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To Ask or Not to Ask: Navigating Post-Leave Inquiries and Medical Examinations Under the Americans with Disabilities Act

Related Professionals

Christy L. Rogers
803.540.2173
CRogers@nexsenpruet.com

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As sticky wickets go, one of the messiest and most complicated laws employers must contend with in navigating their relationship with employees is the Americans with Disabilities Act ("ADA"). The employer's need to obtain information necessary to ensure a safe and productive workforce must constantly be balanced against an employee's right to maintain privacy regarding medical conditions. And as the recent case of *LaCroix v. Boston Police Department* illustrates, medical inquiries and examinations—including those made after an employee returns from a leave of absence—are no exception.

"Examination and Inquiry" Claims Under the ADA

As a general rule, the ADA prohibits an employer from making medical inquiries and requiring medical examinations of current employees. Thus, in order to prove a violation of the ADA's "examination and inquiry" prohibition (§ 12112(d)(4)(A)), an employee must ordinarily only show the examination or inquiry is likely to elicit information about a disability. If the employee does so, then the burden shifts to the employer to show the examination or inquiry, and the resulting disclosure of medical information, was both "job-related" and "consistent with business necessity."

Like many other buzz phrases in the ADA "job-related" and "consistent with business necessity" carry independent legal significance with their own proof requirements. Specifically, the standard is satisfied if the employer can show: (1) it reasonably believes the employee's medical condition impairs his ability to perform the essential functions of the job, or (2) the employee poses a direct threat to himself or others. The employer must prove the asserted "business necessity" is vital to the business and that the request is no broader or more intrusive than necessary.

Police Officers Challenge Blanket Physical and Psychological Examination Policy

In *LaCroix*, two members of the Boston Police Department ("BPD"), James LaCroix and Renee Payne-Callender brought suit in federal court in Massachusetts under the ADA alleging BPD's policy requiring medical and psychological examinations for all officers who return from extended leave, regardless of the nature of the leave or the employee's job duties, violated the ADA's "examination and inquiry" prohibition. Specifically, the policy in question mandated that an officer on leave for three or more months undergo a physical examination by a BPD physician prior to returning to work, and officers who were on a leave of absence for at least six months submit to a psychological examination by a BPD psychiatrist prior to returning to the job.

LaCroix suffered back and hip injuries that temporarily prevented him from performing his job as an officer and required medical leave. More than six months after initiating leave, LaCroix's treating physician released him to return to work. However, BPD informed LaCroix he had to be evaluated by the Department's own physician and psychiatrist prior to returning to the job. During his mental examination, the psychiatrist confirmed there were no concerns about LaCroix's mental state; rather, LaCroix was required to undergo the psychological examination simply due to the length of time he had been absent from work. Similarly, Payne-Callendar suffered a right Achilles tendon injury, which placed her out of work for more than six months. Upon her return and medical release by her own doctor, BPD required Payne-Callendar to submit to a physical and mental examination before being allowed to work. During her psychological evaluation, Payne-Callendar asked whether anyone at BPD had raised an issue regarding her psychological well-being, and the BPD psychiatrist confirmed there were no concerns. Although LaCroix and Payne-Callendar were both cleared by BPD's physicians, they challenged the extended leave policies on the grounds that the required examinations applied to an overly broad class of officers, irrespective of the reason for leave or an officer's specific job assignments.

In their defense, BPD argued the officer examinations after an extended leave from duty were consistent with business necessity due to the unique stressors faced by police officers while on the job, which could lead to overlooked and unreported mental health issues. The Department further contended these emotional stressors, if untreated, could have serious consequences for not only the safety of the individual officer, but also the public at large. BPD's own psychiatrist opined that an officer's extended period of separation from the workplace strongly correlated with negative impacts on mental health and functionality.

The Court Says "No Dice"—BPD Lacks Proof of Business Necessity

Reviewing BPD's policy, the *LaCroix* Court noted an examination that is job-related and consistent with business necessity "must at a minimum be limited to an evaluation of the employee's condition only to the extent necessary under the circumstances to establish the employee's fitness for the work at issue." The parties did not dispute that the BPD examinations were job-related, given the role that police officers play in ensuring public safety. Rather, the crux of LaCroix and Payne-Callendar's contention was that BPD could not demonstrate the examinations were consistent with business necessity—the Court agreed.

Although the Court readily acknowledged police officers must be physically and mentally fit, it still held that BPD's business necessity defense failed because the Department could not justify subjecting *all* officers to physical and/or psychological examinations, when those examinations were wholly unrelated to the injury that caused the need for leave. Most critically, the Court held the blanket examination requirement was not consistent with business necessity because the policy was being enforced "even where there are no specific concerns about an individual's ability to

perform their job duties." Case in point: there were no concerns about the physical or mental stability of LaCroix or Payne-Callendar, but they were both forced to undergo physical and psychological examinations anyway. BPD also lacked proof that being on leave for three months or six months increased the risk for physical and/or psychological conditions, and there was no evidence, such as an industry standard, to support the specific timing of BPD's examinations.

Because BPD failed to "offer any evidence showing that police officers who have been out on sick leave for more than three or six months would pose a safety risk or be unable to discharge their responsibilities when they return to work," BPD's policy violated the ADA.

What's the Takeaway?

Although not all employers are in the business of protecting public safety, there are still some valuable lessons to be learned from the *LaCroix* case when evaluating the feasibility and lawfulness of medical inquiries and examinations.

1. Generalized business concerns are insufficient.

In order to meet the business necessity requirement, which is a high burden under the law, an employer cannot simply demonstrate that an inquiry or medical examination is convenient or beneficial to its business. A general desire to reduce costs, protect employees, or (in the case of *LaCroix*) protect the public interest, without more, will not suffice.

2. Evaluate the job and medical condition at issue.

Policies that mandate medical examinations for *all* jobs, regardless of the position's essential functions, and *all* employees, regardless of medical condition or position, also likely fail the business necessity requirement. Instead, employers need to engage with their counsel to conduct an individualized assessment of the nature of employee's health condition and the job requirements to determine whether a medical examination is warranted. As a general rule, inquiries and medical examinations should normally be related to the specific medical condition for which the employee took leave.

Any policies intended to apply to a defined class of jobs require an employer to show that it defined that class consistent with business necessity. That is, there must be some justification for concluding that the policy is necessary for the class of employees affected. The employer must demonstrate it had some reason for suspecting the class of employees would be unable to perform job functions or would pose a safety risk. However, be wary of these policies because employers face a more difficult burden to establish that the business necessity defense applies to a general policy that affects a wide group of employees versus a policy directed towards a narrower group.

3. Do not make assumptions.

In evaluating whether an employee's ability to perform the essential job functions of his/her job will be impaired by a medical condition or whether that employee will pose a direct threat, an employer must rely on *objective* evidence. This includes information obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination. In other words, an employer cannot assume that given the length of absence or nature of the work performed, an examination or inquiry is needed—especially in instances where an employee has been cleared to return to work by his/her treating physician and there is no other reliable evidence to suggest

concern regarding the employee's physical or mental state.

4. What you do is just as important as what you say.

Bear in mind that even in the absence of a formal written policy, a Court may determine an employer has an unwritten policy—a business practice—that demands inquiry and/or testing. The *LaCroix* Court made such a finding, specifically noting in its opinion that while BPD did not have an official written policy regarding its post-leave examination requirements, the Department had a "consistent practice" of requiring such physical and psychological evaluations. As such, an employer cannot avoid liability simply because the policy was never reduced to writing.

Conclusion

The ADA is full of complex legal requirements, including those involving mandatory medical examinations for current employees. Before drafting a policy or requiring such examinations, employers should consult with trusted legal counsel to ensure their actions do not run afoul of the ADA.