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COMMENTS ON PROPOSED REGULATIONS
TO IMPLEMENT THE EQUAL EMPLOYMENT
PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT

Submitted to the
Equal Employment Opportunity Commission
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Proposed § 1630.14 (b)(3) provides that an employment entrance examination administered after a conditional offer of employment need not be job-related, although only job-related criteria may be used as the basis for screening out otherwise qualified individuals. In effect, employers are permitted to require, as a condition of employment, that individuals accede to medical examinations whose results may not be used for screening purposes.

This proposed regulation is inconsistent with the statutory scheme of the ADA, is not in accord with the legislative history of the ADA, and is likely to lead to discrimination and other harms.

1. The Regulation Is Inconsistent with the Statutory Scheme of the ADA

In theory, the regulation prohibits discrimination by proscribing the use of non-job-related medical examinations for screening purposes. Even if this were true as a practical matter (see #3 below), the ADA has other objectives, including promoting autonomy and protecting the privacy and dignity of individuals with disabilities. Specifically, a statutory goal is to prevent the compelled disclosure of non-job-related medical information.
Although the ADA is silent on the precise issue of whether employment entrance examinations must be job-related, several other provisions of the ADA are instructive. Section 102(c)(2) prohibits preemployment medical examinations and permits preemployment inquiries only of an applicant’s ability to perform job-related functions. Section 102(c)(4) provides that all medical examinations of employees must be either job-related or voluntary. It is certainly arguable that §102(c)(4)(A)’s job-relatedness requirement also applies to employment entrance examinations pursuant to § 102(c)(3). As proposed, the regulation would permit non-job-related medical examinations of conditional offerees but not of incumbent employees. No legislative support is cited by EEOC, nor does it exist for this construction.

2. The Regulation Is Not in Accord with the Legislative History of the ADA

The Legislative History cited by EEOC to support the proposed regulation does not support its conclusion.

The Conference Report (p. 59) is silent on the issue of whether post-offer medical examinations must be job-related.

The Senate Report (p. 39) supports a result directly contrary to EEOC’s interpretation.
The only exception to making medical inquiries that are not strictly job-related is narrow. The legislation allows covered entities to require post-offer medical examinations so long as they are given to all entering employees in a particular category, the results of the examinations are kept confidential, and the results are not used to discriminate against individuals with disabilities unless such results makes the individual not qualified for the job. For example, an entity can test all police officers rather than all city employees or all construction workers rather than all construction company employees. This exception to the general rule meets the employer's need to discover possible disabilities that do limit the persons ability to do the job, i.e., those that are job-related.

The first sentence refers to "strictly" job-related inquires -- those permitted at the preemployment stage -- such as "Do you have a driver's license?" The last sentence makes it clear that the purpose of a post-offer examination is to detect job-related disabilities. The Senate Report goes on to state: "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."
The House Labor Report (p. 73) provides that "medical information obtained in an examination pursuant to 102(c)(3) may be used by the employer as baseline data to assist the employer in measuring physical changes attributable to on-the-job exposures." Baseline data used in medical monitoring of the effects of workplace exposures are job-related. Consequently, this quotation does not support the broader principle for which it is cited by EEOC, that non-job-related post-offer examinations are permissible.

3. The Regulation Is Likely to Lead to Discrimination and Other Harms

While purporting to prohibit discrimination, the regulation facilitates discrimination because neither the ADA nor the EEOC regulations have yet altered the existing common law of employment relations which provides that: conditional offerees have no right to know what medical tests are being performed (e.g. the specific tests being run on a blood sample); conditional offerees have no right to know the results of medical tests; and conditional offerees have no right to know why a conditional offer of employment was withdrawn. Because this information is only discoverable, if at all, after the filing of a discrimination claim, it facilitates surreptitious testing and discriminatory reliance upon non-job-related criteria in decisionmaking.
Equally important, the ADA seeks to promote autonomy and confidentiality. Even medical examinations of employees of some efficacy in promoting employee health generally, such as mandatory, comprehensive annual physicals, are not permitted unless they are job-related or voluntary. §102(c)(4). When medical disclosures are made, they must be confidential. §102 (c)(3).

Under this proposed regulation, employers would be permitted to perform HIV testing, genetic testing, pregnancy testing, and other non-job-related medical examinations of conditional offeres. This could not have been intended by Congress.

CONCLUSION

EEOC should amend 29 CFR § 1630.14(b)(3) to provide that post-offer, employment entrance medical examinations must be limited to assessing job-related physical and mental conditions.

In addition, I would like to re-submit the recommendations I originally proposed on November 20, 1990.