and the nature of your work limitations:\_\_\_\_\_.<sup>34</sup> The DOJ found that this question violated the ADA by asking whether the applicant requires reasonable accommodation for the job. In the settlement agreement, the City agreed to refrain from making future disability-related inquiries of job applicants and to provide training on the ADA to all current supervisory employees and all City employees who participate in making hiring or personnel decisions.

## 2. Employee’s Ability to Perform Job-Related Functions

The ADA carves out an exception so that employers may question applicants about their ability to perform job-related functions.<sup>35</sup> And as explained further in the ADA’s regulations, an employer may make “pre-employment inquiries into the ability of an applicant to perform job-related functions, and/or may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.”<sup>36</sup> However, this is permissible only if *all* applicants in the job category are asked to do this.<sup>37</sup> Moreover, if an employer could reasonably believe that an applicant will not be able to perform a job function because of a known disability, the employer may also ask the applicant to describe or demonstrate how he or she would perform the job.

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<sup>32</sup> EEOC Employment Guidance.

<sup>33</sup> EEOC Enforcement Guidance, at 5-6.

<sup>34</sup> Settlement Agreement Between the United States of America and the City of Dekalb, Illinois, DJ 205-23-59, [https://www.ada.gov/dekalb\\_il\\_sa.html](https://www.ada.gov/dekalb_il_sa.html).

<sup>35</sup> 42 U.S.C. § 12112(d)(2)(B).

<sup>36</sup> 29 C.F.R. § 1630.14(a).

<sup>37</sup> EEOC Pre-employment Guidance (“Employers should remember that, if an applicant says that s/he will need a reasonable accommodation to do a job demonstration, the employer must either[] provide a reasonable accommodation . . . or allow the applicant to simply describe how s/he would perform the job junction.”).

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Courts have given employers a little more flexibility. For instance, in **Adeyemi v. D.C.**, 525 F.3d 1222 (D.C. Cir. 2008), the court held that an employer did not violate the ADA by asking a Deaf applicant how he communicated in offices where no one knew sign language, finding this to appropriate in light of its relationship to questions about job-related functions.<sup>38</sup>

### 3. Affirmative Action / Section 503

Employers may ask applicants to voluntarily self-identify for purposes of the employer's affirmative action program. This issue has become a more prominent one since Section 503 of the Rehabilitation Act requires federal contractors to engage in affirmative employment efforts by, among other things, requiring them to invite applicants to self-identify as having a disability.<sup>39</sup> Although these requirements appear to conflict with the ADA's restrictions on medical exams and inquiries, the EEOC clarified in an informal discussion letter that compliance with a federal regulation requiring federal contractors to invite applicants to voluntarily self-identify as individuals with disabilities *cannot* violate Title I of the ADA.<sup>40</sup> This is because under the ADA, an employer cannot be held liable for violating the ADA if the action was required by another federal statute or regulation.<sup>41</sup>

However, according to the EEOC, even when there is no law requiring the employer to undertake affirmative action, the employer may still ask applicants to "self-identify" as individuals with disabilities if the employer is voluntarily using the information to benefit individuals with disabilities.<sup>42</sup> If an employer is undertaking affirmative action pursuant to a state or local law that permits or encourages affirmative action, the employer may invite voluntary self-identification only if the employer uses the information to benefit individuals with disabilities.

Significantly, if the employer asks applicants to self-identify for purposes of its affirmative action program, there are a few additional special steps an employer must take. The employer must clearly state that the requested information is used solely in connection with its affirmative action program, that the information is being requested on a voluntary basis and will be kept confidential, that refusal to provide the information will not subject the applicant to adverse

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<sup>38</sup> Adeyemi v. D.C., 525 F.3d 1222, 1229 (D.C. Cir. 2008).

<sup>39</sup> 29 U.S.C. §§ 701 et. seq. (1973).

<sup>40</sup> See Letter from Peggy R. Mastroianni, EEOC Office of Legal Counsel, to Patricia A. Shiu, Director, Office of Federal Contract Compliance Programs, at 1 (Aug. 8, 2013), available at [www.dol.gov/ofccp/regs/compliance/sec503/Self\\_ID\\_Forms/OLC\\_letter\\_to\\_OFCCP\\_8-8-2013\\_508c.pdf](http://www.dol.gov/ofccp/regs/compliance/sec503/Self_ID_Forms/OLC_letter_to_OFCCP_8-8-2013_508c.pdf) (last accessed 8/28/2018)

<sup>41</sup> *Id.* (citing 29 C.F.R. § 1630.15(e) ("It may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, or that another Federal law or regulation prohibits an action ... that would otherwise be required by this part.")).

<sup>42</sup> EEOC ADA Enforcement Guidance, at 11, <https://www1.eeoc.gov/policy/docs/medfin5.pdf> (last accessed 8/30/2018) (Enforcement Guidance).

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treatment, and that the information will be used only in accordance with the ADA. To ensure confidentiality, the information must be kept on a separate form from the application and not stored with the application or other personnel records.

When the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) promulgated its regulations implementing Section 503, they were sued by the Associated Builders and Contractors in *Associated Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25 (D.D.C.), aff'd, 773 F.3d 257 (D.C. Cir. 2014).<sup>43</sup> The plaintiffs argued that the data-collection requirements in Section 503 violated Section 12112(d)(2) of the ADA. The court disagreed, citing the legislative history, which confirmed that Congress intended to permit covered entities to “invite applicants for employment to indicate whether and to what extent they have a disability ... when a recipient is taking affirmative action pursuant to section 503 of the Rehabilitation Act of 1973.”<sup>44</sup>

## C. Who is an “Applicant”

Employers should be wary of when these rules apply. The pre-offer rules clearly apply when a non-employee applicant is interviewing for a position. However, according to the EEOC, the rules also apply when a current employee applies for a new, different job with the same employer.<sup>45</sup> In the *Karraker* case, referenced above, the parties stipulated that because the employees at issue were seeking “new positions” within the company, the tests were considered “pre-employment” for purposes of the ADA.<sup>46</sup>

Thus, employers should treat such an employee who is applying for new positions as applicants and not ask disability-related questions or require a medical examinations before the employer makes a conditional offer to the employee-applicant for the new position.<sup>47</sup> Moreover, where an employee is applying for a new position, the current supervisor of that employee may not disclose medical information regarding that employee to the person interviewing the employee for the new job.<sup>48</sup>

## D. Best Practices for Responding to Improper Questions

The recipient of an improper disability-related question during a job interview is placed in a tricky situation. On one hand, if the applicant objects to the question, the applicant risks offending the

<sup>43</sup> *Associated Builders & Contractors, Inc. v. Shiu*, 30 F. Supp. 3d 25, 37–38 (D.D.C.), aff'd, 773 F.3d 257 (D.C. Cir. 2014).

<sup>44</sup> *Id.* (citing S.Rep. No. 101–116, at 40 (1989); see also H.R.Rep. No. 101–485, at 75 (1989)).

<sup>45</sup> EEOC Pre-employment Guidance, *General Principles*, <https://www.eeoc.gov/policy/docs/guidance-inquiries.html>.

<sup>46</sup> *Karraker*, 411 at 835.

<sup>47</sup> EEOC Pre-employment Guidance, *General Principles*.

<sup>48</sup> *Id.*

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interviewer, as well as providing the interviewer with a reason to believe the applicant has a disability. On the other hand, if the applicant answers the question, the interviewer may continue on a discriminatory path for the rest of the application process. Although the best response for any given situation largely depends on the specific facts, there are several best practices for responding to improper questions.

First, the applicant could simply answer the question.<sup>49</sup> Or the applicant could choose a response that addresses the interviewers underlying concern.<sup>50</sup> For example, if the employer asks whether the applicant has any physical disabilities, the applicant could respond, “I am able to perform the job for which I am applying and I do not need any accommodations.” The applicant might also choose to tactfully remind the interviewer that the question is illegal.<sup>51</sup> Some examples of tactful reminders are, “That’s not a legal question. I’d rather cover other points” or, “I’d prefer to focus on my qualifications for the job.” Applicants are advised to document these types of conversations while their memory is fresh. For written applications, another strategy is to leave the offending questions blank, as frequently employers will not notice.

## V. Stage Two / Post-Offer

### A. General Rules

The post-conditional offer (post-offer) period is the period of time after an employer makes an offer of employment to an individual, but before the individual has begun working.<sup>52</sup> This period begins after the “employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer.”<sup>53</sup> As explained by one court: “The ADA recognizes that employers may need to conduct medical examinations to determine if an applicant can perform certain jobs effectively and safely. The ADA requires only that such examinations be conducted as a separate, second step of the selection process, after an individual has met all other job pre-requisites.”<sup>54</sup>

During the post-offer period, employers may pose disability-related questions and require medical examinations, so long as three criteria are met. *First*, the questioning or medical examinations

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<sup>49</sup> Tom Washington, Advice on Answering Illegal Interview Questions: Reply Candidly or Tactfully Decline and You Still Can Win a Job Offer, <https://www.actx.edu/career/filecabinet/39>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> 42 U.S.C. § 12112(d)(3); see also EEOC Pre-employment Guidance, *General Principles* 2.

<sup>53</sup> ADA Enforcement Guidance, at 17.

<sup>54</sup> *Leonel v. Am. Airlines, Inc.*, 400 F.3d 702, 709 (9th Cir. 2005), opinion amended on denial of reh’g, No. 03-15890, 2005 WL 976985 (9th Cir. Apr. 28, 2005).

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must be done for *all* incoming employees in that job category.<sup>55</sup> *Second*, employers must treat such information as confidential medical records and maintain information obtained regarding the medical condition or history of applicants on separate forms in separate medical files.<sup>56</sup> *Third*, the results of the examination or answers to any disability-related question must be used in a manner consistent with all the provisions of the ADA that pertain to employment.<sup>57</sup> This third requirement is the subject of the most litigation.

## B. Rescinding Conditional Offers Based on Disability

This third category has been interpreted to mean that employers may not withdraw a conditional job offer based on a disability or medical-related reasons, unless: (1) the withdrawal is “job-related and consistent with business necessity, and such performance [of essential job functions] cannot be accomplished with reasonable accommodation;” or (2) the applicant “pose[d] a direct threat to the health or safety of the individual or others in the workplace” that could not be reduced by reasonable accommodation.<sup>58</sup>

### 1. Exclusion is Job-Related and Consistent with Business Necessity

The ADA prohibits employers from using criteria to screen out an applicant with disabilities unless the exclusionary criteria are “*job-related* and consistent with *business necessity*, and performance of the essential job functions cannot be accomplished with reasonable accommodation.”<sup>59</sup> Often, applicants are screened out based on information provided during the post-offer medical examination. Accordingly, the relevant question is, whether the criteria are job-related and consistent with business necessity. This provision is important, because it “ensure[s] that individuals with disabilities are not excluded from job opportunities unless they are actually unable to do the job.”<sup>60</sup> It is also consistent with the legislative history, as Congress sought to ensure that “results [of medical examinations could] not be used to withdraw a conditional job offer from an applicant unless they indicate that the applicant is not qualified to perform he job.”<sup>61</sup>

One case example is *EEOC v. American Tool & Mold*, 21 F. Supp. 3d 1268 (M.D. Fla. 2014), during the post-conditional job offer, pre-employment time period, an employee was subject to a

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<sup>55</sup> EEOC Pre-employment Guidance; see also 42 U.S.C. § 12112(d)(3)(A).

<sup>56</sup> 42 U.S.C. § 12112(d)(3)(B).

<sup>57</sup> *Id.*

<sup>58</sup> 42 U.S.C. § 12113(b)(6); 29 C.F.R. §§ 1630.15(b)(1), (2); 29 C.F.R. § 1630.2(r).

<sup>59</sup> *EEOC v. Am. Tool & Mold, Inc.*, 21 F. Supp. 3d 1268, 1283 (M.D. Fla. 2014) (emphasis in original) (citing 29 C.F.R. § 1630.14(b)(3)).

<sup>60</sup> 29 C.F.R. § 1630.10(a).

<sup>61</sup> H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3, at 43; see also 136 Cong. Rec. 10,872 (1990) (statement of Representative Weiss) (“The results of the examination can only be used to withdraw a job offer if the applicant is found not to be qualified for the job based on the results of the exam.”).

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pre-employment medical examination and ultimately found unfit for duty after he failed to submit an old (2003) medical record.<sup>62</sup> The court concluded that this exclusion could violate the ADA because the employer failed to identify any “job-related” criteria that would justify the additional obligation, as the only reason would be to “dispel a fear of additional worker’s compensation claims or potential future injuries” which are not “permissible justifications under the ADA.”<sup>63</sup>

Often times, as a result of information disclosed during the post-offer medical examination, an employer wants additional information. An interesting related issue is who bears the cost of providing such follow-up testing. In *EEOC v. BNSF Railway Co., 2018 WL 4100185 (9th Cir. Aug. 29, 2018)*, Holt, an applicant, received a conditional job offer contingent on a medical review.<sup>64</sup> During the review, Holt disclosed that he had injured his back four years ago, but that his back pain was resolved. His most recent MRI was two years old, and it showed that the previous disc herniation in his back was still present but was less prominent than it was when Holt initially injured his back. Holt has been asymptomatic ever since. Nevertheless, BNSF’s medical examiner requested Holt provide a current MRI. Holt attempted to comply, but because he was asymptomatic, his insurance would not pay for the MRI and Holt could not afford the MRI out of pocket. Holt asked BNSF to waive the MRI request or to pay for it, but BNSF declined to do either. His job offer was subsequently revoked.

The Ninth Circuit concluded that BNSF violated the ADA when it rescinded Holt’s job offer. It explained that the problem was that the employer imposed an additional financial burden on a person with a disability because of that person’s disability. And, in the case of an expensive test like an MRI, by requiring an applicant to pay for this type of expensive test, the result would be to “effectively preclude many applicants, which is at odds with the ADA’s aim to increase opportunities for persons with disabilities.”<sup>65</sup> The court distinguished situations where an employer imposes the same requirement on all entering employees. It also noted that while employers may be permitted to ask for follow-up exams that are “medically related to the previously obtained medical information,” it may not force employees to “shoulder the cost” of such exams. **See also Coons v. BNSF Railway Co., 268 F. Supp. 3d 983 (D. Minn. 2017)** (employer’s decision to withdraw conditional job offer because an applicant did not supply an MRI at applicant’s own expense could support a claim under the ADA).

## 2. Exclusion Because Employee Poses a Direct Threat

Direct threat is a defense under the ADA. The statute defines direct threat as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”<sup>66</sup> The EEOC regulations supplement this statutory language and define direct threat as “a significant

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<sup>62</sup> *EEOC v. Am. Tool & Mold*, 21 F. Supp. 3d 1268 (M.D. Fla. 2014).

<sup>63</sup> *Id.* at 1284.

<sup>64</sup> *EEOC v. BNSF Ry. Co., 2018 WL 4100185 (9th Cir. Aug. 29, 2018)*.

<sup>65</sup> *Id.* at \*8.

<sup>66</sup> 42 U.S.C. § 12111(3)

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risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>67</sup> The EEOC’s regulatory language, which expanded the direct threat defense to include “threat to self,” was upheld by the Supreme Court in **Chevron v. Echazabal**, 536 U.S. 73 (2002).<sup>68</sup>

To successfully show that an applicant poses a direct threat, an employer must make an “individualized assessment of the individual’s present ability to safely perform the essential functions of the job.”<sup>69</sup> The employer bears the burden of proof and “generalized statements of potential harm” are not sufficient.<sup>70</sup> Rather, the employer must consider the following: “(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm.”<sup>71</sup> The determination should be based on “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”<sup>72</sup>

The direct threat defense is structured to ensure that employers cannot withdraw a conditional offer of employment “merely because of fear or speculation that a disability may indicate a greater risk of future injury, or absenteeism, or may cause future workers’ compensation or insurance costs.”<sup>73</sup>

One common pattern in the case law can be seen when employers, concerned about future workers’ compensation claims, withdraw a conditional job offer once learning about an individual’s disability. This was precisely the situation in **EEOC v. Amsted Rail. Co., Inc**, 280 F. Supp. 3d 1141 (S.D. Ill. 2017), where the employer was found liable under the ADA for improperly withdrawing a conditional job offer.<sup>74</sup> In that case, an individual applied to be a “chipper,” which requires using a hammer and grinder to remove metal protrusions from steel casings. The employer extended an offer contingent on passing a medical examination. The applicant passed the medical exam, but he provided additional information indicating he had corrective surgery to relieve carpal tunnel syndrome several years ago. The employer’s medical examiner subsequently found the applicant medically disqualified because of the prior surgery, and withdrew the conditional job offer based on fear the applicant would develop carpal tunnel syndrome in the future. The court found for the EEOC, which had brought the case on the applicant’s behalf, because it found that the employer regarded the applicant as disabled and its conduct “smacks of exactly the kind of speculation and stereotyping that the [ADA] was designed

<sup>67</sup> 29 C.F.R. §1630.2(r)(emphasis supplied).

<sup>68</sup> 536 U.S. 73 (2002).

<sup>69</sup> 29 C.F.R. § 1630.2(r).

<sup>70</sup> See, e.g., *Echazabal v. Chevron USA, Inc.*, 336 F.3d 1023, 1027, 1030 (9th Cir. 2003).

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Garrison v. Baker Hughes Oilfield Operations, Inc.*, 287 F.3d 955, 960 (10th Cir. 2002).

<sup>74</sup> *EEOC v. Amsted Rail. Co., Inc*, 280 F. Supp. 3d 1141 (S.D. Ill. 2017).

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to combat.”<sup>75</sup> In so doing, the court determined that the employer failed to conduct a true direct threat analysis, as it restricted the applicant based on generalized assumptions instead of individualized assessments.

Employers often find themselves in difficult situations when they withdraw conditional job offers without conducting the requisite individualized assessment. That was the situation in *Littlefield v. Nevada Dept. of Public Safety*, 195 F. Supp. 3d 1147 (D. Nev. 2016), where the court concluded that the employer failed to successfully raise a direct threat defense because it failed to conduct an individualized assessment of the applicant before rescinding the offer.<sup>76</sup> The plaintiff had monocular vision because he had his right eye removed as a result of retinoblastoma. He applied for a position as a Department of Public Safety Officer with the Nevada Highway Patrol (NHP) and passed the initial physical and mental testing. During the second phase of physical examination for the position, the examining doctor determined that Littlefield’s monocular vision made him unfit for duty. The court found that NHP did not conduct an individualized assessment necessary to claim that the plaintiff was a direct threat and instead, denied the plaintiff’s application after he was cleared in the first examination and not cleared in the second examination without conducting any additional inquiry or follow up.

An individualized inquiry requires employers to consider the individualized circumstances of the individual’s job, as well as disability. In *EEOC v. American Tool & Mold*, 21 F. Supp. 3d 1268 (M.D. Fla. 2014), a case referenced above, the court concluded that an employer failed to conduct an individualized assessment of the applicant and instead relied exclusively on the assessment of the employer’s medical examiner, who did not even know what the functions of the job were, when it withdrew its job offer.<sup>77</sup>

## VI. Stage Three / Employment

### A. General Rules

Once an individual is employed, the ADA restricts employers from making disability-related inquiries or requiring medical examinations unless such inquiries and examinations are job-related and consistent with business necessity.<sup>78</sup> The burden of establishing that a medical examination or disability related inquiry is job-related and consistent with business necessity is

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<sup>75</sup> *Id.* at 1151 (quoting *EEOC v. Rockwell Int’l Corp.*, 243 F.3d 1012 (7th Cir. 2001) (Wood, J., dissenting)).

<sup>76</sup> *Littlefield v. Nevada Dept. of Public Safety*, 195 F. Supp. 3d 1147 (D. Nev. 2016);

<sup>77</sup> *Am. Tool & Mold*, 21 F. Supp. 3d at 1268.

<sup>78</sup> 42 U.S.C. § 12112(d)(4)(A); *Wright v. Illinois Dep’t of Children and family Serv.*, 798 F.3d 513, 522 (7th Cir. 2015).

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on the employer.<sup>79</sup> EEOC guidance, coupled with court cases, provide guidance to interpret the job-related and business necessity requirement.

Generally speaking, a medical exam and/or disability-related inquiry is job-related and consistent with business necessity when an employee requests a reasonable accommodation. An exam and/or inquiry can also be job-related and consistent with business necessity if an employer has a reasonable belief, based on objective evidence, that as a result of a medical condition, an employee is unable to perform the essential functions of her job or will pose a direct threat to herself or others in the workplace.<sup>80</sup> These categories are not mutually exclusive and often the analysis will overlap.<sup>81</sup> Further, in certain situations, usually in positions that affect public safety, employers are able to show that periodic medical examinations are job-related and consistent with business necessity.

## 1. Reasonable Accommodation

Courts generally uphold employers' requests for medical examination or documentation in response to an employee's request for a reasonable accommodation, so long as the employee's disability and need for accommodation are not obvious.<sup>82</sup>

In *Sloan v. Repacorp, Inc.*, 310 F.Supp.3d 891 (S.D. Ohio 2018), an employer learned that an employee, who was required to operate heavy and dangerous machinery as a part of his job, was taking prescription morphine to treat severe neck and back pain, in violation of company policy.<sup>83</sup> The employer requested that the employee consult with his physician and provide documentation that it was appropriate for the employee to be operating heavy machinery and whether a non-opiate medication could reasonably accommodate his disability. The employee refused to

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<sup>79</sup> *Painter v. Illinois Dep't of Transportation*, 715 Fed. App'x 538, 540 (7th Cir. 2017) ("Employers bear the 'quite high' burden of establishing that compelled medical examinations are consistent with business necessity.").

<sup>80</sup> See *Kroll v. White Lake Ambulance Authority*, 763 F.3d 619, 623 (6th Cir. 2014) ("The employer bears the burden of proving that a medical examination is job-related and consistent with business necessity by demonstrating that '(1) the employee requests an accommodation; (2) the employee's ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to himself or others.'") (*citing Dennan v. Davey Tree Expert Co.*, 266 Fed. App'x 377, 379 (6th Cir. 2007)); see also EEOC Employee Guidance.

<sup>81</sup> See, e.g., *Wright*, 798 F.3d at 524-26 (a social worker was ordered to take a fitness for duty test on the basis of several reports by co-workers and an independent physician that she was unfit to deal with young children, but the court found it was not job-related and consistent with business necessity because the reason for the examination was not genuine).

<sup>82</sup> See *Sloan v. Repacorp, Inc.*, 310 F.Supp.3d 891 (S.D. Ohio 2018) (*citing Kroll v. White Lake Ambulance Auth.*, 763 F.3d 619, 623 (6th Cir. 2014); see also *Atkinson v. SG Americas Securities, LLC*, 693 Fed. App'x 436, 440 (7th Cir. 2017)).

<sup>83</sup> *Sloan v. Repacorp, Inc.*, 310 F.Supp.3d 891 (S.D. Ohio 2018).

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cooperate with this request, and was ultimately terminated for failing to comply. The court construed the situation as one where the employee was asking the employer to modify its policy to permit him to continue using prescription morphine on the job. As a result, the employer's request for information from a physician regarding the employee's morphine use was permitted, because an employer is not required to take an employee's word that they have a disability and require an accommodation.

Employers' requests, however, must be narrowly tailored to the accommodation and disability at issue. Employers usually "cannot ask for an employee's complete medical records because they are likely to contain information unrelated to the disability at issue and the need for accommodation."<sup>84</sup> They also cannot use an employer's request for an accommodation as a means of seeking medical information that is unrelated to the employee's current request.

That was the situation in ***Bingman v. Baltimore County*, 714 F. App'x 244 (4th Cir. 2017**), where in 2010, an employee sought a medical leave due to a back injury.<sup>85</sup> When he tried to return from leave, the County requested his medical records. The problem was that in addition to any medical records about his back injury, the employer also requested medical records about his cancer treatments, which had occurred long before his recent back injury. The employee was initially cleared to return, but after being referred for a medical exam by the company doctor, he was found unfit and fired. This case was tried before a jury who, in July 2016, found for the employee and awarded him \$400,000, including \$298,000 in non-economic damages. When the Fourth Circuit affirmed the jury's decision, it found it "undisputed" that the County had made "unlawful inquiries" when asking about the employee's cancer instead of limiting its requests to his back injury.

The process of providing reasonable accommodations can lead to other business-related reasons to require additional disability information or require a medical examination. Indeed, in certain cases, courts have even upheld an employer's decision to require an employee to undergo a medical examination as part of the interactive process; especially where the employee refuses employer's proffered accommodation ideas and the employer claims to be seeking information about how the employee could be accommodated. In ***Coleman v. Caterpillar, Inc.*, 2017 WL 3840423 (C.D. Ill. Sept. 1, 2017)**, an employee with numerous disabilities, including migraine headaches, anxiety, allergies, depression, irritable bowel syndrome and vertigo, returned from a leave of absence and was permitted to work from home.<sup>86</sup> Despite the initial work adjustments being temporary, the employee eventually requested that her employer permit her to work remotely from home indefinitely and, in response, her employer requested medical information about her disability and need for accommodation. The employer offered the employee to telework part-time, but required her to come to the office on two days a week in order to facilitate training. Citing her doctor's recommendations, the employee refused this offer. Her employer requested that she undergo a medical examination by an independent medical examiner, and when the

<sup>84</sup> EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA), July 27, 2000 (Question 10).

<sup>85</sup> *Bingman v. Baltimore Cty*, 714 F. App'x 244 (4th Cir. 2017).

<sup>86</sup> *Coleman v. Caterpillar, Inc.*, 2017 WL 3840423 (C.D. Ill. Sept. 1, 2017).

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employee refused to do so the employer terminated her employment. The court, addressing the employer's decision to require an examination by an independent medical examiner, found that it was job-related and consistent with business necessity. The court reasoned that the exam was part of a broader effort to ascertain the best way to accommodate the employee's disability, especially once it established that a permanent work-from-home arrangement would not be acceptable.

## 2. Can Employee Perform Essential Job Functions

Employers may ask disability inquiries or require medical examinations if objective evidence from a reliable source gives them reason to question an employee's ability to perform his essential job functions. Mere speculative or subjective evidence regarding an employee's ability to perform his or her essential job functions will not support a request for medical examination.<sup>87</sup> See *Painter v. Illinois Dep't of Transportation*, 715 Fed. App'x 538, 541 (7th Cir. 2017) ("That an employee's behavior could be described as annoying or inefficient does not justify an examination, rather, there must be a genuine reason to doubt whether that employee can perform job-related functions."). Additionally, an employer's proffered justification must be genuine and not simply pretext.<sup>88</sup>

An employer may initiate a request for a medical evaluation where independent facts come to its attention regarding an employee's fitness for duty. In *Barnum v. Ohio State University Medical Center*, 642 Fed. Appx. 525 (6th Cir. 2016), the university placed an anesthetist on sick leave pending the results of a fitness-for-duty examination.<sup>89</sup> The university required this examination after receiving reports from numerous sources that the anesthetist was showing an inability to concentrate on caring for patients, an inability to perform at least one routine task, and had been making comments that suggested suicidal thoughts. The anesthetist submitted to the examination and was reinstated; however, she then brought suit claiming the university discriminated against her in violation of the ADA by requiring her to take the fitness for duty examination. The court found that the examination was "job-related and consistent with business necessity" because a reasonable person would have questioned if, based on her behavior, the anesthetist was still capable of performing her job duties.<sup>90</sup>

In some instances, repeated conduct, even when the conduct in isolation would not support an employer's medical examination, may provide sufficient evidence of concern about an individual's ability to do the job. In *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010), a police

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<sup>87</sup> See *Painter v. ill. Dep't of Transportation*, 715 Fed. App'x 538, 541 (7th Cir. 2017) ("That an employee's behavior could be described as annoying or inefficient does not justify an examination, rather, there must be a genuine reason to doubt whether that employee can perform job-related functions.") (quoting *Wright v. Ill. Dep't of Children and Family Services*, 798 F.3d 513, 524 (7th Cir. 2015)).

<sup>88</sup> *Wright v. Illinois Dep't of Children & Family Svcs.*, 798 F.3d 513, 524-25 (7th Cir. 2015).

<sup>89</sup> *Barnum v. Ohio State University Medical Center*, 642 Fed. Appx. 525 (6th Cir. 2016).

<sup>90</sup> *Id.* at 533-534.

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officer was ordered to undergo a psychiatric evaluation to determine whether or not he was able to carry out his duties.<sup>91</sup> The court found that the employer had sufficient objective evidence to lead it to reasonably question the officer's ability to execute his duties based on several emotional outbursts. Specifically, the officer had been briefly suspended for swearing at and disobeying a superior officer, he had a loud argument with a co-worker, his wife had called police to report a domestic altercation episode with him, and his co-workers reported several concerning comments he had made. The court specifically noted that while “[a] minor argument with a coworker or isolated instances of lost temper would likely fall short of establishing business necessity, [the officer's] repeated volatile responses are of a different character.”<sup>92</sup>

Courts consider the surrounding facts, including the employer's conduct, when determining whether a medical examination was truly job-related and consistent with business necessity. In ***Wright v. Illinois Dep't of Children & Family Services*, 798 F.3d 513 (7th Cir. 2015)**, the Seventh Circuit reviewed a claim brought by an Illinois social worker who had been removed from contact with children in her work in response to concerns expressed regarding her conduct.<sup>93</sup> Following plaintiff's encounter with a child who resided at a state-administered facility, the facility's doctor barred plaintiff from further contact with the child. The doctor issued a medical report questioning plaintiff's ability to work with children, and stating that “her mental health needs to be assessed.”<sup>94</sup> A supervising administrator had also expressed concern regarding plaintiff, given her long-standing behavior patterns including her failures to follow orders. Consequently, defendant ordered plaintiff to undergo a fitness for duty examination, which plaintiff repeatedly refused to do, and then brought suit alleging that this examination constituted discrimination under Title I.

At trial, the jury found that the examination was neither job-related nor consistent with business necessity. The district court thus denied defendant's motion for judgment as a matter of law. On appeal, the Seventh Circuit upheld the decision in plaintiff's favor and reiterated that the burden of proving business necessity is “quite high.”<sup>95</sup> The Court noted testimony that when a fitness for duty examination was pending, standard agency practice was to place the employee on desk duty, and yet here, the plaintiff was permitted to continue overseeing her normal case load (of 22 cases) for almost two months, and was actually assigned to an additional case during that time. This inconsistent application of agency policy suggested that there was no genuine concern for children's safety. Additionally, an administrator testified that had she truly believed that the plaintiff was a risk to children, she would have removed her immediately.

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<sup>91</sup> *Brownfield v. City of Yakima*, 612 F.3d 1140 (9th Cir. 2010).

<sup>92</sup> *Id.* at 1146.

<sup>93</sup> *Wright v. Illinois Dep't of Children & Family Svcs.*, 798 F.3d 513 (7th Cir. 2015).

<sup>94</sup> *Id.* at 518.

<sup>95</sup> *Id.* at 515.

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Similarly, in *Kroll v. White Lake Ambulance Authority*, 763 F.3d 619 (6th Cir. 2014) (“Kroll II”), the case returned to the Sixth Circuit to determine whether the employer’s request that an employee obtain psychological counseling was job-related and consistent with business necessity.<sup>96</sup> In this case, the employee displayed “aberrant emotional behavior” stemming from a relationship.<sup>97</sup> There was evidence that she cried in a grocery store parking lot, called co-workers crying at night, and cried in a hallway at work. However, the Sixth Circuit explained that the behavior relevant to this inquiry is behavior relevant to her ability to perform her job. Because a reasonable jury could find that her “emotional outbursts outside of work hours and not in the presence of patients did not impair her ability to perform essential job functions.”<sup>98</sup> The court explained that there were two incidents where the plaintiff’s behavior may have undermined her ability to do her job; these two incidents, however, may have been enough to start disciplinary procedures or provide additional training, but were insufficient to conclude that the plaintiff was experiencing an emotional/psychological problem that interfered with her ability to perform her job.

Another case emphasizing that “business necessity” is a high standard that is “not to be confused with mere expediency” is *Lewis v. Government of D.C.*, 282 F. Supp. 3d 169 (D.D.C. 2017).<sup>99</sup> In *Lewis*, the city announced that the plaintiff, a human resources employee, was moving office locations to another facility, which had certain areas with highly sensitive information. As a condition to retaining employment during the move, the city required all staff to submit to a number of background tests, including a drug test. The moving employees were also required to disclose alcohol and prescription-drug use, or risk being terminated. The plaintiff refused to comply with this requirement and alleged she was retaliated against repeatedly for doing so and eventually terminated. The plaintiff then brought suit against the city alleging, in part, that she was subject to an improper medical inquiry under the ADA. In denying the employer’s motion for summary judgment, the court noted that “[t]he business necessity standard is quite high, and is not to be confused with mere expediency” and that employer failed to establish beyond dispute that the medical inquiries met this standard.<sup>100</sup>

Finally, courts generally uphold employer’s decisions to require fitness for duty examinations if an employee makes a threat in the workplace. These cases are generally analyzed as whether they are job-related, instead of under the direct threat analysis discussed previously. In *Owusu-Ansah v. Coca-Cola Company*, 715 F.3d 1306 (11th Cir. 2013), during a meeting with management, an employee banged his hand on the table and said that someone was “going to pay for this.”<sup>101</sup> He

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<sup>96</sup> *Kroll v. White Lake Ambulance Authority*, 763 F.3d 619 (6th Cir. 2014) (“Kroll II”).

<sup>97</sup> *Id.* at 624.

<sup>98</sup> *Id.* 625.

<sup>99</sup> *Lewis v. Gov’t of D.C.*, 282 F. Supp. 3d 169 (D.D.C. 2017).

<sup>100</sup> *Id.*

<sup>101</sup> *Owusu-Ansah v. Coca-Cola Company*, 715 F.3d 1306 (11th Cir. 2013).

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was then referred to a psychiatric fitness for duty exam, where he was given the MMPI. The employee challenged this referral, but the court found for the employer, concluding that the medical examination was job-related and consistent with business necessity. The court explained that the employee's ability to handle stress and work reasonably well are essential functions.

In *Painter v. Illinois Department of Transportation*, 715 Fed. App'x 538 (7th Cir. 2017), a court held that an employer's request for medical evaluation was justified due to conduct that permitted a reasonable belief that an employee might pose a threat to the safety of the workplace.<sup>102</sup> Specifically, the employee in question had "snapped and screamed at [coworkers]... gave blank stares and intimidating looks, ranted, constantly mumbled to herself, repeatedly banged drawers in her office, and had mood swings."<sup>103</sup> In addition to these incidents, the employee was said to have growled at coworkers and sent a threatening email to a union representative.<sup>104</sup> Based on these extensive instances of bizarre and threatening conduct, as well as testimony and affidavits from coworkers that expressed their fear of the employee, the court found that the employer had demonstrated, as a matter of law, a direct threat justification for requiring a psychiatric evaluation of the employee.

At least one court has addressed whether any process exists for employees to challenge the determinations made by employers—and concluded that one does not. In *Ellis v. San Francisco State University*, 2016 WL 4241907 (N.D. Cal. Aug. 11, 2016), a professor with a history of a brain tumor was required to submit to a fitness for duty examination.<sup>105</sup> Four reasons were cited for this evaluation, including "unprofessional and inappropriate interactions with staff members."<sup>106</sup> The professor attempted to refute the allegations and requested a meeting, but the employer refused. The employee ultimately refused to submit to the fitness for duty examination, and was terminated. The plaintiff argued, unsuccessfully, that an employer's decision to impose a fitness for duty must be corroborated by a formal investigation or that a doctor must recommend the evaluation instead of a University administrator. However, the court also found that here, a reasonable jury could find that the employer did not have sufficient grounds to require a medical exam.

### 3. Does the Employee Pose a Direct Threat

Employers may also require an employee to undergo a medical examination when there is a reasonable belief based on objective evidence that an employee poses a threat to themselves or others. Just as with a medical examination due to doubts about an employee's performance of

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<sup>102</sup> *Painter v. Ill. Dep't of Trans.*, 715 Fed. App'x 538, 540 (7th Cir. 2017).

<sup>103</sup> *Id.* at 541.

<sup>104</sup> *Id.* at 540 (after the employee emailed the union representative with a bizarre reference to a clock in a conference room, the union representative said she thought the clock was dead. The employee replied "[s]omething's dead alright—however, I prefer to be a lady and not say what I think is dead.").

<sup>105</sup> *Ellis v. San Francisco State Univ.*, 2016 WL 4241907, at \*1–2 (N.D. Cal. Aug. 11, 2016).

<sup>106</sup> *Id.* at \*1.

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essential job functions, this test is an objective one based on the totality of the circumstances. And as discussed above, when proving direct threat, employers must make individualized assessments based on current, objective medical information.

An example of a case with an unsuccessful direct threat defense is *Stragapede v. City of Evanston*, 865 F.3d 861 (7th Cir. 2017), because the employer failed to provide any objective or medical evidence to support its argument.<sup>107</sup> Here, Stragapede was an employee of the City of Evanston's water services department. He took leave after having a traumatic brain injury. Before his return, the city's neurologist examined Stragapede for fitness of duty who noted he had "mild residual cognitive deficits" but cleared him to return to his job. Subsequently, the City noticed that Stragapede struggled with some job requirements such as changing the water meter, logging into his computer, and occasionally driving through intersections while looking down. The City consulted with the neurologist who concluded these issues were likely caused by Stragapede's brain injury. The neurologist drafted a letter stating that Stragapede was a direct threat and the City fired Stragapede. The Seventh Circuit affirmed the lower court's decision that Stragapede was not a direct threat, because the direct threat defense requires medical or other objective evidence, but the City only provided its subjective belief about Stragapede's risk. Moreover, the jury could have rationally found that the neurologist's opinion was unreasonable since he only had one-sided information.

Compare that to *McLane v. School City of Mishawaka*, 2017 WL 430843 (N.D. Ind. Feb. 01, 2017), where the defendant, School City, successfully raised a direct threat defense.<sup>108</sup> School City noticed that its groundskeeper, McLane, was unable to perform the essential functions of his job. The groundskeeper position required McLane to mow the grass, clean bathrooms, and take out the trash. However, when McLane's supervisor observed McLane at work, he observed that McLane had difficulty walking and bending when going about his duties, and that he looked like he was in pain. After conveying these concerns to School City, School City asked McLane to undergo a fit for duty exam. The exam consisted of a medical examination by a doctor and a job site analysis performed by a licensed physical therapist. The results concluded that McLane could not use safe body mechanics and that this made him prone to a back injury. School City decided that McLane could not continue as groundskeeper and transferred him to a hall monitor position. The court granted School City's motion for summary judgment, finding that McLane posed a direct threat to himself in light of the risk relating to his improper lifting mechanics.

## B. Periodic Medical Examinations

Courts have considered when it is appropriate for an employer to require periodic medical examinations as well. Generally speaking, an employer may be permitted to require periodic medical examinations as a matter of course if; 1) "the employees are in a position affecting public safety (e.g., police officers and firefighters); or 2) where the medical examinations are required by other law or regulation (e.g., Federal Aviation Administration and Department of Transportation

<sup>107</sup> *Stragapede v. City of Evanston*, 865 F.3d 861 (7th Cir. 2017).

<sup>108</sup> *McLane v. School City of Mishawaka*, 2017 WL 430843 (N.D. Ind. Feb. 01, 2017).

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medical certifications, Occupational Safety and Health Act standards).<sup>109</sup> However, even where an employer is able to allege a sufficiently job-related justification, the medical examination must still "remain appropriately narrow."<sup>110</sup>

In *Jackson v. Regal Beloit, Inc.*, 2018 WL 3078760 (E.D. Ky. June 21, 2018), the court found that the employer's periodic (every three year) medical examination of powered industrial vehicle operators was impermissible under the ADA because it applied to employees who were not in public safety positions and because it was not required by law. In support of this requirement, the employer argued that it was job-related because it was important for "workplace safety" due to employee's changing healthcare needs.<sup>111</sup> Said the court: "Regal's far-reaching rationale would therefore eviscerate the ADA's prohibition against medical examinations and disability inquiries" as "workplace safety" could also be used as justification.<sup>112</sup>

An example of a case where periodic exams were arguably required is *Parker v. Crete Carrier Corporation*, 839 F.3d 717 (8th Cir. 2016), where an employee responsible for driving commercial trucks was required to undergo periodic medical examinations due to federal regulations.<sup>113</sup> This case also assessed when it is appropriate for an employer to require a medical examination for a class of employees. Here, the employer required all drivers with Body-Mass Index (BMI) scores of thirty-five or more to undergo a sleep study. Because the plaintiff had a BMI of thirty-five or more, he was required to have one. The Sixth Circuit found that employers may require a class of employees to submit to a medical exam if it has "reasons consistent with business necessity for defining the class in the way that it has."<sup>114</sup> Here, the court found that the medical examination was justified due to the nature of employment as a commercial truck driver, and the danger that an incapacitated driver can pose. Specifically, the court found that the employer's belief that individuals with BMI's of thirty-five or more were more likely to have sleep-apnea, and would be at a greater risk for falling asleep while driving, was based on reliable evidence and was therefore reasonable.

Another case breaks the business necessity requirement for class-based medical examinations down even further. In *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 283 F. Supp. 3d 72 (S.D.N.Y. 2017), a court reviewed a suit brought by a union of police officers, challenging their employer's administration of three different medical examinations during their employment.<sup>115</sup> These included an annual general examination as well

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<sup>109</sup> *Jackson v. Regal Beloit, Inc.*, 2018 WL 3078760 at \*8 (E.D. Ky. June 21, 2018).

<sup>110</sup> *Id.*, at \*9 (citing *James v. Goodyear Tire & Rubber Co.*, 354 Fed. App'x 246, 249 (6th Cir. 2009)).

<sup>111</sup> *Id.* at \*8.

<sup>112</sup> *Id.* at \*9.

<sup>113</sup> *Parker v. Crete Carrier Corporation*, 839 F.3d 717 (8th Cir. 2016).

<sup>114</sup> *Id.* at 722.

<sup>115</sup> *Port Authority Police Benevolent Association, Inc. v. Port Authority of New York and New Jersey*, 283 F. Supp. 3d 72 (S.D.N.Y. 2017).

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as two fitness for duty (FFD) examinations. In considering the viability of defendant's policy requiring these examinations in light of plaintiff's concerns regarding the medical privacy of union members, the court noted that, under the ADA, such examinations must be job-related and consistent with business necessity. More specifically, it stated that defendant's policy must be vital to defendant's business, that the class of employees subject to the policy must be consistent with the policy's purpose, and that the policy must be narrowly tailored to serve its objectives.

With regard to the annual general examination, the court granted summary judgment in favor of the union. While as a general matter the court acknowledged that these examinations served the vital purpose of ensuring that officers were capable of performing their inherently dangerous jobs, it also noted that the subject class was too broad, as defendant administered these examinations to all officers, regardless of their titles and job assignments, which the court noted was not consistent with the policy's public safety rationale. In other words, not only did the union need to articulate a valid justification for the medical examination, but it also needed to provide a justification for defining the class subject to examinations as it had. Additionally, the court found that the exam was overbroad in its own scope, as it could identify conditions that had no bearing on officers' abilities to do their jobs.

As to defendant's FFD examinations for workplace injuries, the court granted summary judgment in favor of defendants. The court found that these examinations were job-related and consistent with business necessity, insofar as they helped determine eligibility for workers' compensation, and allowed defendant to review claims before authorizing treatment. Additionally, the court recognized that defendant applied these examinations to only a narrow group, those officers who were injured on the job, and that the examination itself was narrow in scope, investigating only each employee's "chief complaint" and limited to formulating a working diagnosis.<sup>116</sup>

However, the court granted summary judgment for plaintiffs with regard to the other FFD examinations, which defendant administered to officers who had non-workplace injuries and who afterward took five days or more of sick leave. In its analysis, the court addressed each of defendant's justifications for this examination. It was not persuaded by the defendant's argument that the examination served the vital purpose of curbing excessive employee absences (the court finding that this was not necessarily a vital business purpose), but agreed that the examinations were essential to ensuring that employees were fit and safe to return to their positions after incurring injuries. Even so, similar to the annual examinations, the court found these examinations to be overbroad, as they were administered to all such officers regardless of their job tasks, and as defendant offered no evidence that officers taking five or more days of sick leave posed any particular safety risks upon returning to work in all job assignments.

## C. Wellness Plans

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<sup>116</sup> *Id.*

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The text of the ADA specifically permits employers to conduct “voluntary medical examinations” including “voluntary medical histories, which are part of an employee health program available to employees at that worksite.”<sup>117</sup>

This statutory exception leads to the developing issue about whether questions/exams required via participation in an employee wellness plans violate the ADA. Employee wellness plans often require employees to submit to medical examinations and inquiries in order to participate. Some of these plans are tied to employer-sponsored health insurance, while others are not. Employers often provide strong “incentives” for employees to participate in their wellness plans, including greatly reduced healthcare costs. The legal question is, then, whether participation in such program is truly “voluntary.”<sup>118</sup>

The EEOC recently litigated cases regarding wellness programs. In one such case, ***EEOC v. Orion Energy Systems, Inc., 2016 WL 5107019 (E.D. Wis. Sept. 19, 2016)***, employees who opted out of this wellness plan were required to pay their entire monthly health insurance premium. In response to the parties’ cross-motions for summary judgment, the court found that that the employer could avail itself of the “voluntariness” exception in spite of the very strong financial incentives for its employees to join in the wellness program.<sup>119</sup> The parties settled prior to trial, with the consent decree providing for a financial settlement for the employee in question, and with the employer agreeing to ensure that its wellness plans going forward would comply with the ADA’s voluntariness provisions, and that it would not retaliate against any employees raising concerns of this nature in the future.<sup>120</sup>

More recently and significantly, in 2016, the AARP filed suit seeking an injunction against a recently-adopted EEOC rule that permitted employers to impose penalties of up to 30% of the cost of coverage to encourage employees to disclose information that was protected under the ADA and the Genetic Information Nondiscrimination Act (GINA), without rendering such disclosures involuntary. In August 2017, in ***AARP v. EEOC, 267 F.Supp.3d 14 (D.D.C. 2017)***, the court agreed that the EEOC’s rulemaking process had been arbitrary, and sent the rule back to the agency for further revision.<sup>121</sup> In December 2017, in ***AARP v. EEOC, 292 F.Supp.3d 238 (D.D.C. 2017)***, the court found that the EEOC’s projected timeline for completing its revisions to be unacceptably slow, and responded to AARP’s motion to alter or amend its earlier judgment by

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<sup>117</sup> 42 U.S.C. § 12112(d)(4).

<sup>118</sup> In 2016, the EEOC released final rules regarding wellness programs addressing both the safe harbor and voluntariness exceptions. These regulations, along with an accompanying “Q&A,” are available online at [www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm](http://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm) (last visited on March 17, 2018).

<sup>119</sup> ***EEOC v. Orion Energy Systems, Inc., 2016 WL 5107019 (E.D. Wis. Sept. 19, 2016)***.

<sup>120</sup> See “Wisconsin Employer Resolves EEOC Case Involving Wellness Program and Retaliation,” available online at [www.eeoc.gov/eeoc/newsroom/release/4-5-17a.cfm](http://www.eeoc.gov/eeoc/newsroom/release/4-5-17a.cfm), last visited on March 17, 2018.

<sup>121</sup> ***AARP v. EEOC, 267 F.Supp.3d 14 (D.D.C. 2017)***.

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vacating the rule altogether, effective January 1, 2019.<sup>122</sup> As of the time this brief was written, it is unknown whether the EEOC will complete its new rule prior to that date.

There has also been litigation on whether employee wellness plans fall within another ADA exception, called the safe harbor provision, which allows for the collection of medical information by insurers and plan sponsors to make decisions about insurability and cost of insurance. The EEOC's regulations, discuss further below, concluded that the safe harbor provision does not apply to employer wellness plans, since employers are not collecting or using information to set insurance premiums.

## VII. Drug and Alcohol Testing

As noted in Section II, tests for illegal drug use are not considered medical examinations under the ADA.<sup>123</sup> Thus, because drug tests are not medical exams, the ADA does not prohibit employers from inquiring about *current* use of illegal drug use at any stage, even during the pre-offer stage.

The more complicated question, however, is whether an employer can inquire into an individual's *prior* use of illegal drugs. The general rule is the question is prohibited only to the extent it is likely to elicit information about a disability. In determining whether a question about prior illegal drug use is permissible under the ADA, it is important to remember that past illegal drug addiction is a covered disability under the ADA, but past casual use is not.<sup>124</sup> Accordingly, the EEOC states that employers may not ask questions about treatment or counseling received or the illegal use of drugs or the dates or times illegal drugs were used, because that line of questioning is likely to elicit information about drug addiction which is generally considered a disability.<sup>125</sup>

The EEOC has concluded that the following questions are permissible:

- Have you ever used illegal drugs?
- When is the last time you used illegal drugs?
- Have you used illegal drugs in the last six months<sup>126</sup>

These questions are not prohibited because they are not likely to tell the employer anything about whether the applicant had an addiction to the drugs. On the other hand, the following questions

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<sup>122</sup> *AARP v. EEOC*, 292 F.Supp.3d 238 (D.D.C. 2017).

<sup>123</sup> 42 U.S.C. § 12114(d)(1) ("[A] test to determine the illegal use of drugs shall not be considered a medical examination.").

<sup>124</sup> ADA Enforcement Guidance, at 10, <https://www1.eeoc.gov/policy/docs/medfin5.pdf>.

<sup>125</sup> EEOC, Rehabilitation Act and Title VII: Applicant Screening using Disability-related Inquiries, Criminal History Inquiries, and Financial History Inquiries in SF 85P and SF 85P-S, (2011) available at [http://www.eeoc.gov/eeoc/foia/letters/2011/rehabact\\_titlevii\\_85p.html](http://www.eeoc.gov/eeoc/foia/letters/2011/rehabact_titlevii_85p.html) (EEOC Rehab Act and Title VII) (last updated May 17, 2011).

<sup>126</sup> ADA Enforcement Guidance, at 10, <https://www1.eeoc.gov/policy/docs/medfin5.pdf>.

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do provide the employer information about whether an applicant had a drug addiction and are therefore improper:

- How often did you use illegal drugs in the past?
- Have you ever been treated for drug abuse?<sup>127</sup>

Note that this is similar to the analysis about alcohol questions. Questions about drinking habits generally also fall outside the scope of the definition of medical inquiry, unless the particular question is likely to elicit information about alcoholism.<sup>128</sup> For example, an employer is permitted to ask whether an applicant drinks alcohol or has been arrested for driving under the influence.<sup>129</sup> However, questions about how much alcohol an applicant drinks or whether the applicant has participated in an alcohol rehabilitation program are likely to elicit information about whether the applicant has alcoholism. For example, a question about alcohol use and treatment during the past seven years would be impermissible according to the EEOC.<sup>130</sup>

Even though employers may test for illegal drugs, they should take caution to ensure that their tests do not run afoul with the ADA—this could happen if the employer (1) uses the drug test to seek information about more than illegal drugs; or (2) uses the drug tests as “qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability . . . unless the . . . criteria, . . . is shown to be job-related for the position in question and is consistent with business necessity.”<sup>131</sup>

The case *EEOC v. Grane Healthcare Co., 2 F. Supp. 3d 667 (W.D. Pa. 2014)* provides a clear example of both of these potential problems.<sup>132</sup> In this case, Grane collected urine samples from applicants to screen for illicit substances.<sup>133</sup> Four applicants were denied positions because their drug tests yielded “positive” results, and all four testified that the “positive” result was due to the use of legal medications.<sup>134</sup>

The court held that the tests Grane had conducted on the urine samples of applicants qualified as “medical examinations” covered by Section 12112(d) because each urine sample was tested for both medical and drug-use purposes.<sup>135</sup> For example, each sample was tested for elements

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<sup>127</sup> *Id.* at 10-11.

<sup>128</sup> EEOC Preemployment Guidance, available at <http://www.eeoc.gov/policy/docs/preemp.html>.

<sup>129</sup> *Id.*

<sup>130</sup> EEOC Rehab Act and Title VII available at [http://www.eeoc.gov/eeoc/foia/letters/2011/rehabact\\_titlevii\\_85p.html](http://www.eeoc.gov/eeoc/foia/letters/2011/rehabact_titlevii_85p.html).

<sup>131</sup> 42 U.S.C. § 12112(b)(6).

<sup>132</sup> *EEOC v. Grane Healthcare Co., 2 F. Supp. 3d 667 (W.D. Pa. 2014)*.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 703.

<sup>135</sup> *Id.*

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such as “glucose” and “blood.”<sup>136</sup> Because testing criteria based on glucose and blood would obviously produce results indicating medical information far beyond indication of illegal drug use, Grane’s tests “did not fall within the ADA’s exception permitting ‘test[s] to determine the illegal use of drugs.’”<sup>137</sup> The court acknowledged that some drug tests will not constitute “medical examinations” despite having the incidental effect of detecting evidence of legal drug use, but the tests conducted were structured to elicit such evidence.

The court further explained that “an employer may only rely on a test for illicit drug use to make employment decisions based on that illicit use.”<sup>138</sup> Thus, a pre-offer drug test “may not be administered under the guise of testing for illicit drug use when in fact the results are used to make employment decisions based on both legal and illegal drug use alike.”<sup>139</sup>

The case ***Connolly v. First Personal Bank*, 2008 WL 4951221 (N.D. Ill. Nov. 18, 2008)** is another example of the second problem—that employers cannot use the results from drug tests in a way that violates the ADA, such as screening out individuals for reasons that are not job-related and consistent with business necessity.<sup>140</sup> In ***Connolly***, the plaintiff was offered the position of Senior Vice President, contingent on her satisfactory completion of a drug test. Prior to the drug test, the plaintiff informed the company that she had recently undergone a medical procedure that might result in additional medication showing up on the test. The test showed a positive result for Phenobarbital, and the company rescinded its offer of employment. The company declined to open a letter from the plaintiff’s doctor explaining the nature of the lawfully prescribed medication she was taking at the time of the drug test. The district court denied the defendant’s motion to dismiss, holding:

For purposes of the ADA, tests to determine illicit drug use are clearly not medical examinations. However, a test for illicit drug use may also, as in this case, return results for legal drug use that could affect the functioning of the employee in the specific job setting. . . . In these circumstances there is a minimal cost to determine whether the presence of Phenobarbital was legal. The exemption for drug testing was not meant to provide a free peek into a prospective employee’s medical history and the right to make employment decisions based on the unguided interpretation of that history alone.<sup>141</sup>

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<sup>136</sup> *Id.*

<sup>137</sup> *Id.* (citing *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1215-16 (11th Cir. 2010)).

<sup>138</sup> *Id.* (quoting *Connolly v. First Personal Bank*, 632 F. Supp. 2d 928, 931 (N.D. Ill. 2008)).

<sup>139</sup> *Id.*

<sup>140</sup> *Connolly v. First Personal Bank*, 632 F. Supp. 2d 928, 931 (N.D. Ill. 2008) (citing 42 U.S.C. § 12112(b)(6)).

<sup>141</sup> *Id.* at 931.

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A related question is, if an employee tests positive for illegal drugs, may an employer then ask a prospective employee if there is a disability-related reason, despite the general prohibition of seeking disability related information in the pre-offer stage. The answer is yes, but with limits.

In *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206 (11th Cir. 2010), the plaintiff worked in a temporary position and underwent a drug test while seeking permanent employment.<sup>142</sup> The plaintiff has epilepsy and takes barbiturates. This drug was detected during the applicant's pre-offer drug test; once discovered, the employer informed the plaintiff that he had tested positive for barbiturates. The plaintiff responded by explaining that he had a prescription. He was then asked a series of questions by the medical review officer, in the presence of another employee, including how long he had been disabled, what medication he took, and how long he had taken it. The plaintiff did not receive the job. In his ADA lawsuit, the court found that a jury could find the questions posed an unlawful pre-employment inquiry. It explained that while the employer "was permitted to ask follow-up questions to ensure that [plaintiff's] positive drug test was due to a lawful prescription, a jury may find that these questions exceeded the scope of the likely-to-elicit standard."<sup>143</sup>

## VIII. Confidentiality

The ADA also imposes confidentiality requirements on the disability and medical information obtained by employers. Employers must collect all information obtained regarding an applicant or employee's medical condition or history on separate forms and in separate medical files and to treat such information as confidential medical records.<sup>144</sup> However, the ADA does carve out three exceptions from this general confidentiality mandate: (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this provision of the ADA shall be provided relevant information upon request.<sup>145</sup>

Courts have taken this statutory framework and turned it into a three step inquiry for determining whether an employee can recover monetary damages from an employer for violating the Title I confidentiality requirements<sup>146</sup>. The first inquiry asks, as a threshold matter, whether the medical information was received as a result of an employer-initiated medical inquiry or exam. The second

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<sup>142</sup> *Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1215-16 (11th Cir. 2010).

<sup>143</sup> *Id.* at 1216. Another interesting issue in this case was that although the plaintiff had epilepsy, he was found not to have an ADA-covered disability, as this case arose before the ADA Amendments Act. Nonetheless, as discussed below, the Court determined that the ADA's protections about medical exams and inquiries extend to everyone, even individuals without disabilities.

<sup>144</sup> 42 U.S.C. § 12112(d)(3)(B); §12112(d)(4)(C).

<sup>145</sup> 42 U.S.C. § 12112(d)(3)(B)-(iii).

<sup>146</sup> *Shoun v. Best Formed Plastics, Inc.*, 28 F.Supp.3d 786, 788-89 (N.D. Ind. 2014)(citing *Franklin v. City of Slidell*, 936 F.Supp.2d 691, 710-11 (E.D. La. 2013)).

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inquiry is whether the information was disclosed by the employer or otherwise not kept confidential (or whether an exception applies). The final inquiry is whether the employee suffered a tangible injury as a result of the disclosure. The following sections will highlight trends in how courts have addressed these inquiries.

Straightforward examples of medical inquiries or exams where courts found that the solicited information was confidential under the ADA include an employer who requested the employee to provide prescription medication information and submit to a fitness for duty exam,<sup>147</sup> an employer who asked an employee why she was in the hospital,<sup>148</sup> and an employer who required an employee to submit a certificate from a doctor to support FMLA leave.<sup>149</sup> Straightforward examples of disclosures where courts found that the information was not confidential under the ADA include an employee who voluntarily executed releases of information to allow his employer to communicate with his doctors,<sup>150</sup> and an employee who voluntarily informed human resources of his HIV+ diagnosis.<sup>151</sup>

**EEOC v. C.R. England, 644 F.3d 1028 (10th Cir. 2011)** is a particularly harsh example of the free reign employers have once they obtain health information that is not confidential under the ADA. The employee in this case worked as a trainer for truck drivers. The employer required potential trainees to sign a consent form related to the plaintiff's HIV+ status. The court found no violation of the ADA's confidentiality provision because the plaintiff had voluntarily disclosed his status.

Once it has been established that health information is confidential under the ADA, the next question is whether the employer disclosed the information or otherwise failed to keep it confidential (or whether there is any exception that justifies disclosure). Clear cut examples where courts have found that the employer violated the ADA's confidentiality provision include an employer who shared the results of an employee's medical exam with a colleague who had no supervisory authority over the plaintiff,<sup>152</sup> an employer who merged employees' medical records with personnel files upon termination,<sup>153</sup> an employer who left a doctor's letter concerning

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<sup>147</sup> *Hambright v. Bartow County, Georgia*, 2017 WL 6460246 (N.D. Ga. July 11, 2017).

<sup>148</sup> *Fleming v. State Univ. of New York*, 502 F.Supp.2d 324 (E.D.N.Y. 2007). It is worth highlighting that this case is not technically under Title I, but is instead under § 504 of the Rehabilitation Act, which incorporates the ADA confidentiality provision.

<sup>149</sup> *Doe v. U.S. Postal Service*, 317 F.3d 339 (D.C. Cir. 2003). See also, *E.E.O.C. v. Ford Motor Credit Co.*, 541 F.Supp.2d 930 (M.D. Tenn. 2008).

<sup>150</sup> *Sheets v. Interra Credit Union*, 2016 WL 362366 (N.D. Ind. Jan. 29, 2016)(aff'd by *Sheets v. Interra Credit Union*, 671 Fed.App'x 393 (7th Cir. 2016)).

<sup>151</sup> *E.E.O.C. v. C.R. England*, 644 F.3d 1028 (10th Cir. 2011).

<sup>152</sup> *Henderson v. Borough of Baldwin*, 2016 WL 5106945 (W.D. Pa. Sept. 20, 2016). See also, *Gascard v. Franklin Pierce University*, 2015 WL 1097485 (D. N.H. Mar. 11, 2015).

<sup>153</sup> *Equal Employment Opportunity Commission v. ValleyLife*, 2017 WL 227878 (D. Ariz. Jan. 19, 2017).

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plaintiff's reasonable accommodation request uncovered on a desk where other employees could see it,<sup>154</sup> and an employer who allowed an employee's drug screen to be leaked to the press.<sup>155</sup> Based on these guideposts, it is no surprise that defendants in a recent case opted to settle with the DOJ rather engage in litigation when they had disclosed an employee's confidential medical information in a public hearing concerning the employee's job status and then afterwards provided the information to the press.<sup>156</sup>

Much of the fighting between litigants concerns whether an exception applies; in particular, whether the disclosure was permissible because it was in the course of informing supervisors or managers of necessary restrictions on the work or duties or of necessary accommodations. The primary lesson from these cases is that the permissibility of the disclosure hinges on whether the supervisor or manager had a legitimate business need to know the information.

The Seventh Circuit, in *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002) explicitly developed this "need to know" principle in the context of applicants who undergo medical testing after receiving a conditional offer of employment.<sup>157</sup> The plaintiff in *O'Neal* had applied to be a police officer, but as condition of employment was required by the public employee retirement fund to pass a medical exam. After the plaintiff was unable to pass the exam, he sued, claiming that disclosure of his exam results to two members of the local pension board violated the ADA. In rejecting the plaintiff's claim, the Court cited guidance from the EEOC,<sup>158</sup> which stated that an applicant's medical information could be provided to and used by appropriate decision makers involved in the hiring process (or in other words, to people who "need to know") so that they can make employment decisions consistent with the ADA. In the Court's view, since the local pension board was required by the public employee retirement fund to certify the plaintiff's medical exam results, the two member officers needed to know the information and so the disclosure was permissible.

The unauthorized disclosure of one individual's alcohol-related disability was found to be reasonable in *Foos v. Taghleef Industries, Inc.*, 132 F.Supp.3d 1034 (S.D. Ind. 2015).<sup>159</sup> The plaintiff in this case worked at a factory that used dangerous heavy machinery. After taking FMLA leave due to injuries that had been incurred during a bar fight, the plaintiff requested additional FMLA leave and, in so doing, provided a certificate from his doctor indicating that he had alcoholic

<sup>154</sup> *Cripe v. Mineta*, 2006 WL 1805728 (D.D.C. June 29, 2006).

<sup>155</sup> *Giaccio v. City of New York*, 502 F.Supp.2d 380 (S.D.N.Y. 2007).

<sup>156</sup> Settlement Agreement Between the United States of America and the City of New Albany, Indiana on behalf of its police department and merit commission, 10/4/2017, [www.ada.gov/new\\_albany/new\\_albany\\_sa.html](http://www.ada.gov/new_albany/new_albany_sa.html) (last accessed Aug. 30, 2018).

<sup>157</sup> *O'Neal v. City of New Albany*, 293 F.3d 998 (7th Cir. 2002).

<sup>158</sup> EEOC Preemployment Guidance.

<sup>159</sup> *Foos v. Taghleef Industries, Inc.*, 132 F.Supp.3d 1034 (S.D. Ind. 2015).

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pancreatitis. The factory's health and wellness manager then disclosed this information to the plaintiff's supervisor, concerned that the plaintiff may be arriving to work impaired. The Court found that given the legitimate safety concern of an impaired employee around heavy machinery, this disclosure qualified as notifying a supervisor of a necessary work restriction that was permissible under the ADA. This reasoning is analytically imperfect—there is no indication that the plaintiff had any on-the-job restrictions due to alcoholic pancreatitis—but it is comprehensible when viewed through the lens of the plaintiff's supervisor needing to know the information for purposes of operational safety.

Once a plaintiff has proven that the defendant violated the ADA's confidentiality provision, the final showing needed to obtain monetary damages from the court is to show a “tangible injury” that resulted from the unlawful disclosure. In other words, a technical violation of the confidentiality provision will not give rise to damages liability.<sup>160</sup> The most obvious example of a tangible injury to support monetary damages is economic harm, such as job termination.<sup>161</sup>

Plaintiffs may also prove tangible injury with non-economic harm, such as emotional distress.<sup>162</sup> However, the claim must amount to more than a bare allegation. For example, the Court in *Koch v. White*, 35 F.Supp.3d 37 (D.D.C. 2014) found that the plaintiff did not endure any tangible injury, even though he had pled emotional harm, because the plaintiff had already disclosed his medical information in public lawsuits prior to the alleged improper disclosure in the current case.<sup>163</sup> Given the prior public disclosures, the Court found it incredible to believe that the plaintiff had suffered any shame or embarrassment.

## IX. Who Can Enforce Rights

Every circuit court to have considered the issue has found that all individuals—not just individuals who have ADA-defined disabilities—are protected by the ADA's restrictions on disability inquiries, medical examinations, and confidentiality. See, e.g., *Owusu-Ansah v. Coca-Cola Co.*, 715 F.3d 1306, 1310 (11th Cir. 2013) (collecting cases); *Kroll v. White Lake Ambulance Authority*, 691 F.3d 809, 816 (6th Cir. 2012) (“The importance of § 12112(d)(4)(A) in preventing discrimination is underscored by the fact that, in contrast to many other provisions of the ADA, all individuals—disabled or not—may bring suit in aid of its enforcement.”); *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 594 (10th Cir. 1998) (“A job applicant need not make a showing that he or she is disabled or perceived as having a disability to state a prima facie case under 42 U.S.C. § 12112(d)(2).”). As

<sup>160</sup> *Giaccio v. City of New York*, 502 F.Supp.2d 380 (S.D.N.Y. 2007).

<sup>161</sup> *McCarthy v. Brennan*, 230 F.Supp.3d 1049 (N.D. Cal. 2017). The related economic harm of not being able to find new employment was substantiated in *Loschen v. Trinity United Methodist Church of Lincoln*, 2009 WL 2902956 (D. Neb. 2009).

<sup>162</sup> *E.E.O.C. v. Ford Motor Credit Co.*, 531 F.Supp.2d 930 (M.D. Tenn. 2008).

<sup>163</sup> *Koch v. White*, 35 F.Supp.3d 37 (D.D.C. 2014).

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explained by the Eleventh Circuit: “[i]t makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether he has a disability.”<sup>164</sup>

Similarly, claims about failure to keep medical information confidential can be brought by any applicant or employee, regardless of whether they are a qualified individual with a disability under the ADA.<sup>165</sup>

## X. Conclusion

The ADA’s restrictions on an employer’s ability to ask disability-related questions and require medical examinations are among the most important protections found in the ADA. These restrictions seek to implement one of the essential tenants of the ADA: people with disabilities should be judged by their qualifications and their merit instead of their disability. When drafting the ADA, Congress established a framework to balance the rights of employees to keep their disability and medical information private and employers to ensure that they can hire qualified individuals. The case law interpreting these provisions is largely consistent with the detailed guidance issued by the EEOC.

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<sup>164</sup> *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997).

<sup>165</sup> *McPherson v. O'Reilly Automotive, Inc.*, 491 F.3d 726 (8th Cir. 2007).