

Obtaining Medical Information under Title I of the ADA

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Learning Objectives – Who, What, Where, When and Why?

- What is a medical exam or inquiry?
- What medical exams/inquiries can employers request under Title I?
- When are exams/inquiries permitted?
- Who can bring a claim challenging a medical exam or inquiry?
- What medical information must the employer keep confidential?
- Where do the requirements come from? The statute, regulations, EEOC guidance, and case law
- Why did Congress address medical exams and inquiries?



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Legislative History – Why Did Congress Create The Medical Rules?

“Historically, employment application forms and employment interviews requested information concerning an applicant’s physical or mental condition. This information was often used to exclude applicants with disabilities-- particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease and cancer--before their ability to perform the job was even evaluated. In order to assure that misconceptions do not bias the employment selection process, the legislation sets forth a process which begins with the prohibition to pre-offer medical examinations or inquiries.” (Senate Report)



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Statutory and Regulatory Provisions



- ADA Statute Title I (42 U.S.C. § 12112(d)): Medical examinations and inquiries
 - This is one of four subparts of the provision titled Discrimination
- ADA Title I Regulation by EEOC (29 CFR §§ 1630.13 and 1630.14)
 - 1630.13 Prohibited medical examinations and inquiries
 - 1630.14 Medical examinations and inquiries specifically permitted

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Guidance from the EEOC

- Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 2000)
- Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)
- ADA Enforcement Guidance: Pre-employment Disability Related Questions and Medical Examinations (October 1995)
 - (at https://www.eeoc.gov/laws/types/disability_guidance.cfm)



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Rules Cover Three Stages of Employment

| STAGE 1 | STAGE 2 | STAGE 3 |
|----------------|---|-------------------|
| Job Applicants | Job Applicants post-conditional job offer | Current Employees |

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Stage 1: Job Applicants

- 1. **No medical examination or 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
- 2. May ask about the ability of an applicant to perform job-related functions



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What is a Medical Exam?

MEDICAL EXAM

- a procedure or test that seeks information about an individual's physical or mental impairment or health
- normally performed by a doctor or nurse
- medical equipment is commonly used



NOT A MEDICAL EXAM

- a test to determine the illegal use of drugs shall not be considered a medical examination (42 U.S.C. § 12114(d)(1))
- test of applicant's ability to perform a job function, e.g., lift a 30 pound box, or physical agility, e.g., police officer running an obstacle course.
- a personality test, as long as it would not lead to identifying a medical disorder (and is not routinely used to diagnose mental impairments).

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What is a Medical Inquiry as to whether the applicant is an individual with a disability or as to the nature or severity of such disability?

Answer: Any question *likely* to elicit that the applicant has a disability

MEDICAL INQUIRY (not permitted)

- Asking if the applicant will need a reasonable accommodation on the job
- Asking about worker's comp history
- Asking about medications



NOT MEDICAL INQUIRY (permitted)

- Asking about current or prior illegal drug use (but can't ask about addiction, which is a disability if the person is in recovery)
- Asking whether someone with an obvious disability will require a reasonable accommodation to perform specific job duty **IF it is reasonable to assume one might be needed** (and can only ask about accommodation and not info on disability)

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Stage 2: Job Applicants post-conditional job offer

Employer may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if:

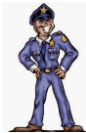
- (A) all entering employees are subjected to such an examination regardless of disability;
- (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, with certain exceptions
- (C) the results of such examination are used only in accordance with this subchapter.



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Post-Conditional Job Offer, continued

- Typically, employers require medical exams post-conditional job offer in law enforcement and other safety-sensitive settings – e.g., police, fire, correctional, transportation operators – where employee’s health status is relevant to job safety.
- Usually, the applicant receives a letter stating this is a job offer conditioned upon passing a medical exam, and directing the employee to appear for a medical exam.
- To get a conditional job offer, applicants often have passed a test qualifying them for the job.



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Post-Conditional Job Offer, continued

- Employer often contracts with a doctor to perform medical examinations.
- All types of medical questions are allowed.
- The employer may require follow-up examinations or questions if they are medically related to the previously obtained medical information.
- Employer is liable for decision whether or not to hire, even if employer relies on doctor’s recommendation.
- If applicant’s job offer is revoked after the medical exam, the failure to hire is likely because of medical reasons. This may be a violation of the ADA.

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Stage 3: Employees



- **No medical examination or inquiries of an employee** as to whether such employee is an individual with a disability or as to the nature or severity of the disability, **unless** such examination or inquiry is shown to be **job-related and consistent with business necessity**
- OK to conduct **voluntary medical examinations**, including voluntary medical histories, which are part of an employee health program available to employees at that work site.
- A covered entity may make inquiries into the ability of an employee to perform job-related functions.
- Information obtained must be kept confidential

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What is a disability-based exam or inquiry that is "job related and consistent with business necessity" and thus permissible?

1. When the employer has a reasonable belief based on objective evidence that:
 - an employee will be unable to perform the essential functions of his or her job because of a medical condition; or,
 - the employee will pose a direct threat because of a medical condition
2. A request for medical information about an employee when the employee has requested a **reasonable accommodation** and his or her disability or need for accommodation is not obvious
... (cont'd)

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... Job related and consistent with business necessity

3. Periodic medical examinations of employees in positions affecting public safety when narrowly tailored to address specific job-related concerns
4. A request for medical information about employees when the employer is required to do so by another **federal law or regulation** (e.g., DOT medical certification requirements for interstate truck drivers)
5. A **voluntary** program aimed at identifying and treating common health problems, such as high blood pressure and cholesterol

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Examples of permissible disability-related exams and inquiries



- Periodic physicals to determine fitness for duty (e.g., periodic blood pressure screenings and stress tests for private security officers who are expected to pursue and detain fleeing criminal suspects)
 - In *Jeffrey v. Ashcroft*, 285 F. Supp. 2d 583 (M.D. Pa. 2003), the Bureau of Prisons terminated a chaplain with chronic pulmonary disease after he failed a physical abilities test. The court denied summary judgment for the employer, holding that there was not sufficient evidence to show that passing the physical test was related to an essential function of the job. Furthermore, chaplains hired before 1997 were not required to take the physical test, and the test requirement had been waived for other chaplains.

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... examples

- Medical exam or inquiry clearing employee to return to work after leave for medical condition, limited to assessment of ability to work (e.g., returning to work as truck driver after heart attack)
- Employee exhibits medical problem at work (e.g., crane operator faints at work)



- Employee exhibits aberrant behavior or performance problem in the workplace that indicates medical concern (e.g. threatens to kill co-worker; or takes off all their clothes; or makes large number of errors and explains that new medication affecting thinking).

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Recent Case – EEOC v. McLeod Health, Inc. 914 F.3d 876 (4th Cir. 2019)

- Newsletter editor with a lifetime physical disability had her job for 28 years
- Often travelled throughout different medical campuses to do in-person interviews, attend events, and take photos
- Fell 3 times (no severe injuries) and manager thought she looked groggy – sent for a fitness-for-duty and functional capacity eval
- Found unfit to do her job; placed on leave and fired
- **4th Cir:** Found for employee (reversed summary judgment)
 - Disputed whether navigating within campuses was essential function of the job
 - Disputed whether employer had reasonable belief based on objective evidence that employee posed a direct threat when navigating through campuses
 - She had job for 28 years; falls caused no severe injury; not enough that employer thought that she looked groggy



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What medical inquiries are permitted because they are not *disability-related*?

- asking generally about an employee's well being (e.g., How are you?), asking an employee who is sneezing or coughing whether s/he has a cold or allergies, or asking how an employee is doing following the death of a loved one
- asking an employee about non-disability-related impairments (e.g., How did you break your leg?)
- asking a pregnant employee how she is feeling or when her baby is due



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Confidentiality



When employers collect medical information through a medical exam or inquiry, it must be kept separately from personnel files and as a confidential medical record, subject to the following exceptions:

- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; and
- (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 chapter shall be provided relevant information on request

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Voluntary disclosures are not protected

- However, if an employee voluntarily discloses medical information to an employer, outside the context of a medical examination or inquiry, the ADA does not protect this as a confidential medical record.
- For example, an employer's email to an employee asking about his whereabouts was not a medical inquiry even though the employee responded detailing his medical condition, and thus, the employer had no duty under the ADA to keep confidential the disclosed medical information.



E.E.O.C. v. Thrivent Fin. for Lutherans, 700 F.3d 1044, 1050 (7th Cir. 2012)

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Who Can Challenge an Unlawful Medical Exam or Inquiry under ADA?

Most federal circuits have held that an individual *without* a disability may bring a medical exam/inquiry claim under Title I

- This is different from the rest of Title I, where individuals bringing a claim must have a disability (or have an association with a person with a disability)



Why?

- The statute applies protections relating to medical inquiries and exams to “applicants” and “employees,” not only individuals with disabilities
- As one court noted, “It makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability.” *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997)

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Voluntary Wellness Programs

- Voluntary medical exams for employees are permitted, if they are part of an employee health program available to employees at that work site.
- Generally these are referred to as Wellness Programs
- EEOC promulgated regulations regarding Wellness Programs on May 17, 2016
- EEOC withdrew parts of its regulations January 1, 2019 after the D.C. federal court found they violated the law. Plaintiffs in the case argued that the regulation violated the ADA because it allowed employers to use financial incentives and penalties that coerced employees to participate in the program, thus making the program not “voluntary.”



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Questions?

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