Revisiting Disability-Related-Inquiries and Medical Examinations Under Title I of the ADA

ADA Knowledge Translation Center Legal Brief No. 1

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2018

Introduction

The United States Court of Appeals for the Third, Seventh, and the Eighth Circuits[1] have issued decisions in the last two years that address an employer's ability under the Americans with Disabilities Act (ADA) to mandate medical examinations of its employees. An employer's ability to mandate medical examinations or make disability-related-inquiries of employees are not new issues for the federal courts. Nor have the statute, regulations, or administrative guidance substantially changed since the ADA became law. However, the federal appellate court decisions mentioned above and recent Equal Employment Opportunity Commission (EEOC) regulations on employer wellness programs and the ADA, as well as the increasing use of "big data" to make employment related decisions, have raised visibility of the issues. It seems an appropriate time for a legal review.

This brief begins with a review of the relevant ADA statutory and regulatory language as well as the EEOC guidance on disability-related-inquiries and medical examinations in employment. The EEOC guidance is not

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[1] *McNelis v. Pennsylvania Power & Light Co*., 2017 U.S. App. LEXIS 15207 (3rd Cir. 2017); *Painter v. Ill. DOT*, 2017 U.S. App. LEXIS 24600 (7th Cir. 2017); and *Parker v. Crete Carrier Corp*., 839 F.3d 717 (8th Cir. 2016); cert. denied April 3, 2017.

binding on the courts; however, it has been important in clarifying intent in ADA employment related issues. The next section reviews recent case law from the federal Circuit Court of Appeals and the brief concludes with a discussion of implications for individuals with disabilities in employment considerations due to wellness programs and employers' use of "big data."

ADA Title I – Employment

The Americans with Disabilities Act includes five major sections or titles. Title I describes the duties of private employers with more than 15 employees and the rights of individuals with disabilities in their employment related interactions with those employers. The general prohibition is that no employer (covered by the ADA),

> [S]hall discriminate against a qualified individual on the basis of a disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.[2]

Congress was concerned with the low number of individuals with disabilities employed in this country historically. In an effort to address the conscious and unconscious bias towards individuals with disabilities, Title

[2] 42 U.S.C. §12112(a).

I requirements reflect Congressional efforts to ensure that an individual's abilities and not disabilities are the focus of any employment decision.

Because employers are interested in hiring well-qualified people and choosing those who are likely to be productive once employed, employers historically would use the interview and often ability tests (physical or mental) to help screen applicants. As the liability for hiring certain employees—such as those who use illicit drugs, abuse alcohol, or have a history of violence—increased, and technological options became available, employers began to add screening tests that claimed to be able to predict who would be successful at work. While those hiring goals are understandable, Congress was concerned that applicants were being asked questions about their health and/or given tests that were used to exclude or otherwise discriminate against individuals with disabilities. The invisible disabilities—such as epilepsy, heart disease and mental illness—were highlighted as examples of impairments screened out during the employment process, regardless of the person's ability to perform the job in question.

ADA Title I standards were, in part, an effort to ensure that qualified individuals with disabilities were not being denied jobs based on assumptions about a person's ability to perform the required job tasks, a refusal to provide reasonable accommodations which would allow the person to do the job successfully, or worries about liability for

future undefined injury. The limitations on disability-related-inquiries and medical examinations imposed on employers in Title I are one method of achieving this goal. Specifically, Title I addresses the use of employment inquiries related to disability or requirements that people take medical examinations at three stages in the employment process. These stages are 1) prior to an offer of employment (pre-offer); 2) after a conditional offer of employment but prior to hiring (post-offer); and 3) during employment. Each stage is discussed below.

Stage 1: Pre-employment Disability-Related-Inquiries & Medical Examinations (Pre-offer)

The ADA addresses two types of action by potential employers that are severely limited in the pre-employment stage.

Disability-Related-Inquiries

The first action involves disability-related-inquiries before a "conditional offer" of employment is extended. Specifically, the ADA prohibits employers from asking about the existence, nature or severity of a disabling condition prior to the making of a conditional job offer.[3] EEOC has defined "disability-related-inquiry" as "a question that is likely to elicit information about a

[3] 42 U.S.C. §12112(4)(A); 29 C.F.R. §1630.13(a); 14(a)(b).

disability."[4] This definition includes questions related to disability status, including details about illness or disability or workers' compensation claims. Examples of impermissible questions at this pre-employment stage include those asking 1) about the existence of impairments; 2) about limitations on major life activities; and 3) an applicant to show an ability to perform the job but not asking others when it is not obvious there is a disability. In addition, employers cannot ask about reasonable accommodation unless it is obvious that a person has a disability or an applicant voluntarily discloses a disability.[5] The EEOC states this is to "ensure that an applicant's possible hidden disability (including a prior history of a disability) is not considered before an employer evaluates an applicant's non-medical qualifications."[6] It should be noted that asking about genetic information is specifically prohibited under the *Genetic Information Nondiscrimination Act of 2008* (GINA).[7]

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[4] ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (10/10/95). Number 915.002.

[5] Id.

[6] Id.

[7] 42 USCS §§ 2000ff et seq.

Pre-offer questions that are permissible under Title I include such things as asking:

1. All applicants if they can perform the job tasks or those with an obvious disability who the employer believes will need a reasonable accommodation, to demonstrate the ability to perform the tasks essential to the job in question with or without reasonable accommodation;
2. A person about their work history;
3. About required certifications and licenses or educational backgrounds required for the job; and
4. About medical documentation of a disability when an applicant requests reasonable accommodation unless the disability is obvious or has already been disclosed to the potential employer.[8]

In addition to the "voluntary disclosure" of a disability related to the permissible reasonable accommodation inquiry in the pre-employment stage, EEOC has clarified that employers may "invite applicants to voluntarily self-identify for purposes of the employer's affirmative action program" in certain circumstances. [9] These include the following:

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[8] ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (10/10/95). Number 915.002.

[9] Id.

1. The employer is undertaking affirmative action because of federal, state or local law requiring affirmative action for individuals with disabilities;
2. The employer is voluntarily using the information to benefit individuals with disabilities;
3. The written or oral communication related to this self-identification is used "solely in connection with affirmative action obligations or efforts" and that the information is being requested on a voluntary basis, kept confidential, not subject the applicant to "adverse treatment" and used in accordance with the ADA;
4. The "information obtained must be on a form that is kept separate from the application."[10]

Medical Examinations

The second general limitation in the pre-offer stage concerns medical examinations. The rule is that ADA Title I bans any medical examination, defined as a "procedure or test that seeks information about an individual's physical or mental impairments or health" during the pre-offer employment stage.[11] EEOC provides several factors to consider in determining what is a "medical examination" including whether:

1. The test is administered by a health care professional;
2. The test is interpreted by a health care professional;

[10] Id.

[11] 42 U.S.C. §12112(d)(2); 29 C.F.R. §1630.13(a).

3. The test is designed to reveal an impairment or physical or mental health;
4. The test is invasive;
5. The test measures an employee's performance of a task or measures his/her physiological responses to performing the task;
6. The test normally is given in a medical setting; and
7. Whether medical equipment is used.[12]

These guidelines are helpful but the EEOC also provides examples as to what is a legally permissible test—and therefore not a medical examination—in the pre-employment stage. The following list outlines those examples.

1. Physical fitness tests are not medical tests as long as they do not measure physiological or biological responses to performance.[13]

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[12] ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (10/10/95). Number 915.002.

[13] Examples of physiological or biological responses include blood pressure measurements, cholesterol levels, or heart stress measurements. See https://www.eeoc.gov/policy/docs/preemp.html

2. Agility tests are not medical tests if used to demonstrate ability to perform actual or simulated job tasks.
3. Polygraph tests are not medical examinations; however, any disability related inquiries cannot be included as part of the test.
4. Alcohol tests are medical, but illegal drug tests are not medical (illegal drug use is not protected by the ADA).[14]

Stage 2: Post Conditional Offer of Employment Prior to Hiring (Post-Offer)

The limitations imposed on the employer by the ADA after a job offer has been extended but before employment begins are not as extensive as those during the pre-employment stage. Specifically, an employer may make disability-related-inquiries and perform medical examinations, and the job offer can be conditional pending the results of those inquiries or tests. The definitions of disability-related-inquiries and medical examinations are the same as outlined above for Stage 1.

If the employer asks post-offer disability-related-inquiries and/or requires medical examinations then they must be 1) required of all individuals in the same job category—i.e., required of both disabled and nondisabled individuals, and

[14] Id.

2) the medical information obtained must be kept and maintained on separate forms and in separate medical files, and be treated as confidential medical records.[15] The ADA does make exceptions to this confidentiality rule for individuals who "need to know" medical information during employment, such as supervisors and managers if there are necessary restrictions and accommodations required, first aid and safety personnel if needed for emergency treatment, and government officials investigating compliance under ADA.[16]

Post-offer inquires and/or medical examinations do not have to relate to the specific job tasks and the ADA itself does not set outside limitations. Disability-related-inquiries and/or the results of medical examinations may be used to determine accommodations or to evaluate whether an individual can safely perform the relevant job tasks.[17] However, there is a risk of discrimination if these inquiries or medical examinations screen out people with disabilities after the conditional job offer. Therefore, the ADA requires that if an offer is withdrawn because the inquiries and/or medical examinations indicate a disability, the employer must then show that the withdrawal of the offer was "job-related and consistent with business

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[15] 29 C.F.R. §1630.14(b).
[16] 29 C.F.R. §1630.14(b)(1)(i)-(iii).
[17] 42 U.S.C. §12112(d)(3)(B)(i)-(ii).

necessity."[18] Specifically, a withdrawal will not violate the ADA if the results of post-offer inquiries or medical examinations indicate that the individual is unable to perform the essential functions of the job even with reasonable accommodation or is a direct threat (to self or to others).

Federal regulations define **direct threat** as:

> Meaning a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.[19]

Employers can establish a qualification standard that an individual not pose a direct threat to self or others in the workplace. However, if that direct threat is the result of disability than the employer must also ask if the risk can be mitigated or eliminated by a reasonable accommodation.

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[18] 42 U.S.C. §12112(d)(3); 29 CFR §1630.10 14(b)(1)-(2).
[19] 29 C.F.R. §1630.2(r).

If not, then the employer does not violate the ADA by refusing to hire an individual with a disability.

The risk level is important in this analysis. The employer cannot refuse to hire an individual with a disability on the basis of a slight, speculative or remote risk. It must be a significant risk of substantial harm. EEOC regulations outline specific considerations in determining whether an individual poses a significant risk of substantial harm to others to include the following:

1. The decision was made on a case-by-case basis.
2. There has been an identification of the specific risk.
3. If the person has a mental or emotional disability, the employer has identified the specific behavior(s) that pose the direct threat.
4. If the person has a physical disability, the employer has identified the specific aspects that would pose the direct threat.[20]

Stage 3: During Employment

Congressional concern that individuals with disabilities face risk for adverse employment related decisions during employment is reflected in the continued restrictions of an employer's use of disability-related-inquiries and medical examinations of its employees. However, under certain

[20] 29 C.F.R. §1630 1630(r).

circumstances, both are allowed. The relevant statutory section states that:

> 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.[21]

It should be noted that this rule covers all employees, not just those with disabilities as defined under the ADA.

Disability-related-inquiries

For all intents and purposes, the definitions of both disability-related-inquiries and medical examinations are the same in the employment stage as they were in the earlier stages and described above. However, EEOC issued additional guidance in the form of a Q&A document that addressed specific questions regarding disability-related-inquiries or medical examinations during employment.[22]

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[21] Disability-related-inquiries and medical examinations of employees is addressed in 42 U.S.C §12112(d)(4)(A) (1994); 29 CFR §1630.14(c) (1998).

[22] Questions and Answers: Enforcement guidance on disability-related-inquiries and medical examinations of employees under the ADA at https://www.eeoc.gov/policy/docs/qanda-inquiries.html

In this published Q/A document, EEOC defined a disability-related-inquiry as a question or series of questions likely to elicit information about a disability and therefore not allowed as a general rule, while questions not likely to elicit information about a disability are always permitted. Permissible types of questions include those related to general well-being, regarding the ability to perform job functions and about the current use of illegal drugs. Included in the guidance were numerous other examples of the types of questions that are permissible as well as those that are not allowed.[23]

Medical Examinations

Although the definition of "medical examination" does not differ in any significant way from the definition in the pre-employment stage, EEOC issued specific guidance that differs somewhat for the employment stage. Specifically, in the EEOC employment guidance for employees, a medical examination is defined as:

> A procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health. Medical examinations include vision test, urine and breath analyses; blood pressure

[23] Id.

screening and cholesterol testing, and diagnostic procedures such as x-rays, CAT scans, and MRIs.[24]

A question regarding this definition concerns personality tests used by employers both with applicants during the pre-employment stage and with employees. According to one researcher, "approximately 76% of all companies with more than 100 employees are using personality tests."[25] Typically these tests are used during the pre-offer stage as a way to more quickly screen applicants on the basis of an individual's interpersonal skills, emotional literacy and social insight.[26] For some individuals with disabilities, these personality tests will be barriers to initial employment interviews based on symptoms of their disabilities—such as Autism Spectrum Disorder (ASD) or Post-Traumatic Stress Disorder (PTSD).

But these personality tests are also used during employment. In *Karraker v. Rent A Center*,[27] the Seventh

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[24] Id.

[25] Tomas Chamorro-Premuzic, Ace the Assessment, Harvard Business Review (July 2015) as quoted in Wendy F. Hensel, People with Autism Spectrum Disorder in the Workplace: An Expanding Legal Frontier, 52 Harv. C.R.-C.L.L. Rev. 73 (Winter 2017) fn. 136.

[26] Id.

[27] *Karraker v. Rent A Center,* 411 F3d 831 (7th Cir. 2005).

Circuit Court of Appeals was asked to decide whether such a test, in this case the MMPI (Minnesota Multiphasic Personality Inventory), was a medical examination under ADA. The MMPI was given to employees of the company who were interested in promotion.[28] Only the "vocational scoring" portion of the MMPI was used and the employer argued that the intent was not to diagnosis any mental impairment nor was it scored by a health care professional. The company stated that it used the scores to evaluate employees "employment related personality traits" and therefore the MMPI was not a medical examination. The Court did not accept Rent A Center's arguments and stated that because the MMPI has the ability to measure "depression, hypochondriasis, hysteria, paranoia, and mania" it was indeed a medical examination under the ADA. The Court ruled that an employer's use of a personality test to evaluate applicants or employees was a medical examination under the ADA regardless of what the employer's intention was or whether it was reviewed by a medical professional. According to the court, although the personality test was not used by the company to diagnose a mental disorder, it was nonetheless a medical

[28] When an employee requests consideration for a promotion, the EEOC and the courts consider any required "medical examination" as if it were a pre-employment medical examination.

examination because of the effect it could have on individuals with mental disorders. As the judge wrote,

> 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 [the employer] 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 promotion.[29]

In essence, this is an effect-based analysis of the use of personality tests by an employer under ADA. It should be noted that the ruling does not prohibit all use of personality tests either in the pre-employment process or during employment. Personality tests that are intended to measure things such as honesty, preferences, and/or habits, and not designed to screen or identify for disability, are probably acceptable under the ADA. However, it should be noted that if the reason for giving personality tests is to identify individuals who will be successful in a job, there is evidence that personality tests "are not valid predictors of employee success" and according to some researchers, "close to zero" in doing so.[30]

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[29] Id. at 836-7.

[30] See 52 Harv. C.R.-C.L. L. Rev. 73, fn. 153, 154.

Job-Related and Consistent with Business Necessity

Although the general rule is that disability-related-inquiries and medical examinations are not allowed during employment, an employer can ask a disability-related-inquiry or require a medical examination of an employee when it is "job-related and consistent with business necessity." That standard is met 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;
2. An employee will pose a **direct threat** due to a medical condition;[31]
3. It is necessary to follow up on a request for reasonable accommodation when a disability is not known or obvious; or
4. When periodic medical examinations and other monitoring under specific circumstances may be job-related and consistent with business necessity." [32]

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[31] Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA). EEOC No. 915.002 dated 7/27/00.

[32] Id.

The requirement that there is a "reasonable belief, based on objective evidence" can be satisfied in several ways. The employer may know about a specific employee's medical condition and observe job- related concerns, or may observe specific symptoms that indicate there may be a disability that is or will impair his/her ability to perform the essential functions of the relevant job or will pose a direct threat due to the medical condition.[33] In some cases, an employer may rely on third party information if the information is determined to be reliable and if consideration is given to how well the reporter knows the individual in question, the seriousness of the condition and how the reporter gained the information.

In addition, an employer may be required to conduct medical examinations in order to comply with other federal or state laws. The EEOC gives examples of several relevant federal laws—e.g., Department of Transportation (DOT) medical certification requirements for interstate truck drivers and the Federal Mine Health and Safety requirements.[34] Legislative history includes other examples such as medical certifications required for commercial airline pilots, marine pilots, firefighters, and air traffic controllers.[35] Courts have also recognized

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[33] Id.

[34] Id.

[35] H.R.Rep.No 101-485 (III) (1990).

Occupational Safety and Health Administration (OSHA)[36] and the Nuclear Regulatory Commission (NRC) regulations as relevant.[37] When other laws require medical examinations to obtain licensure or certification to meet qualification standards for the job in question, there is no ADA violation to mandating applicants or employees take those examinations.

There is deference given to the employer's standards under the "business necessity" defense. However, the Second Circuit Court of Appeals [38] explanation of the "job-related and consistent with business necessity" under ADA offers some additional considerations as follows:

> [I]n proving a business necessity…an employer cannot simply demonstrate that an inquiry is convenient or beneficial to its business. Instead, the employer must first show that the asserted "business necessity" is vital to the business. . . . The employer must also show that the examination or inquiry genuinely serves the asserted business necessity and that the request is no broader or more intrusive than necessary. The employer need not show that the examination or

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[36] *Chevron U.S.A., Inc. v. Echzabal*, 536 U.S. 73 (2002).
[37] *McNelis v. Pennsylvania Power & Light Co.* (3rd Cir. 2017).
[38] *Conroy v. N.Y. State Dept of Corr. Servs*, 333 F3d 88 (2d Cir. 2003).

> inquiry is the only way of achieving a business necessity . . . but the examination or inquiry must be a reasonably effective method of achieving the employer's goal. [39]

Direct Threat Standard

An employer can require that an applicant or employee with a disability "not pose a direct threat to the health or safety of other individuals in the workplace" under the ADA.[40] The EEOC regulations clarified this somewhat by requiring that the direct threat must present "a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation" and that this includes risk of threat to the individual or others.[41] EEOC includes requirements that the decision must be based on individualized assessment of the present ability of the individual to perform the job safely based on reasonable medical judgment relying on the most recent medical knowledge and/or on the best available objective evidence.[42] In addition, the medical examination must be the least intrusive method that will satisfy the safety concern.

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[39] Id. at 97-8

[40] 42 U.S.C. §12113(b).

[41] 29 C.F.R. §1630.2(r), 1630.15(b)(2).

[42] 29 C.F.R. §1630.2(r).

The direct threat standard has been a source of significant litigation under the ADA including an unanimous decision by the United States Supreme Court in *Chevron U.S.A, Inc. v. Echzabal* supporting the EEOC regulations regarding direct threat to self that some have argued went beyond the statutory language limiting the direct threat risk to others in the workplace.[43] Numerous other federal courts have weighed in on the parameters of the direct threat defense including whether the EEOC individualized assessment requirement precludes medical examinations of a class of employees without individualized assessment. Several circuit courts of appeals have stated that as long as the employer has a reasonable basis for concluding that the class genuinely poses a safety risk and the examination is given based on reasons that can be justified by business necessity, then individualized assessment is not required.[44]

In an "informal discussion response letter" to an inquiry sent to EEOC addressing employment, the agency noted in a footnote that,

> An employer always is allowed to have an employee whom it reasonably believes is unable to work

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[43] *Chevron U.S.A., Inc. v. Echzabal*, 536 U.S. 73 (2002).
[44] *Conroy et. al. v. NY State Department of Correctional Services*, 333 F.3d 88 (2nd Cir. 2003); Parker v. Crete Corp.; 839 F.3d. 717 (8th Cir. 2016).

without posing a direct threat examined by a medical professional of the employer's choice. The employer, however, must pay for the cost of the medical examination.[45]

Periodic medical examinations of employees are generally not allowed although there are exceptions for individuals working in jobs involving public safety, such as police, firefighters and airplane pilots. In these job classifications, or others that can be shown to involve public safety, the restrictions are that the examinations must address specific job-related concerns that could negatively affect the ability of the individual to perform essential job functions and result in a direct threat.[46] Courts have ruled in cases involving the use of such inquiries or examinations within the Department of Transportation (DOT), Nuclear Regulatory Commission and states' Department of Corrections.

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[45] ADA: Post-Offer, Pre-Employment Medical Exams (EEOC) letter from Joyce Walker-Jones, ADA Policy Division dated February 26, 2009.

[46] EEOC Enforcement Guidance: The Americans with Disabilities Act: Applying Performance and Conduct Standards to Employees with Disabilities, Questions and Answers (2011) question 18.

In 2014, an offshore drilling company asked EEOC to confirm that it could require periodic medical examinations of employees under ADA although the rationale for doing so was not clearly allowed under the regulations.[47] The company was concerned with the safety of its offshore employees if one of them experienced a medical emergency and wanted to require periodic medical examinations of all employees in jobs that were both dangerous and remote. The company felt that such examinations were both job-related and met the business necessity standard required under Title I. The specific request to EEOC was for a confirmation that ADA permits periodic mandatory medical examinations of employees beyond the narrowly defined exceptions, to include those in dangerous jobs in remote locations. The EEOC did not agree that the exception extended to dangerous jobs in remote locations. They emphatically advised that the proposed policy would violate the limitations on employer medical examinations on the basis of safety.

This technical assistance response, while not formal EEOC guidance, does raise the question as to whether there can

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[47] Letter from Marc Klein, Thompson & Knight L.L.P., Request for Technical Assistance under the ADA to Joyce Walker-Jones, Senior Attorney Advisor, ADA Policy Division, Equal Employment Opportunity Commission (March 18, 2004) (on file with the EEOC).

be a defensible employer policy that requires medical examinations of a class of employees—versus an individual employee or those in public safety jobs—on the basis of safety. Although decided prior to the EEOC technical assistance document above, a case from the Fifth Circuit in 2000, *EEOC v. Exxon, Co.*, [48] addressed this issue and whether the direct threat or business necessity test should be used. Exxon introduced a new policy in 1989 after the Valdez tanker accident that caused extensive environmental damages and resulted in extensive liability for the company. Because there was evidence that alcohol was involved in the accident and the captain of the tanker had received treatment for alcoholism, the new policy permanently removed all employees who had undergone treatment for substance abuse from certain safety sensitive and minimally supervised positions. The EEOC sued Exxon arguing that the direct threat test must be used to support a safety-based qualification standard. The Fifth Circuit disagreed and stated that a company may defend safety-based qualification standards with the business necessity standard and not the direct threat provision. Instead, the court ruled that the direct threat test applies in cases of an individual's supposed risk that is not addressed by an existing qualification standard.[49] The

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[48] *EEOC v. Exxon, Co.*, 203 F.3d 871 (3rd. Cir 2000).
[49]203 F.3d at 875.

Third and Ninth Circuit Courts of Appeal have also supported this position.[50]

There are two additional exceptions to the general rule against disability-related-inquiries and /or medical examinations during employment. The first is that disability-related-inquiries and/or medical examinations are permitted if they are made because of affirmative action obligations under local, state or federal law as mentioned earlier in this brief. The second exception is that ADA allows employers to offer voluntary employee health or wellness programs to employees related to identifying and treating common health problems such as high blood pressure and cholesterol. However, the ADA does not define voluntary. In part to help define "voluntary" in the context of the ability of employers to ask disability related questions and/or offer medical examinations in the context of voluntary programs, EEOC issued final rules on employer wellness programs and Title

[50] *Verzeni v. Potter*, 109 Fed. Appx.485 (3rd Cir. 2004); *Morton v. United Parcel Service, Inc*. 272 F.3d 1249 (9th Cir. 2001).

I of the ADA in 2016 which became effective on January 1, 2017.[51]

The rules state that wellness programs which request health information of employees can be considered voluntary if employers offer inducements (rewards for participation or penalties for nonparticipant) to get employees to disclose personal health information or take medical examinations. However, these inducements must be within limits that are approximately the same as the 30 percent of the cost of medical coverage set forth in the Health Insurance Portability and Accountability Act (HIPPA) and the Affordable Care Act (ACA).

The American Association of Retired Persons (AARP) sued EEOC in an attempt to block these new rules from taking effect. AARP argued that the inducement limit of 30% is too high to give employees a meaningful choice and that the rules are arbitrary and capricious because EEOC did not provide an adequate explanation or justification to the

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51 https://www.federalregister.gov/documents/2016/05/17/2016-11558/regulations-under-the-americans-with-disabilities-act#print. The EEOC also amended the *Genetic Information Non discrimination Act* regulations to address an employer's ability to offer incentives for an employee's family members to participate in wellness programs.

incentive ceiling. The US District Court for the District of Columbia issued its ruling in the case on August 22, 2017.[52]

The federal district court found that EEOC failed to provide "a reasoned explanation" for how its wellness rules affected the voluntary disclosure of medical information, and therefore, the rules were arbitrary and capricious. The judge rejected the EEOC justification for the incentive ceiling and stated:

> Based on the administrative record, it appears that EEOC co-opted the 30% incentive level from the HIPAA regulations without giving sufficient thought to whether or how it should apply in the context of the ADA, and particularly in the context of the ADA's requirement that wellness programs be voluntary.[53]

However, because the rules are already in effect, the judge remanded the regulations to EEOC to fix the problems rather than vacating them immediately. It appears that he will monitor the EEOC response to that order as he wrote in the opinion that he will not vacate the rules "assuming that the agency can address the rules' failings in a timely manner." This seems to imply that he may vacate the rules

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[52] *AARP v. United States Equal Employment Opportunity Commission*, _____(D.D.C. 2017). http://www.employmentandlaborinsider.com/wp-content/uploads/sites/328/2017/08/AARP-v.-EEOC.pdf

[53] Id. at 28.

in the future if EEOC does not provide the necessary justification for the 30% incentive level. The EEOC may attempt to revise the regulations or may appeal the federal district decision and hope for another legal analysis and different decision. For more information on the final rule on employer related wellness programs and the ADA Title I, EEOC has posted several summaries that may be helpful.[54]

Finally, EEOC provides guidance on how the disability-related-inquiries and medical examinations rules apply in various internal employment changes. If an employee applies for a new (different) job with the same employer, then the rules related to a new applicant for a job apply. If an employee is automatically or noncompetitively promoted, then he/she is not an applicant, but remains an employee and those rules apply. Similarly, if the employee

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[54] The Small Business Fact Sheet: Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act available at https://www.eeoc.gov/laws/regulations/facts-ada-wellness-final-rule.cfm and a Q/A document entitled EEOC's Final Rule on Employer Wellness Programs and Title I of the Americans with Disabilities Act at https://www.eeoc.gov/laws/regulations/qanda-ada-wellness-final-rule.cfm

is doing the same job, but temporarily located somewhere else, then the rules related to employees apply.[55]

With this background in the statutory and regulatory guidance on the ability of the employer to use disability-related-inquiries or require medical examinations of its employees, and relevant federal court decisions, the next section reviews several recent federal decisions that illustrate the application of the ADA medical examination rules in employment.

Recent Federal Circuit Court Cases Regarding Medical Examinations of Employees

Parker v. Crete Carrier Corp., 839 F.3d 717 (8th Cir. 2016); cert. denied April 3, 2017.

On April 3, 2017, the United States Supreme Court denied certiorari in a case from the Eighth Circuit Court of Appeals, *Parker v. Crete Carrier Corporation*.[56] Robert Parker (Parker) brought the case under ADA Title I against

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[55] If the employer already has medical information about an applicant to a new position, it cannot use that information to discriminate. The employer can ask about reasonable accommodation for the new position if it already knows the person has one.

[56] *Parker v. Crete Carrier Corp.*, 839 F.3d 717 (8th Cir. 2016); cert. denied April 3, 2017.

his employer Crete Carrier Corporation (Crete) over Crete's sleep apnea screening program. Parker had been a truck driver and trainer at Crete for over five years and there were no indications on the record of any concerns from his employer. In fact, he had received excellent performance reviews, including an award for five years of accident free driving and one for being the top trainer for the company. In 2012, Parker completed his mandatory Commercial Driver Fitness Determinations (CDFD) medical examination as required by the Federal Motor Carrier Safety Administration (FMCSA). Numerous tests are given as part of that examination to ensure that a driver does not have any impairment that interferes with driving. It was determined that Parker satisfied the medical/health standards and he was given the 2-year Department of Transportation (DOT) certificate required to drive certain commercial vehicles.

Beginning in 2008, two advisory boards for the FMCSA recommended that the medical/health requirements for DOT certification include an evaluation of drivers who may have obstructive sleep apnea.[57] The specific concern was that sleep apnea causes daytime sleepiness and therefore drivers would be more likely to have accidents. The most recent recommendation issued in 2016 is that any driver

[57] Sleep apnea is a sleep disorder resulting when breathing is interrupted during sleep.

who either has 1) BMIs[58] of 40 or above or 2) BMIs of 33 or above plus additional risk factors, should have a sleep apnea test using the most comprehensive method which is the in-laboratory polysomnography or in-lab sleep study.[59]

Crete had adopted a variation of these recommendations in 2010 and began to require sleep apnea testing for certain employees with either 1) a BMI over 35 or 2) a recommendation for a sleep study by the driver's physician. Anyone found to have sleep apnea as the result of the study was given a "treatment plan." However, the program was not introduced to Parker's facility until 2013 after he had taken and passed the CDFD medical examination and received his 2-year certification a year earlier. Because Parker's BMI was over 35 at his most recent DOT physical in 2012, Crete scheduled him for the in-lab sleep study.

After he was informed that he needed to take the in-lab sleep study, Parker obtained a note from a Certified Physician Assistant (PA) stating, "I do not feel it is medically necessary for Robert to have a sleep study." Parker then refused to take the sleep study and following his removal from "service" as a driver, gave the note from the PA to Crete. He was not reinstated and subsequently sued his

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[58] Body Mass Index.

[59] *Parker*, 839 F.3d at 719.

employer for requiring a medical examination in violation of the ADA and also discriminating against him because it regarded him as having a disability under the law. The federal district court for Nebraska granted summary judgment for Crete.[60] Parker then appealed that decision to the Eighth Circuit Court of Appeals which upheld the lower court's summary judgment for the company.

In its decision, the Eighth Circuit reviewed the relevant ADA statutory language on disability-related-inquiries and medical examinations. First, the ADA prohibits employers from requiring a medical examination unless it is shown to be job-related and consistent with business necessity. If an employer requires a medical examination, it has the burden of showing that the exam is both job-related and the "business necessity" standard is met. Further, the requested examination can be no broader or more intrusive than necessary.[61] The Eighth Circuit relied heavily in its analysis on the *Conroy v. NY State Dept. of Corr. Servs*,[62] decision from the Second Circuit. Specifically, the Eighth Circuit agreed that a court will uphold an employer's decision that there are legitimate, non-discriminatory

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[60] *Parker v. Crete Carrier Corp.,* 158 F. Supp.3d 813 (D. Neb. Jan. 20, 2016).

[61] Id. at 8 quoting *Thomas v. Corwin*, 483 F.3d 516, 527 (8th Cir. 2007).

[62] 333 F3d 88 at 98 (2nd Cir. 2003).

reasons to doubt the employee's capacity to perform his or her job duties. Further the court held that the exam given "does not need to be the only way to achieve a business necessity, but it must be a reasonably effective method to achieve the employer's goals."[63] The fact that Crete did not consider the individual circumstances of Parker did not concern the court; rather, it cited the ability of an employer to require a class of employees to take medical exams as long as the class is defined "reasonably." In this case, the medical information presented by Crete was sufficient to convince the court that the employer had mandated a medical examination for a class of truck drivers based on medical evidence suggesting that those individuals were at high risk for sleep apnea which if untreated would pose a significant safety risk in the performance of their job.

Parker requested review of the Eighth Circuit decision by the United States Supreme Court specifically asking, among other things, "Whether an employer, under the ADA can require a class of current employees to submit to a medical examination without accounting for individual medical needs or narrowly tailoring the request?" Because the Supreme Court choose not to accept the appeal, the Eighth Circuit ruling remains mandatory legal guidance in that Circuit and persuasive in those Circuits which have not specifically ruled on this issue. The Eighth Circuit gave

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[63] Id.

deference to the employer's decision to mandate testing for a certain class of employees because Crete had the medical data to support the job-related and consistent with business necessity defense required under the ADA. The concerns of the company were the safety of its drivers and the public in positions that involve high risk for both. There was sufficient medical support to convince the court that the screening criteria and the examination itself were reasonable. Although many other types of "screening" tests of employees may pass this test, it is important to remember the public safety nature of the jobs, the DOT certification recommendations based on strong scientific evidence, that were critical components in the legal analysis.

McNelis v. Pennsylvania Power & Light Co., 2017 U.S. App. LEXIS 15207 (3rd Cir. 2017)[64]

McNelis v. Pennsylvania Power & Light Co is a more recent case involving a safety concern and mandatory medical examinations of employees. Like the *Crete* case, it involves the requirement that an employee meet the qualifications for the employee's job that involves successfully passing a medical examination in order to obtain a license or security clearance. The *McNelis* decision is the first appellate court ruling involving the United States Nuclear Regulatory

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[64] 2017 U.S. App. Lexis 15207 (3rd Cir. 2017). Renamed *McNelis v. Susquehanna Nuclear, LLC* after the case was filed due to an error in the name of the defendant.

Commission fitness-for-duty (FFD) regulations and the ADA. The stated purpose of the FFD regulations is to "ensure that "individuals are not under the influence of any substance, legal or illegal, or mentally or physically impaired from any cause, which in any way adversely affects their ability to safely and competently perform their duties."[65] The NRC regulations also require that nuclear plants maintain an access authorization program to monitor access to sensitive areas of the plant and ensure that "employees are trustworthy and reliable, such that they do not constitute an unreasonable risk to public health and safety or the common defense and security."[66] Employee monitoring is continual and all employees are required to report suspicious behaviors of their co-workers. Any report of suspicious behavior requires a reevaluation of the reported individual's security clearance.[67]

In this case, a security guard was fired when he failed a FFD psychological examination required after a fellow employee reported that the guard was experiencing personal and mental health problems including paranoia about surveillance. In addition, it was reported that the employee showed signs of difficulty with alcohol and drug

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[65] 10 C.F.R. §26.23(b).
[66] 10 C.F.R. §73.56(c).
[67] 10 C.F.R. §73.56(f)(3).

use. The security guard argued discrimination under ADA because he was "erroneously regarded as having a disability in the form of alcoholism, mental illness and/or illegal drug use and that this belief was a motivating factor in his firing."[68]

To establish a prima facie case of disability discrimination under the ADA, the plaintiff must show 1) that he/she has a disability as defined under ADA; 2) is a qualified individual, and 3) has suffered an adverse employment action because of the disability. The issue for the Third Circuit Court was whether the security officer was "qualified" for the security guard position and the analysis included two factors. The first was whether the security guard had the necessary prerequisites for the position—e.g., the education and experience the employer required. The guard did have the necessary education and experience according to the court. The second factor considered was whether he could perform the essential functions of the job with or without accommodations. One of the essential functions of the job included "the unrestricted security access authorization that NRC requires of all armed security guards"[69] which he could not obtain after failing the psychological examination. Therefore, the court determined that the firing of the security officer for failing the FFD program examination

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[68] 2017 US. App. Lexis 15207 at 7.

[69]Id. at 3.

was not a violation of the ADA because he was not qualified for the position.

The court noted that although this specific issue was a first for the Appellate Court, numerous district level federal courts had ruled similarly. In addition, the appellate judges noted rulings from other circuit courts on Department of Transportation (DOT) regulations and the ADA that were similar in the analysis used to determine whether an individual was qualified to perform certain jobs. There has never been any real debate in ADA analysis that if an individual with a disability cannot perform the essential functions of a job, the person is not qualified. If the individual is not qualified, it is not discriminatory to refuse to hire and/or to terminate employment of the individual. However, the analysis under ADA does not stop with the issue of the ability to perform essential functions. The additional questions that must be asked and genuinely considered include 1) are the tasks at issue actually essential functions of the job, and 2) whether with reasonable accommodations, the individual can indeed perform the essential functions. The Third Circuit did not address these two issues because the EEOC regulations provide a clear defense to employers who must meet other state or federal laws related to certain jobs such as the DOT certifications for truck drivers or nuclear power plant security clearance regulations.

Painter v. Illinois Dept. of Transportation, 2017 U.S. App. LEXIS 24600 (7th Cir. 2017)

The Seventh Circuit Court of Appeals issued its decision in *Painter v. Illinois Dept. of Transportation* in early December 2017. Ms. Painter was an office administrator for the Illinois Department of Transportation. Many of her office colleagues complained about her behavior and as a result, she was placed on administrative leave and required to go through a "fitness for duty" examination. The initial examination was conducted by an occupational medicine specialist who declared her able to perform the essential functions of the job without "posing a threat to herself or others." However, he did note some concerns and recommended she be reevaluated in 45 days. That reevaluation resulted in a referral to a psychologist who began to see Ms. Painter for treatment. Ms. Painter did return to work in a different division of the Department of Transportation (DOT), but complaints from her colleagues continued. Ultimately she was placed on administrative leave three times and each time was referred for an assessment; in total she received five different examinations from a variety of mental health specialists. The complaints continued and at one point the police were notified when Ms. Painter communicated in a threatening way with her union representative. At the final evaluation, a psychologist determined that she was not fit to return to work due to her "paranoid thinking and the highly disruptive behavior which results from her paranoia."

Following her termination, Ms. Painter brought an ADA complaint against the Illinois Department of Transportation arguing that she was regarded as disabled by the DOT and forced to submit to five medical examinations.

The district court found for the DOT in summary judgment and the Seventh Circuit Court of Appeals upheld this finding that the "business necessity and job-related" defense of the ADA was met by the state of Illinois. The Seventh Circuit acknowledged that the employer's burden of showing that "compelling" medical examinations are consistent with the business necessity defense under ADA Title I is quite high. In addition, the Court reviewed the EEOC guidance that business necessity requires that an employer has a "reasonable belief based on objective evidence that a medical condition will impair an employee's ability to perform essential job functions or that the employee will pose a threat due to a medical condition."[70] Behavior that is annoying or inefficient is not sufficient to justify a medical examination but the court noted that "preventing employees from endangering their coworkers" is a business necessity.[71] There is no discussion

[70] EEOC Enforcement Guidance Disability-Related Inquiries and Medical Examinations of Employees under the ADA (July 27, 2000).

[71] Painter v. Ill. DOT, at 8.

of the consideration of reasonable accommodation in the Seventh Circuit opinion.

Practical Implications

Balancing the interest of the business community in hiring individuals who will be productive employees with the desire of individuals with disabilities to work but who face continued systemic discrimination continues to be challenging in many situations. The statutory and regulatory language regarding disability-related-inquiries and medical examinations have not changed substantially since the ADA became law, although there have been amendments to the statute and the regulations and EEOC has provided additional interpretative guidance. One of the more recent EEOC publications was an update to an earlier document after a public meeting on employment testing and screening under federal anti-discrimination laws, including the ADA. The document, Employment Tests and Selection Procedures, offered best practice suggestions for testing and selection. Although the guidelines cover several civil rights laws, the practice suggestions are relevant to employers covered by the ADA.[72]

[72] Employment Tests and Selection Procedures available at https://www.eeoc.gov/policy/docs/factemployment_procedures.html

The ADA general rule is that medical examinations that exclude individuals with disabilities, or tend to do so, are not allowed under Title I. However, there are exceptions to this general rule. Medical examinations that exclude individuals with disabilities are allowed if the examinations are job-related and consistent with business necessity and if required after a conditional offer of employment. These types of examinations are often given when the job has potential health and safety risks and/or is related to public safety. [73]

The job-related and consistent with business necessity standard can be met in one of three ways. In all cases, the burden is on the employer to prove that the standard has been met.

1) When there is another state or federal law requiring a medical examination in order to obtain a certificate or license that allows an individual to be qualified for a job as illustrated by the *Crete* and *McNelis* cases described above;

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[73]The Third Circuit Court recently summed up this exception to the general rule as follows: "[T]he premise that the ADA applies differently to professions that implicate the public welfare is as essential as it is unremarkable." 2017 U.S. App. Lexis 15207 (3rd Cir. 2017) at 12.

2) An individual, based on reasonable and objective information, cannot perform the essential functions of a job even with reasonable accommodation and therefore is not qualified for the job; or
3) When an individual's impairment creates a direct threat to self or others in the workplace that cannot be mitigated or eliminated by reasonable accommodation as illustrated by the *Painter* case summarized above.

Employers are also permitted "to set job-related qualification standards, including education, skills, work experience, and physical and mental qualifications necessary for job performance, health, and safety."[74] However, if any qualification standard or other selection criterion screens out or tends to screen out individuals with disabilities, it must be shown that the criterion is **job-related** and **consistent with business necessity** after consideration of any reasonable accommodation.[75]

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[74] ADA: Post-Offer, Pre-Employment Medical Exams (EEOC) letter from Joyce Walker-Jones, ADA Policy Division dated February 26, 2009. https://www.eeoc.gov/policy/docs/preemp.html

[75] Id.

If any **safety** standard screens out or tends to screen out individuals with disabilities, the employer must show that the individual presents a **direct threat**, defined as a significant risk of substantial harm that cannot be reduced or eliminated through reasonable accommodation.[76] The EEOC regulations provide several factors to consider as to whether the direct threat standard has been met:

1. The decision is made on a case-by-case (individual) basis by identifying the specific risk posed by the individual;
2. The duration of the risk;
3. The nature and severity of the potential harm;
4. The likelihood that the potential harm will occur; and
5. The imminence of the potential harm.[77]

In addition, employers must consider any reasonable accommodation that would eliminate or reduce the risk. This assessment must be based on reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. This information can come from the individual him/herself, medical doctors, rehabilitation counselors,

[76] 29 C.F.R. §1630;1630.15(b).
[77] 29 C.F.R. §1630.2.

and physical therapists or other professionals who have expertise in the disability and/or know the individual.[78]

The federal courts have consistently upheld the EEOC regulations and guidelines regarding disability-related-inquiries and medical examinations.[79] Despite the stability of the law, there continue to be questions related to the ability of ADA covered employers to make disability-related-inquiries and/or require medical examinations throughout the employment process. What is a medical examination continues to be debated in the courts. The use of "personality tests" in employment and the requirements that individuals meet psychological or physical standards raise concerns when the person can perform the essential functions of the job. Specifically, the ADA is concerned with the intent behind the administration of personality tests—i.e., is the intent to identify disability or to evaluate traits such as honesty or work habits? The *Karraker* case referenced earlier

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[78] 29 C.F.R. §1630.2(r).

[79] As discussed above, the recent EEOC regulations regarding employer wellness programs were remanded to the federal agency to address the justification for the incentive ceiling established in the regulations. However, although an important issue for employees with disabilities, it is tangential to the general rules regarding disability-related-inquiries and medical examinations under the ADA.

discusses the intent of the "examination." As more individuals with disabilities with the technical skills needed to perform many jobs and more employers utilize on-line personality tests to make initial decisions about who is considered qualified to continue the employment process, there is greater likelihood that individuals with disabilities will be denied opportunities before any consideration of reasonable accommodation.

A second concern is illustrated by the *Parker* case. In that case, the employer required a medical examination be given to a class of employees at high risk for sleep apnea based on other health indicators. This raises questions as to where the limits may be on the ability of an employer to screen employees for various impairments. The *Parker* decision relied heavily on the regulations which allow an employer to justify a medical examination on the basis of another law—i.e., the DOT certification requirements for certain truck drivers—and the medical recommendations from the DOT board. As science continues to make connections between personal behaviors and medical data with future health risks, there is potential for increased employer interest in evaluating its employees. One of the risk factors supporting the justification for the examination in the *Parke*r case was a person's BMI. It is not hard to imagine BMI being used as a risk factor in screening for other impairments—e.g., risk of diabetes, stroke or heart attack.

In addition to the issues discussed earlier related to the adoption of “wellness programs” by many employers, there is growing concern with the increased use of “people analytics,” an example of “big data” or huge sets of quantitative information. This information is then used – or could be used -- by employers in a variety of employment decisions including hiring, promotion etc. Although this is a new field in human resources, there is the potential for the information gathered to be used in a discriminatory manner towards, among others, individuals with disabilities. ADA and GINA are examples of two federal laws that in part address the concern that employers collecting and using sensitive personal information may result in discriminatory actions. And these laws do limit an employer’s ability to collect personal information. However, these statutes do not address an employer’s ability to gather “aggregated health data” or other forms of “big data.” The ADA could be amended to ensure that limitations are placed on the use of big data in employment decisions and/or new laws written to ensure that the use of such data is not used to discriminate on the basis of disability. There is growing awareness of the risks involved in terms of accuracy of the data collected and the impact on all employees, but it will be important for

disability advocates to monitor the impact on individuals with disabilities.[80]

Congress passed the Americans with Disabilities Act (ADA) in 1990 with the goal of ending discrimination on the basis of disability in the United States. Several of the four goals of the statute relate to assisting individuals with disabilities in achieving economic self-sufficiency and some progress has been made towards achieving increased economic opportunities for some individuals with disabilities.[81] However, individuals with disabilities continue to be marginalized members of society in many aspects of life as reflected in the most recent data on the status of Americans with disabilities.[82] In particular, employment opportunities continue to be limited and economic self-

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[80] See e.g., 88 U. Colo. L. Rev. 961 (fall 2017) The Law and Policy of People Analytics and 68 Hastings L.J. 777(May 2017) Big Data and the Americans with Disabilities Act.

[81] 42 U.S.C. §1210(a)(8).

[82] U.S. Department of Commerce (2012). Americans with Disabilities: 2010 at https://www.census.gov/content/dam/Census/library/publications/2012/demo/p70-131.pdf

sufficiency a dream for many individuals with disabilities.[83] The Congressional focus on limiting the disability-related-inquiries and medical examinations of individuals with disabilities in the employment process was intended to ensure that employers were making decisions that were based on the ability of the individual to perform the relevant job with accommodations and not based on health or disability related information that could be used to exclude qualified individuals. Maintaining the stringent rules related to the ability of an employer under ADA to make disability-related-inquiries or require medical examinations during the employment process will be important to ensure that individuals with disabilities have the opportunity to work.

[83] The unemployment rate for persons with disabilities was 10.5% in 2016; 4.6% for nondisabled people. See Bureau of Labor Statistics (DOL) USDL-17-0857 Persons with a Disability: Labor Force Characteristics—2016 at https://www.bls.gov/news.release/disabl.nr0.htm

Content was developed by the ADA Knowledge Translation Center and is based on professional consensus of ADA experts and the ADA National Network.

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The contents of this case law brief were developed under a grant from the National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR grant number 90DP0086). NIDILRR is a Center within the Administration for Community Living (ACL), Department of Health and Human Services (HHS). The contents of this case law brief do not necessarily represent the policy of NIDILRR, ACL, HHS, and you should not assume endorsement by the Federal Government.