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**Analysis of the ADA as it Pertains to Medical Examinations  
of Police Officers Applying for Special Assignments**

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**Question:**

*“Does the ADA restrict a police employer from making disability-related inquiries and requiring medical examinations of police officers applying for special assignments (e.g., SWAT, HNT, deep cover investigator, etc.)?”*

**Background:**

Title I of the Americans with Disabilities Act of 1990 (the “ADA”) limits an employer’s ability to make disability-related inquiries or require medication

examinations at three stages: pre-offer, post-offer, and during employment. In its guidance on preemployment disability-related inquiries and medical examinations, the Equal Employment Opportunity Commission (EEOC)-the federal agency responsible for implementation and enforcement of the ADA-addressed the ADA's restrictions on disability-related inquiries and medication examinations at the pre- and post-offer stages. The EEOC subsequently issued enforcement guidance focused on the ADA's limitations on disability-related inquiries and medical examinations during employment.

The ADA states, in relevant part:

“A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.”

The EEOC, in its guidance pertaining to disability-related inquiries and medical examinations of employees, commented on the meaning of this provision of the ADA:

“This statutory language makes clear that the ADA's restrictions on inquiries and examinations apply to all employees, not just those with disabilities. Unlike other provisions of the ADA which are limited to qualified individuals with disabilities, the use of the term ‘employee’ in this provision reflects Congress's intent to cover a broader class of individuals and to prevent employers from asking questions and conducting medical examinations that serve no legitimate purpose. Requiring an individual to show that s/he is a person with a disability in order to challenge a disability-related inquiry or medical examination would defeat this purpose. *Any* employee, therefore, has a right to challenge a disability-related inquiry or medical examination that is not job-related and consistent with business necessity.”

In attempting to address the issue underlying this analysis, the first question that must be answered is whether the employer is making a “disability-related inquiry” or whether the test or procedure it is requiring is a “medical examination.” The next question is whether the person being examined is an “employee.” If the person is an employee (rather than an applicant or a person who has received a conditional job offer), the final question is whether the inquiry or examination is “job-related and consistent with business necessity” or is otherwise permitted by the ADA. Each of these questions will be addressed in turn below.

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

In its guidance on Preemployment Questions and Medical Examinations, the EEOC explained in detail what is and is not a disability-related inquiry and medical examination. In short, a “disability-related inquiry” is a **question (or series of questions) that is likely to elicit information about a disability**. The same standards for determining whether a question is disability-related in the pre- and post-offer stages apply to the employment stage. Disability-related inquiries may include the following:

- asking an employee whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee’s disability;
- asking an employee to provide medical documentation regarding his/her disability;
- asking an employee’s co-worker, family member, doctor, or another person about an employee’s disability;
- asking about an employee’s prior workers’ compensation history;
- asking an employee whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past, or monitoring an employee’s taking of such drugs or medications; and,
- asking an employee a **broad** question about his/her impairments that is likely to elicit information about a disability (e.g., What impairments do you have?).

Questions that are not likely to elicit information about a disability are *not* disability-related inquiries and, therefore, are not prohibited under the ADA.

Questions that are permitted include the following:

- asking generally about an employee’s well being (e.g., How are you?), asking an employee who looks tired or ill if s/he is feeling okay, 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 or the end of a marriage/relationship;

- asking an employee about nondisability-related impairments (e.g., How did you break your leg?);
- asking an employee whether s/he can perform job functions;
- asking an employee whether s/he has been drinking;
- asking an employee about his/her current illegal use of drugs;
- asking a pregnant employee how she is feeling or when her baby is due; and,
- asking an employee to provide the name and telephone number of a person to contact in case of a medical emergency.

A “medical examination” is a procedure or test that seeks information about an individual’s physical or mental impairments or health. The guidance on Preemployment Questions and Medical Examinations lists the following factors that should be considered to determine whether a test or procedure is a medical examination, no one of which alone is reliably sufficient to determine that a test or procedure is medical:

- (1) whether the test is administered by a health care professional;
- (2) whether the test is interpreted by a health care professional;
- (3) whether the test is designed to reveal an impairment or physical or mental health;
- (4) whether the test is invasive;
- (5) whether the test measures an employee’s performance of a task or measures his/her physiological responses to performing the task;
- (6) whether the test normally is given in a medical setting; and,
- (7) whether medical equipment is used. Medical examinations include, but are not limited to, psychological tests that are designed to identify a mental disorder or impairment. Psychological tests that measure personality traits such as honesty, preferences, and habits are **not** considered medical examinations.

### **Who Is An Employee?**

The ADA defines the term “employee” as “an individual employed by an employer.” According to the EEOC’s guidance on Disability-Related Inquiries and Medical Examinations of Employees,

“An employer should treat an employee who applies for a new job as an **applicant** for the new job. The employer, therefore, is prohibited from asking disability-related questions or requiring a medical examination before making the individual a conditional offer of the new position. Further, where 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.

“After the employer extends an offer for the new position, it may ask the individual disability-related questions or require a medical examination as long as it does so for all entering employees in the same job category. If an employer withdraws the offer based on medical information (i.e., screens him/her out because of a disability), it must show that the reason for doing so was job-related and consistent with business necessity.

“An individual is *not* an applicant where s/he is **noncompetitively** entitled to another position with the same employer (e.g., because of seniority or satisfactory performance in his/her current position). An individual who is temporarily assigned to another position and then returns to his/her regular job also is not an applicant. These individuals are employees and, therefore, the employer only may make a disability-related inquiry or require a medical examination that is job-related and consistent with business necessity” (General Principles B (4)).

Although the EEOC appears to be silent on the issue of disability-related inquiries and medical examinations of employees applying for a promotion, transfer, or special assignment, the following guidance is offered by the [National Employment Law Institute](#):

“When an employee applies for a transfer or promotion to another job, it is important to understand which rules apply to the questions/examinations of the individual. In other words, is the employee considered an *applicant* for the new job (and therefore at the pre-offer stage), or is s/he considered an *existing employee* (and therefore at the employment stage)? The safest approach is to consider the individual an applicant for the new job (i.e., at the *pre-offer* stage with respect to the new job). Therefore, the employer should not ask any disability-related questions or require any medical examinations until after the employee is given a conditional offer of the new job. Along these lines, in [Koepping v. Tri-County Metropolitan Transportation District of Oregon](#), #95-36151, 120 F.3d 998 (9th Cir.

1997), the court held that it did not violate the ADA for the employer to request that a demoted employee take a physical examination after an offer of a new job, but before he started that job.

“The EEOC has stated that an employer ‘should treat an employee who *applies* for a new job as an applicant for the new job.’ Therefore, no disability-related questions may be asked and no medical examinations may be given before the individual is offered the new job. In addition, supervisors who know medical information about the employee may not share that information with individuals interviewing the employee for the new job. Importantly, however, the EEOC has stated that employers may ask disability-related questions and may perform medical examinations after the individual is offered the new job (if it does so for all entering employees into that new job). Of course, the situation would be different if the individual is not ‘competing’ for the new job, but is simply entitled (non-competitively) for a new job based on factors such as seniority. In that case, the individual would not be considered an ‘applicant’ for the new job. As a result, any disability-related questions or medical examinations must be job-related and consistent with business necessity.”

### **What Is Meant by “Job-Related and Consistent With Business Necessity”?**

The EEOC admonishes that, “Once an employee is on the job, his/her actual performance is the best measure of ability to do the job.” Generally, a disability-related inquiry or medical examination of an *employee*-as opposed to an applicant-may be “job-related and consistent with business necessity” when an employer “has a reasonable belief, based on objective evidence, that: (1) an employee’s ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition.” These “threshold” conditions also are reflected in the [Psychological Fitness-for-Duty Evaluation Guidelines](#) published by the International Association of Chiefs of Police.

Sometimes this standard may be met when an employer knows about a particular employee’s medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer also may be given **reliable information** by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job-related and consistent with business necessity for an employer to make disability-related inquiries or require a medical examination.

An employer's reasonable belief that an employee's ability to perform essential job functions will be impaired by a medical condition or that s/he will pose a direct threat due to a medical condition must be based on ***objective evidence*** obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination. Such a belief requires an assessment of the employee and his/her position and cannot be based on general assumptions.

The preceding information leads me to conclude that a police officer who voluntarily applies for assignment to a special unit (e.g., SWAT, hostage negotiation team, undercover assignment, etc.) may be asked disability-related questions or given a medical examination under *either* of two scenarios:

1. the officers are considered ***employees***, in which case either of the two threshold conditions must be met before a disability-related inquiry or medical examination may be considered job-related and consistent with business necessity (i.e., either the employer has a reasonable belief, based on objective evidence, that the employee's ability to perform essential job functions will be impaired by a medical condition, or the employee will pose a direct threat due to a medical condition); or
2. the officers are considered ***applicants***, in which case a disability-related inquiry or medical examination may be permitted *after* the applicant is given a conditional job offer, but before s/he starts work, as long as the inquiry or examination is conducted for all entering employees in the same job category.

According to the advice of David Fram, Director of EEO & ADA Services, National Employment Law Institute, "[t]he safest approach is to consider the individual an applicant for the new job. Therefore, the employer should not ask any disability-related questions or require any medical examinations until after the employee is given a conditional offer of the new job." In addition, "supervisors who know medical information about the employee may not share that information with individuals interviewing the employee for the new job."

Following this procedure would require that psychological evaluations that include or constitute medical examinations or disability-related inquiries must be given *only* to candidates who first have been non-medically evaluated and given bona fide conditional offers of employment. If an employer denies an applicant an assignment, transfer, or promotion on the basis of the medical examination or disability-related inquiry, the employer must comply with the ADA when taking

people out of the pool to fill actual vacancies. “The employer must notify an individual (orally or in writing) if his/her placement into an actual vacancy is in any way adversely affected by the results of a post-offer medical examination or disability-related question. If an individual alleges that disability has affected his/her placement into an actual vacancy, the EEOC will carefully scrutinize whether disability was a reason for any adverse action. If disability was a reason, the EEOC will determine whether the action was job-related and consistent with business necessity.”

The more difficult question is what to do when an employee who is under consideration for a special assignment and who lawfully is required to submit to disability-related inquiries or a medical examination is deemed not only to not meet the psychological standards for the new assignment or position, but also deemed to not meet the standards for fitness in his/her *current* position. The EEOC offers the following guidance pertinent to this question:

“If an employer decides to terminate or take other adverse action against an employee with a disability based on the results of a medical examination, it must demonstrate that the employee is unable to perform his/her essential job functions or, in fact, poses a direct threat that cannot be eliminated or reduced by reasonable accommodation. Therefore, when an employer discovers that an employee has a condition for which it lawfully may test as part of a periodic medical examination, it may make additional inquiries or require additional medical examinations that are **necessary to determine whether the employee currently is unable to perform his/her essential job functions or poses a direct threat due to the condition**” (emphasis included in original text).

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This analysis was reviewed by Wayne W. Schmidt, LL.M., J.D., of the AELE Law Enforcement Legal Center, in Park Ridge, Illinois, and Judge Emory A. Plitt, Jr., of Bel Air, Maryland. Mr. Schmidt is vice-chair of the IACP Legislative Committee and frequent contributor to the IACP Police Psychological Services Section. Emory Plitt is a Circuit Judge in Harford County, MD, and is a former chair of the IACP Legal Officers Section. He previously served as chief counsel to the Maryland State Police.

#### Notes:

1. 42 U.S.C. §§12101-12117, 12201-12213 (1994).



2. [Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990](#), 8 FEP Manual (BNA) 405:7191 (1995) [hereinafter Preemployment Questions and Medical Examinations].

Other ADA guidance documents are available through the Internet at <http://www.eeoc.gov/>.

3. Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act of 1990, Compliance Manual, Volume II, Section 902, No. 915.002 (2000) [hereinafter Disability-Related Inquiries and Medical Examinations of Employees].

4. “Covered entity” means an employer, employment agency, labor organization, or joint labor management committee. 29 C.F.R. §1630.2(b)(1998). For simplicity, the EEOC guidance refers to all covered entities as “employers.” The definition of “employer” includes persons who are “agents” of the employer, such as managers, supervisors, or others who act for the employer (e.g., agencies used to conduct background checks on applicants and employees, and psychologists used to conduct psychological evaluations of applicants and employees). 42 U.S.C. §12111(5)(1994).

5. 42 U.S.C. §12112(d)(4)(A)(1994); 29 C.F.R. §1630.14(c)(1998).

6. See e.g., 42 U.S.C. §12112(a)(1994) (no entity shall discriminate against a qualified individual with a disability because of the disability of such individual).

7. Congress was particularly concerned about questions that allowed employers to learn which employees have disabilities that are not apparent from observation. It concluded that the only way to protect employees with nonvisible disabilities is to prohibit employers from making disability-related inquiries and requiring medical examinations that are not job-related and consistent with business necessity. See S. Rep. No. 101-116 at 39-40 (1989); H.R. Rep. No. 101-485, pt. 2, at 75 (1990) (“An inquiry or medical examination that is not job-related serves no legitimate employer purpose, but simply serves to stigmatize the person with a disability.” A person with cancer “may object merely to being identified, independent of the consequences [since] being identified as [a person with a disability] often carries both blatant and subtle stigma”).

8. See [Roe v. Cheyenne Mountain Resort \(I\)](#), 124 F.3d 1221, 1229, 7 AD Cases (BNA) 779, 783 (10th Cir. 1997); appeal after remand, [Roe v. Cheyenne Mountain Resort \(II\)](#), 1999 U.S. App. Lexis 2611 (10th Cir. 1999); Griffin v.

Steeltek, Inc., 160 F.3d 591, 595, 8 AD Cases (BNA) 1249, 1252 (10th Cir. 1998), *cert. denied*, 119 S.Ct. 1455, 526 U.S. 1065 (1999); Gonzales v. Sandoval County, 2 F.Supp. 2d 1442, 1445, 8 AD Cases (BNA) 1337, 1340 (D.N.M. 1998); Fredenburg v. Contra Costa County Department of Health Services, 172 F.3d 1176, 9 AD Cases (BNA) 385 (9th Cir. 1999); (plaintiffs need not prove that they are qualified individuals with a disability to bring claims challenging the scope of medical examinations under the ADA). In Leonel v. American Airlines, Inc., No. 03-15890, 400 F.3d 702 (9th Cir. 2005), the court determined that the procedural mandates of the ADA as they pertain to disability-related inquiries or medical examinations apply to all applicants and employees, not merely qualified persons with a disability.

Some courts, however, have held that to bring a claim alleging a violation of the ADA's prohibition against disability-related inquiries and medical examinations, an individual must demonstrate that s/he is a qualified individual with a disability. See e.g., Armstrong v. Turner Industries, Inc., 141 F.3d 554, 558, 8 AD Cases (BNA) 118, 124 (5th Cir. 1998), *aff'd* 950 F.Supp. 162, 7 AD Cases (BNA) 875 (M.D. La. 1996) (plaintiff must be a qualified individual with a disability to challenge an illegal preemployment inquiry); Hunter v. Habegger Corp., No. 97-2133, 139 F.3d 901 [table], 1998 U.S. App. 4167 (Unpub., 7th Cir. 1998) ("it seems clear that in order to assert that one has been discriminated against because of an improper inquiry, that person must also have been otherwise qualified"). For these reasons, it is the [EEO] Commission's position that the plain language of the statute explicitly protects individuals with and *without* disabilities from improper disability-related inquiries and medical examinations.

Also see, "Medical Privacy in the Workplace," Craig M. Cornish, American Bar Association, Section of Labor and Employment Law, Mid-Winter Meeting, 1999.

9. See *supra*, "Disability-Related Inquiries and Medical Examinations of Employees," at General Principles, B.

10. For example, employers may make disability-related inquiries and require medical examinations that are required or necessitated by another federal law or regulation. Employer may make disability-related inquiries and conduct medical examinations that are part of their voluntary wellness programs. Employers also may, in limited circumstances require periodic medical examinations of employees in positions affecting public safety (e.g., police officers and firefighters) if they are narrowly tailored to address specific job-related concerns.

11. Preemployment Questions and Medical Examinations, *supra* note 2, at 4-13, 8 FEP at 405:7191, 7192-97.

12. *Id.* at 4, 8 FEP at 405:7192.

13. *Id.* at 4-13, 8 FEP at 405:7192-97.

14. See [Roe v. Cheyenne Mountain Conference Resort, Inc. \(I\)](#), 124 F.3d 1221, 7 AD Cases (BNA) 779 (10th Cir. 1997) (employer had a policy of requiring all employees to report every drug, including legal prescription drugs); *Krocka v. Bransfield*, 969 F.Supp. 1073 (N.D. Ill. 1997); affirmed, 203 F.3d 507 (7th Cir. 2000) (police department implemented a policy of monitoring employees taking psychotropic medication).

15. Preemployment Questions and Medical Examinations, *supra* note 2, at 9, 8 FEP at 405:7195.

16. An individual who currently uses drugs illegally is not protected under the ADA; therefore, questions about current illegal drug use are not disability-related inquiries. 42 U.S.C. §12114(a)(1994); 29 C.F.R. §1630.3(a)(1998). However, questions about *past* addiction to illegal drugs or questions about whether an employee ever has participated in a rehabilitation program *are* disability-related because past drug addiction generally is a disability. Individuals who are addicted to drugs, but are not currently using drugs illegally, are protected under the ADA. 29 C.F.R. §1630.3(b)(1),(2)(1998).

17. Preemployment Questions and Medical Examinations, *supra* note 2, at 14, 8 FEP at 405:7197.

18. Disability-Related Inquiries and Medical Examinations of Employees, *supra* note 3, at General Principles B,2. See also *supra*, note 2 (“Psychological examinations are medical if they provide evidence that would lead to identifying a mental disorder or impairment (for example, those listed in the American Psychiatric Association’s most recent Diagnostic and Statistical Manual of Mental Disorders (DSM)). . . . On the other hand, if a test is designed and used to measure only things such as honesty, tastes, and habits, it is not medical”).

19. 42 U.S.C. §12111(4)(1994); 29 C.F.R. §1630.2(f)(1998). This term has the same meaning as it does under Title VII of the Civil Rights Act of 1964. 42 U.S.C. §2000e(f)(1994).

20. An employee in this situation is an applicant with respect to rules concerning disability-related inquiries and medical examinations but *not* for employee

benefits (e.g., retirement, health and life insurance, leave accrual) or other purposes.

21. Where the employer already has medical information concerning an individual at the pre-offer stage for the new position (e.g., information obtained in connection with the individual's request for reasonable accommodation in his/her current position) and this information causes the employer to have a reasonable belief that the individual will need a reasonable accommodation to perform the functions of the *new* job, the employer may ask what type of reasonable accommodation would be needed to perform the functions of the new job, before extending an offer for that job. An employer, however, may not use its knowledge of an applicant's disability to discriminate against him/her. The employer also may not use the fact that the individual will need a reasonable accommodation in the new position to deny him/her the new job unless it can show that providing the accommodation would cause an undue hardship.

22. David K. Fram, Esq., "Resolving ADA Workplace Questions," Twelfth Edition, A National Employment Law Institute Publication (2002), pp. VI-37 to VI-38.

23. Disability-Related Inquiries and Medical Examinations of Employees, *supra* note 3, at Job-Related and Consistent With Business Necessity.

24. "Direct threat" means a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. 29 C.F.R. §1630.2(r)(1998). Direct threat determinations must be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job, considering a reasonable medical judgment relying on the most current medical knowledge and/or best available objective evidence. *Id.* To determine whether an employee poses a direct threat, the following factors should be considered: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm. *Id.*

25. EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities at 15, FEP Manual (BNA) 405:7468-69 (1999) [hereinafter The ADA and Psychiatric Disabilities].

26. [Psychological Fitness-for-Duty Evaluation Guidelines](#), International Association of Chiefs of Police, Police Psychological Services Section (2004), at Guideline #1.

27. Disability-Related Inquiries and Medical Examinations of Employees, *supra* note 3, at Job-Related and Consistent With Business Necessity, A(5).

28. Factors that an employer might consider in assessing whether information learned from another person is sufficient to justify asking disability related questions or requiring a medical examination of an employee include: (1) the relationship of the person providing the information to the employee about whom it is being provided; (2) the seriousness of the medical condition at issue; (3) the possible motivation of the person providing the information; (4) how the person learned the information (e.g., directly from the employee whose medical condition is in question or from someone else); and (5) other evidence that the employer has that bears on the reliability of the information provided. *Id.*

29. *Id.*

30. *Id.*

31. In order for a conditional offer to be considered “real,” the employer must gather and consider all non-medical information that it reasonably can. If, after a conditional offer, the employer continues to gather or analyze non-medical information that reasonably could have been gathered or analyzed pre-offer, the conditional offer is deemed “not real” and, consequently, all subsequent disability-related inquiries or medical examinations would be in violation of the ADA’s prohibition against pre-offer medical examinations and inquiries. See *supra*, note 8, [Leonel v. American Airlines, Inc.](#), No. 03-15890, 400 F.3d 702 (9th Cir. 2005).

32. If the individual is not “competing” for the new job, but is simply entitled (non-competitively) to the new job or position based on factors such as seniority, the individual would not be considered an “applicant” for the new job or position. Instead, any disability-related questions or medical examinations must be job-related and consistent with business necessity (i.e., they must meet either of the two “threshold considerations”). See also *supra*, note 26.

33. *Supra*, note 22.

34. *Id.*, at VI-37.

35. *Id.*

36. [Karraker v. Rent-A-Center](#), #04-2881, 411 F.3d 831, 2005 U.S. App. Lexis 11142 (7th Cir. 2005); 316 F.Supp.2d 675 (C.D. Ill., 2004) *reversed*.

37. *Supra*, note 2. (“May an employer give offers that exceed the number of vacancies or reasonably anticipated openings? Yes. The offers will still be considered real if the employer can demonstrate that it needs to give more offers in order to actually fill vacancies or reasonably anticipated openings. For example, an employer may demonstrate that a certain percentage of the offerees will likely be disqualified or will withdraw from the pool. Example: A police department may be able to demonstrate that it needs to make offers to 50 applicants for 25 available positions because about half of the offers will likely be revoked based on post-offer medical tests and/or security checks, and because some applicants may voluntarily withdraw from consideration.”)

38. *Supra*, note 2.

39. Disability-Related Inquiries and Medical Examinations of Employees, *supra* note 3, at Periodic Testing and Monitoring, D(18).

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