

May 20, 2005

## **EMPLOYMENT ALERT**

### **DISABILITY DISCRIMINATION: WHEN IS A JOB OFFER A “REAL” OFFER?**

In an opinion issued recently, the Ninth Circuit Court of Appeals held that a conditional offer of employment subject to both medical examinations *and* non-medical contingencies, rather than an offer conditioned on nothing other than successful completion of a medical examination, is not a “real” offer of employment. The ADA prohibits an employer from making a conditional job offer subject to a medical examination until all non-medical information has been obtained and evaluated.

Plaintiffs in *Leonel v. American Airlines, Inc.*, applied in writing and were initially interviewed by telephone for flight attendant positions with American Airlines. They were then flown to American’s Dallas, Texas, headquarters and, after group and individual interviews, were issued both oral and written conditional offers of employment that were contingent upon passing background checks and medical examinations.

American immediately sent the plaintiffs to its on-site medical department where they were required to complete medical history questionnaires and give blood samples. Plaintiffs were warned in writing that providing false information or not providing complete information would be grounds for non-hire. Both in completing the forms (one of which required them to list all medications and another which asked whether they had any medical conditions) and during a meeting with nurses to discuss their medical histories, none of the plaintiffs disclosed their HIV-positive status or relevant medications. Eventually, following results of the blood tests, plaintiffs disclosed their HIV-positive status. American then rescinded its offers of employment on the basis of “nondisclosure” for failure to be candid or to provide full and correct information.

The ADA regulates the sequence of the hiring process so that any medical examinations or inquiries occur only after the employer makes a “real” job offer. This sequence ensures that the potential for improper consideration of a disability is minimized. The Court stated that to issue a “real” job offer, the employer must have either completed all non-medical components of its application process or be able to demonstrate that it could not reasonably have done so before issuing the offer.

The sequencing of the process is key and its structure protects applicants who wish to keep their personal medical information private. When employers abide by the two-step process, an applicant knows when he or she has been denied employment on medical grounds and can

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challenge an allegedly unlawful denial. The Court held that American Airlines was not entitled to obtain the medical information until it had completed the background checks unless it could demonstrate that it could not reasonably have completed the background checks before the medical examinations. The Ninth Circuit Court of Appeals remanded the case to the District Court for further proceedings.

This opinion reminds employers that the ADA prohibits medical examinations and inquiries until after the employer has completed all other components of its application process, and has made a “real” job offer.

Labor and Employment Practice Group  
HARRANG LONG GARY RUDNICK P.C.

Sharon A. Rudnick  
Caroline R. Guest  
Jens Schmidt  
Walter Miller  
Christine Cusick Nesbit  
Wendy J. Baker  
Judith A. Recchio

\* \* \*

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