FIREHOUSE LAWYER

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FMLA-WHAT IS A "SERIOUS HEALTH CONDITION"?

One of the important requirements for qualification for leave under the Family and Medical Leave Act (FMLA) is that the employee have a serious health condition. But if we can summarize the cases in the federal courts, the word "serious" may be taken with a grain of salt.

In September, the 8th Circuit held that a small hernia and other mild stomach conditions might qualify as a serious health condition. Between the issuance of the trial court's decision and this appellate reversal by the 8th Circuit, the U.S. Dept. of Labor had released an opinion letter noting that relatively minor health conditions may meet the definition for a serious health condition under the FMLA. In that Wage and Hour Opinion, the Department stressed the necessity for an incapacity of more than three consecutive calendar days including qualifying treatment by an appropriate health professional as being the minimum. The appellate court remanded this case back to the district court for further consideration of whether the hiatal hernia and other mild stomach conditions met the minimum.

FMLA-NEED FOR PHYSICIAN CERTIFICATION

In August, the U.S. District Court for Middle Florida held that a health care provider must certify a health condition as serious, or the FMLA leave is not available. In this case, an Orange County, Florida court system employee's son was diagnosed with a sufficiently serious behavioral disorder to qualify her for FMLA intermittent leave, which she utilized for a few months by enjoying a modified schedule. Later, however, her son improved and she returned to her regular work schedule.

Unfortunately, approximately one month later, the child's behavior again deteriorated. She requested a modified work schedule, using FMLA intermittent leave, but the son's physician did not classify the health condition as serious on the medical certification form. The employer did not approve the leave request but she left work early anyway and her employment was terminated.

The court worker brought suit against her former employer, claiming a violation of the FMLA. The employer successfully argued that the medical certification did not classify the son's condition as serious and therefore she had no right to leave work early. Moreover, her unauthorized departure was a legitimate ground for termination. While the employee argued that her final medical certification was simply a re-certification of a continuing health problem, the court held that it was a new certification because the child's condition had improved sufficiently to allow her to return to her regular work

NEED FOR PHYSICIAN

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CERTIFICATION (cont.)

schedule. Also, there was no reason for the employer to be required to seek a second opinion of a different physician, as it had no reason to doubt the validity of the medical certification. The federal court ruled the employer's reason for her discharge was legitimate and non-discriminatory.

...AND IN OTHER CASES...

In July, the District Court for Northern Illinois ruled that pregnancy is not a serious health condition. The employee did not prove that she suffered an incapacity due to her pregnancy as required by the FMLA.

Incapacity is an integral part of a serious health condition definition, held the 8th Circuit Court of Appeals in July, in a case involving a Safeway employee whose son had a psychological condition. The court held that the child had three psychiatric consultations, but that did not qualify as a period of incapacity. Therefore the Safeway employee's leave was denied.

Finally, in a third case in the 5th Circuit Court of Appeals in July the court held that an employee with carpal tunnel syndrome did not prove she had an FMLA-qualifying serious health condition because she was not incapacitated for more than three consecutive calendar days.

FMLA, HEALTH CARE COVERAGE AND COBRA

An important right granted under FMLA is the right to continued health care coverage during periods of FMLA leave. Employers are obligated to reinstate employees to the same health coverage at the conclusion of the leave period, even if the employee's coverage should lapse during the leave due to their own failure to make premium payments.

Of course, the major federal statute relating to continuation of health coverage is the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), but it focuses on benefits protection primarily in the context of employment termination. Under COBRA, employers who sponsor health insurance plans covering 20 or more employees must extend the availability of such coverage to individuals who would otherwise lose protection. One qualifies by being terminated or having a reduction in work hours, as long as such reasons are not encompassed within gross employee misconduct.

After the enactment of the FMLA, little had been written about the relationship between these two federal statutes. In 1995, however, the IRS did publish a notice providing some guidance on the interaction between COBRA and FMLA. The IRS stated that taking FMLA leave itself does not qualify a person under COBRA. COBRA rights can be triggered, however, on the last day of FMLA leave if an employee is covered by a health plan before the FMLA leave began, they do not return to work, and in the absence of COBRA coverage they would lose health care protection through the plan. Ordinarily, that date would serve, therefore, for measuring the 18 month COBRA entitlement. In the IRS's view, a lapse of coverage during the FMLA leave would be irrelevant.

While some state laws provide for a longer leave period than the 12 weeks under FMLA, the IRS stated that is irrelevant when determining when the COBRA qualifying event occurs.

NOTA BENE: The FMLA only applies to employers with 50 or more employees.

AFFIRMATIVE ACTION-CALIFORNIA'S ANTI-AFFIRMATIVE ACTION LAW UPHELD

In November, 1996

AFFIRMATIVE ACTION (cont.)

California voters passed Proposition 209 to eliminate public affirmative programs based on race and gender. Plaintiffs alleged that Proposition 209 denied racial minorities and women equal protection of the laws, and that it was void under the Supremacy Clause because it conflicted with Title VII, a major civil rights law. After the district court granted the Plaintiffs a temporary injunction to prevent the state from implementing Proposition 209, the state appealed to the 9th Circuit Court of Appeals.

The Court of Appeals held that Proposition 209 did not violate the Fourteenth Amendment. The Plaintiffs challenged this new law not as an impediment to protection from unequal treatment, but as an impediment to receiving preferential treatment. The court held that impediments to preferential treatment do not deny equal protection. The Fourteenth Amendment permits affirmative action programs to exist but it does not require them. Addressing the Supremacy Clause issue, the court found that Title VII only pre-empts state laws that actually conflict with the federal law. Since Title VII does not require the granting of preferential treatment, Proposition 209 was consistent with the federal statute and therefore not pre-empted. Coalition for Economic Equity v. Wilson, 110 F.3d 1431 (9th Circuit 1997).

PRIVACY IN OFFICE CONVERSATIONS

In a Tennessee federal district court case, the court held the county could be liable for violation of the federal wiretapping statute. Two county animal control officers engaged in personal and private conversations at the department office. No persons other than the employees were present and the conversations ceased whenever a car approached the only entrance to the building or when the telephone was being used. A department director taped the conversations by placing a recorder on the top shelf of the cabinet in the storage room/bathroom at the office. He disclosed the contents and played the tape recordings for other persons. He then used the substance of the taped conversations in an attempt to terminate the officers' employment. Although the County Executive put a stop to the activity and began an investigation, and although the officers did not lose their jobs or any pay or benefits, they filed suit alleging violations of the federal wiretapping law, civil rights statutes and certain state laws.

The federal wiretapping statute prohibits certain intentional interceptions and/or disclosures of oral communication, by electronic, mechanical or other means. There must be an expectation of privacy which is objectively reasonably on the part of the person whose oral communication was intercepted. Under the circumstances, the district court found that the employees had a reasonable expectation of privacy. See Dorris v. Absher, 959 F.Supp. 813 (M.D.Tenn. 1997).

OBTAINING INFORMATION FROM APPLICANTS AND EMPLOYEES - ADA AND WASHINGTON LAW

Employers, personnel departments and human resource specialists have struggled for years with the difficulties of obtaining information from applicants and employees, while at the same time avoiding discriminatory conduct or violation of statutory rights. This article explores the "do and don'ts" of pre-employment inquiries of applicants, and also discusses the difficult legal issues relating to obtaining medical information and similar information from employees without violating the Americans with Disabilities Act.

INFORMATION FROM APPLICANTS (cont.)

Within the limited space available here, we will attempt to generally outline some prohibited practices and recommended procedures. A detailed study of the entire area requires intimate knowledge of the pre-employment inquiry guide of WAC 162-12, promulgated under the Washington Law Against Discrimination (RCW 49.60). Also, the Americans with Disabilities Act is complex and includes implementing regulations, interpretive guidance, a technical assistance manual and other enforcement guidance manuals. Therefore, this article must by its very nature be a sort of summary.

Physical agility and physical fitness tests are not considered medical examinations and may be given to applicants before making an offer of employment, as long as given equally to all applicants. If the employer were to measure the applicants' physiological or biological responses as part of the test, then they would be prohibited medical examinations. A test which is job related and consistent with business necessity can be used. For example, if applicants are expected to lift and carry a certain amount of weight comparable to fire hose, that would be job related, but it would be inappropriate to simultaneously take their pulse or blood pressure, as that would be a prohibited medical examination.

Similarly, a psychological evaluation might be a prohibited medical examination. If the test simply measured personality traits such as honesty, it might be fine but any psychological battery of tests tending to provide evidence or identification of a mental disorder or impairment would be a medical examination and therefore prohibited. In one recent case, Thompson v. Borg-Warner Protective Services Corp., No. C-94-4015, 1996 WL 162990 (ND Cal. March 11, 1996), the court determined that a test designed to reveal behavior problems or emotional instability was not a medical examination.

A vision test is not medical if it evaluates the ability to read labels or distinguish objects but a vision test administered by an optometrist or an opthalmologist is a medical examination. Even asking an applicant to read an eye chart is a medical examination and therefore prohibited.

Employers may require applicants to test for illegal drugs, because under the ADA a person currently using illegal drugs is not a qualified individual with a disability.

Generally, prior to making an offer, employers cannot ask what medical conditions or disability the applicant has or had in the past. Employers may not ask anything likely to elicit information about a disability or closely related to a disability. Questions may be permissible if there are many possible answers and only some of the answers include disability related information. These guidelines are quite vague. However, in 1995 the Department of Labor published an enforcement guidance with respect to pre-employment disability-related questions and medical examinations.

Employers may ask an applicant about their qualifications and skills, education, work history or required certification or licenses. If the job description requires a person to be able to lift a certain amount of weight, the employer may ask whether the person can do that. The employer may ask whether the applicant can perform job-related functions or how they would be able to perform specific functions. It would be best to state the physical requirements of the job and then ask the applicant if they can actually do that either with or without reasonable accommodation. You may ask, for example, the applicant to show how they would lift the required poundage. You must, however, ask all job applicants the same question. You may ask how many days of work a person missed during the past year at their prior

INFORMATION FROM APPLICANTS (cont.)

job. General questions about attendance are acceptable but you may not ask how many sick days or sick leave hours a person took within a relevant period. You may ask questions designed to detect leave abuse, asking for example how many Mondays and/or Fridays were missed at their prior job.

An employer may ask whether a person drinks alcohol. Alcoholism is a disability so employers must be careful. You may ask questions about drinking habits unless the question is likely to elicit information about alcoholism. You can ask whether a person drinks alcohol or whether they've been arrested for driving under the influence, but you cannot ask how much alcohol an applicant drinks or whether they have participated in an alcohol rehab program, because these questions tend to pertain to alcoholism.

Under the ADA, an employer may ask whether an applicant has ever been arrested. However, an employer's improper use of arrest or conviction records may violate Title VII of the Civil Rights Act of 1964. See also discussion below of state requirements.

Under the ADA, you may ask whether they have ever used illegal drugs. Or you may ask "Have you used illegal drugs in the past six months?" You may not inquire into past drug addiction. Past addiction to illegal drugs or controlled substances is a protected disability under the ADA so long as the individual is no longer using drugs and has been rehabilitated or is participating in a supervised rehab program. Neither past casual use of illegal drugs or present use of illegal drugs is protected by the ADA. You may not ask whether a person takes any drugs or medication. These questions elicit information about an applicant's medical condition or medical history which is not allowed. You may not ask whether the person ever filed a Workers Compensation claim.

The foregoing discussion is based upon the ADA only. The Washington Law Against Discrimination prohibits discrimination against persons with disabilities. The pre-employment inquiry guide allows inquiry into whether the applicant can perform the essential functions of the job for which they are applying, with or without reasonable accommodation. It is fair to inquire as to how the applicant could demonstrate or describe the performance of specific job functions. Under WAC 162-12-140, however, inquiries about the nature, severity or extent of a disability or whether the applicant requires reasonable accommodation are prohibited. Similar to the ADA, whether the applicant has applied for or received Workers Compensation cannot be asked.

All of the discussion above concerning improper interview questions applies equally to the questions posed in the written job application form. Questions regarding medical history, hospitalization, treatment by a physician or psychologist or whether the applicant has had a major illness are all inappropriate. Clearly you cannot ask about treatment for a past drug addiction, alcoholism or past Workers Compensation history.

Under the ADA, slightly different rules apply after the employer has made an offer of employment conditioned only upon the results of medical examinations or other disability related inquiries. Passing the required medical exam must be the only condition to the job offer. If there are other conditions to the job offer, such as passing a background investigation, then the offer is not considered bona fide and medical examinations are not permitted. In Buchanan v. City of Antonio, 85 F.3d 196 (5th Circuit, 1996), the court held the job offer conditioned on successful completion of the entire screening process, including physical and psychological examinations, physical fitness test, an assessment board and an extensive background investigation was not

INFORMATION FROM APPLICANTS (cont.)

a qualified conditional offer of employment.

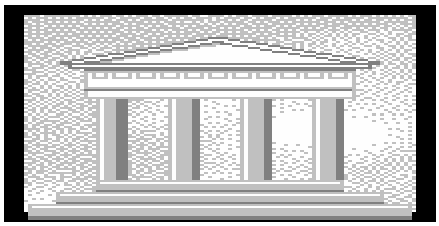
Once you have gotten to the stage of a conditional offer of employment, where medical examination is the only remaining condition, then you can make unlimited medical inquiry, as long as all applicants at that stage are given the same exam or subjected to the same medical inquiry.

Turning to the employment stage, after a person is hired, the ADA requirements become even more stringent. Generally, an employer cannot make any medical inquiry of an employee during employment unless falling within recognized exceptions. For existing employees, employers cannot make medical inquiries or require medical exams without a specific determination that the inquiry is job related and consistent with business necessity. If physical examinations or medical monitoring are required by law, this fits within an exception. The EEOC has acknowledged that an action taken to comply with another federal law is job related and consistent with business necessity. Examples of specific federal laws requiring medical examinations or medical inquiry without violating the ADA would include federal safety regulations regulating interstate bus and truck drivers, OSHA, the federal Mine Health & Safety Act and other federal statutes requiring employees exposed to toxic or hazardous substances to be medically monitored at specific intervals. The employer must make an independent evaluation whether a state or local law requirement is permissible under the ADA. Just because a medical inquiry is required by state or local law that does not automatically relieve an employer from its ADA obligations; the requirement must be job related and consistent with business necessity.

Fitness for duty examinations may well be job related and consistent with business necessity if the employee is in a physically demanding job, such as fire fighting. It may also be job related and consistent with business necessity if the employee is obviously having difficulty performing their job effectively or there is evidence of problems relating to job performance.

In Deckert v. City of Ulysses, #93-1295-PFK, 1995 WL 580074 D.Kan. Sept. 6, 1995 (affirmed, 10th Circuit Dec. 31, 1996) it was a medical necessity to conduct a medical evaluation of a long term employee who suddenly began to perform poorly. In Yin v. State of California, 95 F.3d 864 (9th Circuit 1996) it was business necessity to require an independent medical examination of an employee whose excessive absenteeism had seriously hurt her productivity and performance.

In conclusion, prior to employment, both before and after an offer of employment has been made, and during employment, an employer must be extremely careful to ask only those inquiries that are permitted both by the ADA and the Washington pre-employment inquiry guide. Specific questions concerning applications and interview questions should be cleared through legal counsel before being used in a routine manner. I recommend regular "checkups" for personnel departments and human resource managers with respect to their application and interview process.



FIREHOUSE LAWYER GOES WORLDWIDE

Yes. The Firehouse Lawyer is available to communicate with clients and others through e-mail at firehouselaw@earthlink.net. In 1998, my goal is to establish a home page on the Internet, and

FIREHOUSE LAWYER - WORLDWIDE (cont.)

make *The Firehouse Lawyer* newsletter available through that means, if possible.

LIBRARY RESOURCES

During 1997, I have greatly enhanced the library resources in my office. In early 1997, I started with CD Law, which is a comprehensive CD ROM legal research library including Washington statutes, case law and Washington Administrative Code regulations. The data bases also include the United States Code, various local municipal codes, and for my purposes a very important service - the Public Employment Relations Commission cases.

I also now subscribe to the Thompson Publishing Group's Fair Labor Standards Handbook and the Family and Medical Leave Handbook.

In addition to obtaining numerous employment law newsletters, I have purchased *How Arbitration Works* by Elkouri and a treatise by Data Research, Inc. on the statutes, regulations and case law protecting individuals with disabilities.

The most recent addition to the library is another searchable CD ROM data base developed by the Labor and Employment Law Section of the American Bar Association. This section library, updated quarterly, provides an instantly searchable database on various labor and employment topics, including the Americans with Disabilities Act, the National Labor Relations Act, the FMLA and numerous labor and employment issues of current interest. Given space limitations, it is imperative for lawyers to utilize modern technology. It is amazing how much data is stored on just a few compact disks. Moreover, now that the Firehouse Lawyer is on the Internet, I will be able to perform legal research "on the Internet".

NOTA BENE:

Since January 1, 1997, I have developed a fire department safety checklist and a set of forms for safety officers. Designed to help fire departments comply with the new WAC 296-305 safety standards, these materials are available to fire departments throughout the state, subject to payment of reasonable copying costs.

In June, 1997, a model Safety Resolution and complete set of operating instructions (SOPs) have been completed, to comply with the "vertical standards". These are also available to all Washington fire departments, subject to payment of reasonable copying costs.

Please call for information.