

## in this issue:

AUGUST 2000

### The EEOC Regulates Disability-Related Inquiries and Medical Examinations of Employees Under the ADA

*By Eduardo F. Cuadras Jr. and Rod M. Fliegel*

In July, the EEOC issued its Enforcement Guidance regarding Disability-Related Inquiries and Medical Examinations of Employees Under the Americans With Disabilities Act ("2000 E/G") (available on the Internet at <http://www.eeoc.gov/docs/guidance-inquiries.html>). As the title suggests, the 2000 Enforcement Guidance focuses on these issues as they relate to current employees, whereas the Agency's 1995 Enforcement Guidance addresses preemployment issues. Together, these advisory materials state the EEOC's views as to when and under what circumstances an employer may ask applicants and employees disability-related questions and conduct medical examinations. Although courts are not bound by the EEOC's interpretation of the law, judges regularly defer to the EEOC in areas of the law that the Agency enforces, including the ADA. Thus, in order to minimize the risk of ADA liability, employers should take the EEOC's guidance into consideration in formulating and administering applicable personnel policies. This article highlights some of the important aspects of the 2000 Enforcement Guidance.

As a preliminary matter, while the 2000 Enforcement Guidance explains how disability-related inquiries and medical examinations are regulated by the ADA, no insights are offered on what actions an employer may take based on what it learns in response to such an inquiry or after it receives the results

of a medical examination. Moreover, while the 2000 Enforcement Guidance imposes on employers additional and affirmative obligations, the EEOC says virtually nothing about the corresponding responsibilities of employees. In fact, employees have a duty to cooperate with their employers with regard to furnishing appropriate medical information. Your local Littler attorney can assist you with questions about these related areas of ADA law.

#### What is a Disability-Related Inquiry or Medical Examination?

##### *Disability-Related Inquiries*

To avoid making improper disability-related inquiries, employers should educate managers and supervisors about the critical distinction between permissible and impermissible questions. A disability-related inquiry "is a question (or series of questions) that is likely to elicit information about a disability." [2000 E/G, Question 1] With regard to employees, such inquiries must be "job-related and consistent with business necessity" or otherwise permitted by the ADA. [2000 E/G, "General Principles," Section B] On the other hand, simply asking an employee who looks tired or sick if he or she is "feeling okay" is not a disability-related inquiry. In addition, employers may ask an employee if he or she has been drinking or currently using illegal drugs. [2000 E/G, Question 1]

### Medical Examinations

A medical examination is “a procedure or test that seeks information about an individual’s physical or mental impairments or health.” [2000 E/G, Question 2] With regard to employees, such examinations must be “job-related and consistent with business necessity” or otherwise permitted by the ADA. [2000 E/G, “General Principles,” Section B] The name of the examination (e.g., “fitness test”) does not determine if it is a “medical examination.” Instead, the procedures involved in the examination must be considered. For example, while “physical fitness tests” ordinarily are not considered medical examinations, they may be regulated by the ADA if the examiner collects information about the employee’s blood pressure or heart rate. [2000 E/G, Question 2]

### Standing to Assert Claims

Notably, the federal courts are currently split on the issue of standing to assert claims for improper disability-related inquiries and medical examinations. While some courts including the Ninth Circuit have allowed any employee, disabled or not, to pursue these claims [*Fredenburg v. Contra Costa County Dept. of Health Serv’s*, 172 F.3d 1176 (9th Cir. 1999)], other courts have limited standing to pursue claims to disabled employees. Not surprisingly, the EEOC has endorsed the more liberal interpretation of the statute. Thus, for purposes of these particular claims, the 2000 Enforcement Guidance may expand the class of individuals who can invoke the ADA. [2000 E/G, “General Principles,” Section B]

### Job-Related and Consistent With Business Necessity

An employer may ask disability-related questions and/or require a medical examination if it has reason to question (1) whether an employee’s ability to perform essential job functions will be impaired by a medical condition, or (2) whether

the employee can perform the job without posing a direct threat of harm. [2000 E/G, “Job-Related And Consistent With Business Necessity, In General”] However, the employer’s concerns must be reasonable and supported by objective evidence. The employer may rely on second-hand information, but the information must be reliable. In addition, the employer may seek medical information in order to follow up on a request for accommodation when the disability or need for accommodation is not known or obvious. [*Id.*]

### Second Opinions

Notably, while the regulations implementing the Family Medical Leave Act (“FMLA”) set forth detailed rules regarding an employer’s right to obtain a second (and even third) medical opinion about an employee’s health problems [29 C.F.R. § 825.307], the ADA’s implementing regulations are silent on this issue. The 2000 Enforcement Guidance settles this open question, albeit indirectly. If accommodation is requested, the employer may ask the employee for appropriate medical documentation. [2000 E/G, Question 11] The EEOC takes the position that the employer should ask the employee to furnish this information before requiring an examination with an employer-selected doctor. Furthermore, if the employee submits incomplete information, he or she should have a chance to cure the deficiency. If the employee fails to do so, the employer may require an examination, at the employer’s expense. [*Id.*] Alternatively, the accommodation may be refused, at least until sufficient documentation is provided. [2000 E/G, Questions 9 and 11]

In 1999, the EEOC stated that medical documentation is “insufficient” if it does not specify the ADA disability and explain the need for an accommodation. [Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans With Disabilities Act, Question 7 (1999)] In a rare conces-

sion to employers, the 2000 Enforcement Guidance states that documentation can be insufficient if other factors indicate that the information provided is not credible or is fraudulent. [2000 E/G, Question 11]

### Return to Work Issues

If an employer has a reasonable belief that an employee’s present ability to perform essential job functions will be impaired by a medical condition or that he or she will pose a direct threat due to a medical condition, the employer may make limited disability-related inquiries or require the employee to submit to a medical examination. [2000 E/G, Question 17]

### Job Changes Within a Company

The EEOC has adopted a liberal interpretation of the scope of the hiring process. The Agency has concluded that employees who apply for new jobs within the company must be treated like regular job applicants. [2000 E/G, Question 4] Thus, the employer may not ask disability-related questions and may not require a medical examination unless and until it makes a conditional job offer. [*Id.*] This rule is restricted to the competitive hiring process and does not apply to the situation where an employee is automatically entitled to another position because of seniority or satisfactory job performance. Temporary job assignments are also excluded. [*Id.*]

### Medical Confidentiality

The EEOC has also placed new restrictions on the disclosure of medical information by managers during the internal hiring process. “[W]here a current supervisor has medical information regarding an employee who is applying for a new job, s/he may not disclose that information to the person interviewing the employee for the new job or to the supervisor of that job.” [2000 E/G, Question 4] On the other hand, if the interviewer already has medi-

cal information at the pre-offer stage for the new position, he or she may not have to ignore it. The employer may ask certain questions if that information gives rise to a reasonable belief that an accommodation may be needed in the new job. [Id. at n. 37] The need for accommodation itself is not a legitimate reason for refusing the job change, absent a showing of “undue hardship.” [Id.]

## Practical Suggestions

ADA-type issues must be assessed on an individualized, case-by-case basis, and with the benefit of appropriate and responsive, objective medical evidence. Thus, employers in all jurisdictions should:

- Train supervisors and managers about the circumstances justifying disability-related inquiries and medical examinations at the pre-hire and post-hire stages of the employment relationship.
- Avoid making or ratifying hasty personnel decisions based on unreliable secondhand information, especially if no accommodation has been requested or the employee has not voluntarily disclosed his or her medical condition.
- Adopt, circulate, and enforce suitable medical confidentiality policies.

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*Eduardo F. Cuaderes Jr. is a shareholder in Littler Mendelson's Dallas office. Rod M. Fliegel is a shareholder in the San Francisco office. If you would like further information, please contact your Littler attorney at 1.888.Littler, www.littler.com, or email info@littler.com, or Mr. Cuaderes at JCuaderes@littler.com or Mr. Fliegel at RFliegel@littler.com.*

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