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Pre-Employment Medical Exams: The Absolute Last Step in the Hiring Process, or Employer Beware!

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Collecting medical information and blood samples from job applicants is prohibited until and unless the employer has completed *all other steps* in the hiring process, including background checks. In *Lionel v. American Airlines, Inc.*, 400 F.3d 702 (9th Cir. 2005), the employer rescinded conditional offers of employment based on the applicants' failure to disclose they had HIV. The Ninth Circuit ruled that this violated the federal Americans With Disabilities Act ("ADA") [42 U.S.C. § 12112(d)(2)(a) and (d)(3)], the California Fair Employment and Housing Act ("FEHA") [Gov. Code § 12490(e)], and the applicant's constitutional right to privacy, because the employer conducted the medical exams before exhausting all other pre-employment screening.

This case is an important reminder to employers that the sequence of activities in the hiring process is critical to ensure compliance with federal and state law. All steps in the hiring process should be carefully coordinated and monitored so that any medical testing or evaluation is the very last step in the process.

BACKGROUND

American Airlines flew pre-screened applicants to Dallas, at its expense, for interviews for flight attendant positions. Four successful applicants were offered the positions on the spot. The job offers were conditioned upon satisfactory background checks and medical examination. As

soon as the interviews were over, the applicants were whisked off to the company medical facility where they were asked exhaustive medical questions, and subjected to urinalysis and blood sampling—the latter without consent nor disclosure as to what blood tests would be performed.

The blood tests revealed that the applicants were HIV positive but the applicants did not disclose this fact in their medical history forms. The airline rescinded the conditional job offers based on the applicants' failure to disclose, and the applicants sued.

PRE-HIRE MEDICAL EXAMS ARE PERMISSIBLE

The ADA and FEHA prohibit not only intentional discrimination in hiring but also regulate the sequence of the hiring process. Under both federal and state law, medical examinations and inquiries can only be made after the employer has made a "real" job offer. A "real" job offer is one where:

- The employer has completed all non-medical components of its application process; or
- The employer can demonstrate that it could not reasonably have done so before issuing the offer.

The court found that American Airlines' job offers were not "real" because they were contingent on the applicants successfully completing both the medical component and critical background checks.

EMPLOYERS' EXPLANATIONS NO GOOD

American Airlines offered a series of reasons to explain and justify its actions, all of which the court rejected:





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- **Competition:** American argued it was important to expedite the hiring process to compete for applicants. But competition is not a valid basis to violate the ADA and FEHA.
- **Convenience of the applicants:** American argued it was simply more convenient for the applicants to do the medical exams on the same trip as the interviews. However well-intentioned this may have been, the court said convenience is no reason to avoid federal and state mandates.
- **We didn't evaluate the information until later:** American argued that it evaluated the non-medical information before it considered the medical information. But the ADA and FEHA regulate the timing of when employers collect the information, not the order in which they evaluate it. The statutes deliberately allow job applicants to shield their private medical information until they know that, absent an inability to meet the medical requirements, they will be hired, and if they are not hired, the true reason will be transparent.
- **No reasonable alternatives offered:** even if American jumped the medical exams ahead of the background checks, the job offer could be deemed “real” if American established there were no reasonable alternatives to doing so. There were a number of reasonable alternatives: for example, American could have completed the background checks before the interviews; kept the applicants in Dallas longer; flown the applicants to Dallas twice; performed the medical exams at other locations or used the applicants' own doctors. But American did not explore these options nor offer any evidence to show these were not feasible.

PRIVACY CONCERNS ARE IMPLICATED

Both the federal and California constitutions protect an individual's right to privacy which is implicated by inquiries into a person's medical history, medical exams and, in particular, by blood tests. However, under California law, parties have diminished expectations of privacy in the context of pre-employment medical exams. But those expectations are not lowered to the point of extinction—the proper notice and consent must be provided, at minimum.

The procedures used by American's medical facility and staff gave rise to serious concerns as to whether they infringed upon the applicants' privacy rights. Although all applicants were asked if they had a “blood disorder” (and one was specifically asked about HIV/AIDS), the applicants were not specifically tested for HIV/AIDS. Instead, questions about their HIV status arose when a complete blood count revealed elevated levels of mean corpuscular volumes which is a condition found in 99% of HIV positive individuals. American never informed the applicants that their blood samples would be analyzed for a complete blood count, and when one of the applicants asked what his blood would be tested for, the nurse simply said “anemia.”

“BUT FOR” THE TIMING, NON-DISCLOSURE COULD BE A VALID REASON NOT TO HIRE

American rescinded the job offers because the applicants failed to disclose their HIV status (not because they were HIV positive). The court made it clear that if the medical exams are done lawfully, it was not suggesting an applicant has an option to lie or that an employer is foreclosed from refusing to hire an applicant who lies.





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WHAT SHOULD EMPLOYERS DO?

- Establish a clear sequence of activities in the hiring process with the medical component being the very last step in the process.
- Where possible, conduct background checks (employment verification, criminal history, and the like) earlier in the process as these can be time-consuming.
- Refrain from asking any medically-related questions during the hiring process until all steps except the medical component are completed and a conditional offer of employment has been made.
- In extraordinary circumstances that cause the employer to believe the medical exam must be done before all other steps are completed, explore all reasonable alternatives and only proceed if all those alternatives are not feasible.

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