

# Require an applicant medical exam? Job offer must come first

The ADA protects job applicants from discrimination based on disability, and one of these protections is the right to be free from medical tests or examinations as part of the initial selection process. The idea is that such exams may reveal hidden disabilities and dissuade those who have disabilities from even applying for jobs they are qualified to fill.

But employers also need to know that the applicants they bring on board don't have medical problems that could make it impossible or unsafe to do the jobs once they start.

That's one reason the EEOC has come up with a strict set of guidelines for when employers can demand medical exams or tests.

Essentially, an employer can ask an applicant to undergo a job-related medical examination only *after* it has made a job offer. The offer can be conditional on passing the examination, but cannot be required before the applicant receives a formal offer of employment.

An employer that wants to avoid litigation should make absolutely clear that the applicant has received a job offer, conditional on passing the medical examination or test. You can do this by speaking directly with the employee and explaining the offer and the exam requirement, then carefully noting it in the applicant's file.

**Advice:** The best approach is to let the employee know in writing that he has a job, contingent on passing the exam or meeting legitimate and business-related medical criteria.

**Recent case:** Brian Conto worked as a mechanic and had a medical history that included a liver transplant after suffering for years with Budd-Chiari syndrome, a rare disease. He took anti-rejection drugs and was doing well, despite periodic problems. Then, he had an auto accident and began taking prescription medication to reduce back pain.

None of this kept him from doing his job.

So when he applied for a job with Norfolk Southern, a railway company, he didn't mention his past or current health problems. But the company asked him to fill out numerous medical questionnaires and undergo medical examinations.

Ultimately, the railroad did not hire him.

At the core of the lawsuit Conto subsequently filed was whether he got an employment offer contingent on passing a physical examination or whether the exam and medical information were required *before* an offer. Conto claimed no one told him he had a job offer, while Norfolk Southern said it did make an offer and only afterward requested medical exams and information.

The court said there was no clear-cut evidence either way of whether or not Norfolk Southern had made an

offer. So it sent the case to trial.

If the jury believes Conto, then Norfolk Southern may find itself in the odd position of losing an ADA lawsuit brought by an applicant who never asked for any accommodations or even claimed he was, in fact, disabled. (*Conto v. Norfolk Southern Corporation*, No. 05-1509, WD PA, 2007)