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Employers Must Consider the ADA before Requiring Medical Examinations

Depending on your industry, it may be commonplace for you as an employer to require medical examinations of employees for a specific purpose in order to ensure the safety and health of those employees. This often occurs, for example, in situations where employees have been exposed to a dangerous chemical and relevant laws, such as OSHA regulations, require medical examinations/testing for purposes of assessing and monitoring the impact of the exposure. From an employer's perspective, however, the question sometimes arises as to whether, as a reasonably prudent measure, it can also require those employees to submit to medical examinations for other purposes, even if the examinations are not absolutely necessary or required at the time — such as whether there was exposure to any other chemicals or exposure below levels at which medical evaluation is mandated by OSHA.

To answer that question, an analysis of the Americans with Disabilities Act ("ADA") is required. Of course, other federal laws, such as the Genetic Information Non-Discrimination Act ("GINA"), the Health Insurance Portability and Accountability Act ("HIPAA") and OSHA, also may be implicated in this analysis, as could state disability-related laws and/or privacy laws, but for purposes of this blog post, our analysis is limited to the ADA.

Under the ADA, a required medical examination or inquiry of an employee must be job-related and consistent with business necessity. For example, employers may conduct (i) employee medical examinations where there is evidence of a job performance or safety problem that they reasonably believe is caused by a medical condition; (ii) examinations required by other federal laws such as OSHA; or (iii) return-to-work examinations when they reasonably believe that an employee will be unable to do his job or may pose a direct threat because of a medical condition. Therefore, in the situation presented above, it likely would violate the ADA for an employer to require employees to submit to medical examinations, as a reasonably prudent measure, to test for exposure to chemicals that were not known to be present. However, the inquiry does not end there.

Under the ADA, employers may conduct *voluntary* disability-related inquires or

medical examinations, so long as such voluntary examinations are part of an employer's employee health program and reasonably designed to promote health or prevent disease. Whether an employee health program is reasonably designed to promote health or prevent disease would be evaluated by a court in light of all the relevant facts and circumstances. An employer can meet this standard if it can show that its program has a reasonable chance of improving the health of, or preventing disease in, participating employees. The standard also requires that the health program not be overly burdensome, a subterfuge for violating the ADA or other laws prohibiting employment discrimination, and is not highly suspect in the method chosen to promote health or prevent disease. Notably, a program consisting of a measurement, test, screening, or collection of health-related information without providing results, follow-up information, or advice designed to improve the health of participating employees would be found *not* to be reasonably designed to promote health or prevent disease, unless the collected information actually is used to design a program that addresses at least a subset of the conditions identified. A program also would be found not to be reasonably designed if it exists mainly to shift costs from the employer to employees based on their health, or simply to give an employer information to estimate future health care costs.

Employers should keep in mind that conducting medical examinations, even with the express consent of the employee, is not without certain risks. Indeed, any use of the information learned from these medical examinations, and in particular any adverse action taken as a result, would open up your company to significant liability. For that reason, information relating to medical examinations should never be kept in an employee's personnel file. Rather, information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.

In sum, if this is something your company is considering, it should be done only after consultation with legal counsel, and after careful consideration of the factors discussed above.