

# Labor and Employment Alert



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## Post-offer Medical Exams must follow other Background Checks

July 8, 2005

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### Executive Summary

An employer that conducts a post-offer/pre-employment medical exam before completing all other non-medical background checks risks violating the Americans with Disabilities Act (ADA). According to a recent decision by a federal appeals court, an offer of employment conditioned on successful completion of a drug test, a medical exam and a satisfactory background check violated the ADA when, after the conditional offer was made, the applicants were immediately sent in for medical exams before job references, employment verifications and criminal history checks were completed. The court sent this case to the jury because the employer's hiring process was out of sequence. This case highlights the importance of making sure that an applicant's medical information must be the very last bit of information to be collected once a conditional job offer has been made. *Reference: Leonel v. American Airlines, Inc., 400 F.3d 702 (9th Cir. 2005), en banc hearing denied.*

### Detailed Analysis

The ADA provides that an employer may require a medical examination after an employment offer has been made and prior to the commencement of the employment duties. Many employers engage in a hiring process where a promising candidate is often given a job offer specifically conditioned on successfully passing a background check including employment verification, job references, criminal history, drug screen and a medical exam. Unless the conditional job offer is carefully worded and the medical exam is stated as the very last condition to be met, an employer risks violation of the ADA.

## **The Consequences of Conducting a Medical Exam out of Sequence**

That's what happened to American Airlines when it extended conditional job offers to three applicants for flight attendant positions. The job offers were issued after the applicants had gone through a rigorous application process culminating with the flying of each of the applicants to American's Dallas headquarters for group and individual interviews. At the end of the interviews each applicant was given a written conditional job offer that stated that American was "pleased to make you a conditional offer of employment as a flight attendant . . . that is contingent upon your successful completion of a drug test, a medical examination and a satisfactory background check." After making the offer, the applicants were directed to go immediately to American's medical department for a medical exam. In the medical exam each applicant was asked to disclose all medications taken and any significant health conditions. None of the applicants disclosed the fact that they were HIV positive and were taking medication for their conditions. When blood tests later revealed the fact that they were HIV positive the job offers were rescinded because they had failed to be candid and provide full and correct health information. The American representative was careful to point out in rescinding the offers that he had not received any specific medical information from the medical exam itself - - only that the applicants had failed to disclose a medical condition in the process.

The applicants then sued, but they lost at the lower court level when a summary judgment was granted in favor of American. The 9th Circuit Court of Appeals reversed and sent the case back for a jury trial. The Court's analysis is an important reminder of how crucial it is that the sequence of conducting the post-offer/pre-employment medical exam must be in the correct order.

## **The ADA Requires Medical Exams to be the Last Contingency to Hiring**

The Court relied on the language of the ADA and the EEOC's enforcement guidance and its Technical Assistance manual to conclude that the ADA does not only bar intentional discrimination but it also regulates the sequence of an employer's hiring process. Because American's offers were subject to both medical and non-medical conditions the offers were not "real" because the medical condition was not the final condition.

The ADA was written to protect employees from being forced to disclose private medical information until all other contingencies have been eliminated. That mechanism allows the applicant to choose whether to disclose the private medical information once they have been assured that they would be hired so long as they can perform the job's essential functions.

The two step process mandated by the ADA also allows the rejected applicant to isolate the reason for the rejection as related to the results of the medical exam. These intended statutory protections outweighed the arguments raised by American. American argued that to delay the hiring process until non-medical background checks are completed would make it more difficult to compete for applicants. It was also argued to be inefficient to follow the sequence since the applicants were already at the company headquarters site

and to send them home only to have to have them return once the non-medical checks are completed would be inconvenient for the applicants.

Although the Court did recognize that there could be compelling circumstances to go out of sequence American was unable to establish why other alternatives could not have been used and still remain within the required sequence. Ultimately, the jury will now have to decide if American's explanations are sufficient to overcome the ADA's mandated sequence.

While this case arose in California and was decided by the 9th Circuit Court of Appeals its impact should not be discounted. Sitting on the three judge panel in this case was Richard Cudahy, Senior Judge, and respected jurist of the 7th Circuit which covers Indiana. The decision also cites to 7th Circuit precedent in reaching its conclusion. Accordingly the reminder to follow the proper sequence in completing post-offer/pre-employment medical exams should be heeded by all Human Resources departments.

### **Suggestions for Compliance**

Consider the following suggestions to reduce the risk of violating the ADA sequence requirement:

- Determine the current practice regarding the sequence of collecting post-offer/pre-employment medical and non-medical information about applicants.
- Evaluate the wording of the conditional job offer. Is it clear that successfully completing the medical exam is the last contingency for hiring?
- Consider two rounds of conditional job offers: The first, after interviews, informing the applicant that they had reached the final stages of the application process and would be hired absent problems with their background checks or medical exams; and the second, after completion of the background checks, ensuring employment if the applicant passed the medical exam.
- If the two step process is truly unworkable, then articulate and be able to prove that there are no reasonable alternatives to completing the medical exam before completing other background checks. Note that reasons such as the convenience of the applicant, business efficiency, and competitive hiring pressures will not likely be compelling.

For further information please contact your local counsel or [Steve Lyman](#), [John Ryan](#), [Jon Bumgarner](#), [Kevin Stella](#), [Kevin Gfell](#) or [Dana Stutzman](#) at Hall, Render, Killian, Heath & Lyman, P.S.C. at 317/633-4884.

**About Hall Render:**

[Hall, Render, Killian, Heath & Lyman](#) is a full service law firm with offices in Indiana, Kentucky, Michigan and Wisconsin. Since the firm was founded by William S. Hall in 1967, Hall Render has focused its practice primarily in the area of health law and is now recognized as one of the nation's preeminent health law firms.

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