

**Employee Medical Exams Only Permitted After Other Job Offer Contingencies Satisfied**

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The Ninth Circuit Court of Appeals has ruled that employers must strictly follow all procedural aspects of the Americans with Disabilities Act (“ADA”) to avoid liability. *Leonel v. American Airlines, Inc.*, 400 F.3d 702 (9<sup>th</sup> Cir. 2005). Specifically, the court held that an employer’s hiring process may violate the ADA and related state statutes if it does not exactly follow the ADA-prescribed sequence.

Three individuals who were HIV positive applied for flight attendant positions. The airline gave each a conditional offer of employment contingent upon passing a background check and medical examination, which included a medical history questionnaire that asked whether they had any “blood disorder or HIV/AIDS.” None of the applicants disclosed their HIV-positive status, or that they were taking related medications. When the applicants’ blood tests subsequently revealed that they were HIV-positive, the airline rescinded the job offers, citing the applicants’ failure to disclose information during their medical examinations. The California based applicants claimed the airline’s medical examination and questionnaire were prohibited by the ADA and California’s Fair Employment and Housing Act (FEHA) because they were administered prior to the completion of the background checks.

In reversing the U.S. District Court, the Ninth Circuit found that the ADA and FEHA regulate the hiring process sequence, and only permit medical examinations and questionnaires after a “real” job offer is made; one that is not subject to other contingencies. Because the airline administered the medical examination and questionnaire before conducting the background check, the appellate court found, “the offers were therefore not real, the medical examination

process was premature, and [the airline] cannot penalize the applicants for failing to disclose their HIV-positive status.”

Given this decision, it would be prudent for all employers to review their hiring procedures and insure that medical inquiries and examinations are the final step in the pre-employment process. Employers should also confirm that any medical tests conducted as part of a pre-employment exam are within generally accepted medical practices. If special tests are required, procedures should be established for providing notice and obtaining consent for such tests.

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