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FLORIDA
EMPLOYMENT LAW LETTER

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What's Inside

On HRhero.com

Technology
What are your rights and obligations when it comes to employees' use of workplace technology like phone systems, e-mail, and mobile devices? It can be a tricky area. At www.HRhero.com, you can find the following tools to make sure you're in compliance with the law:

- HR Sample Policy — Use of Computers and the Internet, www.hrhero.com/lc/policies/332.html
- HR Executive Special Report — Managing Your Workplace in an Electronic Age, www.hrhero.com/special_reports/electronic.shtml?

HIRING

Knowing your limits: preoffer medical inquiries

The Americans with Disabilities Act (ADA) protects individuals with disabilities from discrimination. To be protected under the law, a person must be a qualified individual with a disability that substantially limits a major life activity. The law also restricts an employer's ability to make medical examinations or inquiries that relate to an applicant's disability status. The law addresses three phases of the application process: preoffer, postoffer but preemployment, and employment. In the following case, the court addressed whether an individual must have a disability in order to be protected from medical examinations or inquiries in the preoffer stage.

TMI: too much information

John Harrison worked as a temporary employee at Benchmark Electronics. In May 2006, his supervisor, Don Anthony, invited him to submit an application for a permanent position. Benchmark required all its employees to be tested for drugs. In accordance with the policy, Harrison submitted to a drug test. His test results came back positive, requiring a review of the test by a medical review officer.

At some point after the drug test but before the review, Anthony became privy to the results. He informed Harrison that his test was positive for barbiturates. Harrison explained that he had a prescription, and Anthony told him to retrieve it. The supervisor then called the medical review officer and passed the phone to Harrison. The officer asked questions about the medication and, upon being informed that Harrison suffered from epilepsy, asked a series of questions about his medical history. During the conversation, Anthony remained in the room and heard his responses.

Not long after that conversation, Benchmark was informed that Harrison's drug test had cleared and Anthony was told he could hire him. Anthony, however, told HR not to prepare an offer letter for him and asked the temporary employment agency not to return him to work at Benchmark because he had a performance and attitude problem and had threatened him. As a result, Harrison was terminated from the employment agency. He sued Benchmark, claiming the company had engaged in an improper medical inquiry under the ADA.

Whom does the law protect?

The Eleventh U.S. Circuit Court of Appeals (the federal appeals court over Florida) considered whether Harrison could sue for an improper medical inquiry under the ADA when he wasn't disabled. The law says an employer can't conduct a medical examination of a job applicant, ask whether he is an individual with a disability, or ask about the nature or severity of a disability.

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Under the ADA, an employer may ask only about the applicant's ability to perform job-related functions. The court determined that in the preoffer stage, an employer can't perform medical examinations and inquiries beyond questions related to the ability to perform job-related functions with respect to *any applicant.*

When are you asking too much?

The Eleventh Circuit then turned to the merits of Harrison's claim to determine if he had a valid claim for a prohibited medical inquiry. The ADA provides an exemption from its prohibition against medical examinations for drug tests because it doesn't consider a test for the illegal use of drugs to be a "medical examination." The law also allows employers to ask *limited* follow-up questions in response to a positive drug test. Questions that attempt to validate the test results by asking about lawful drug use or possible explanations for positive results are allowed. However, questions that are an attempt to elicit information about a disability are illegal.

In Harrison's case, the court found that because he was forced to disclose the fact and extent of his epilepsy and Anthony wasn't aware of his condition before that conversation, a reasonable jury could find that the supervisor's presence in the room was an intentional attempt to elicit information about a disability (which is a violation of the ADA). As a result, the court allowed Harrison's case to proceed to trial. *Harrison v. Benchmark Electronics Huntsville, Inc.* (11th Circuit, January 11, 2010).

Bottom line

This case makes it clear that *any* applicant has a potential claim under the ADA. Therefore, you shouldn't make preemployment medical inquiries about any applicant, even if he doesn't appear to be disabled. Further, you should carefully guard the results of any applicant's drug test and make sure any follow-up questions to a positive drug test aren't disability-related. ✤

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