

HR NEWS



Creating & Maintaining a Healthy Work Environment



Understanding and Making Effective Use of Direct Threat Assessments Under the ADA

By Timothy B. McConnell

Following enactment of the 2008 amendments to the Americans with Disabilities Act (ADA), employers were confronted with a dramatically different and very employee-friendly statute. A number of challenging issues have arisen from the greatly broadened scope of ADA protections.

Questions involving reasonable accommodations, the interactive process and leave have predominated for employers and human resources professionals. This is due in large part to the grey area these issues occupy.

Another area of the ADA should not be overlooked, however. The direct threat medical assessment, which allows employers to conduct disability-related medical examinations of employees who potentially pose significant risks for substantial harm, can serve as an extremely useful tool for managing aberrant, hostile or threatening employee behavior in the workplace.

Conducting Medical Examinations Under the ADA

Understanding the ADA's provision for direct threat assessments requires first understanding what the law allows and forbids when it comes to conducting any type of medical examination. As a threshold matter, the ADA prohibits employers from requiring a current employee to undergo a medical examination unless the procedure can be "shown to be job-related and consistent with business necessity."

The next thing to know is that the ADA defines a medical examination as "a procedure or test that seeks information about an individual's physical or mental impairments or health." Examples of ADA-compliant medical examinations include vision tests conducted and analyzed by ophthalmologists or optometrists, blood pressure screening and cholesterol testing, range-of-motion tests that measure muscle strength and motor function, and psychological tests.

Third, it matters when an employer asks a job applicant or employee to undergo a medical examination. Pre-offer, an employer is prohibited from requiring any medical examinations even if the procedures are job-related.

An employer may require medical examinations after making an offer of employment and before an employee starts working. This is true regardless of whether the medical examination is related to the job being offered as long as each incoming employee in the same job category undergoes the same examinations.

During a person's period of employment, an employer may require medical examinations only if the exams are job-related and consistent with a business necessity. This is when the direct threat assessment comes into play.

During employment, a medical examination is considered to be job-related and consistent with a business necessity when an employer has "a reasonable belief based on objective evidence" that



- 1) An employee's ability to perform essential job functions will be impaired by a medical condition; or, in keeping with the theme of this article,
- 2) An employee will pose a direct threat due to a medical condition.

The ADA defines a direct threat as “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.” In order to determine whether an employee poses a direct threat, an employer must conduct an individualized assessment of the employee's ability to safely perform the functions of their job while taking into consideration the duration of the risk and the nature, severity, likelihood and imminence of the potential harm. Additionally, any determination of a direct threat must be based on an objective assessment of facts and/or be supported by medical evidence, which requires a medical examination.

A Direct Threat Scenario

At this point, you are probably thinking, “Wonderful, another typical lawyer response. I now have a bunch of legal terms and concepts but no idea how to apply them to real-life situations.” This is precisely the problem with using ADA's direct threat assessment.

While the statute and the Equal Employment Opportunity Commission provide some abstract guidance, employers struggle with carrying out a direct threat assessment in their actual workplaces. Permit me to make this discussion more tangible by laying out the following scenario.

Mary works as a nurse at ABC Hospital. Over the past 6 months, her homelife has fallen apart. She recently finalized her divorce, and her son faces a criminal prosecution.

Mary's personal issues have begun surfacing at work, and her performance has suffered. She recently told a coworker, “Maybe I'd be better off I wasn't here. Maybe I should just put a gun to my head. Maybe I should just not be here.” The coworker informed Mary's supervisor, Tom, of the comment.

Over the next several weeks, Tom received multiple reports from surgeons, operating room nurses, anesthesiologists and other nurses regarding Mary's inability to concentrate on taking care of patients. In one incident, a surgeon had to ask Mary at least twice to raise a patient's operating table because Mary was not paying attention. When the surgeon managed to get Mary's attention, she responded by saying, “I'm not worth anything. What good does it do or what difference does it make? Why should I even be here? Maybe I should do everybody a favor and not be around.”

What can or should ABC Hospital do about Mary?

This scenario falls precisely within the direct threat exception for conducting a medical examination because there is significant evidence that would cause a reasonable person to inquire whether Mary is still capable of performing her job. Consequently, requiring Mary to undergo a medical examination would be job-related and consistent with the hospital's business necessities. ABC Hospital can, and should, require Mary to do so to determine whether she can safely perform her job duties.

Steps and Rules for a Direct Threat Assessment and Decision

Once ABC Hospital determines that requiring Mary to undergo a medical examination is warranted and permissible under the

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ADA, its managers and HR team must take the following steps and considerations.

Identify an Appropriate Health Care Professional to Conduct the Examination

First, the hospital can choose the health care professional who conducts the examination. It is important for ADA compliance, however, that the health care professional have expertise in Mary's specific condition and be able to provide medical information that allows ABC Hospital to determine the effects of the condition on Mary's ability to perform her job.

The hospital must also pay all the costs associated with the employee's visit to the health care professional.

Under ADA, the hospital can and should communicate with the health care professional throughout the assessment process. Unfortunately, and unlike with administration of Family and Medical Leave Act leave, there are no forms upon which an employer can rely.

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The hospital should work with their employment counsel to craft a very narrowly focused letter that states the reasons it is requesting this medical examination of Mary. The letter should also include any relevant facts it would be helpful for the health care professional to know when deciding which tests to do.

Last, the letter should include a specific directive that the medical examination be limited to determining whether Mary can continue performing her job, with or without a reasonable accommodation, without posing a direct threat. An employer cannot ask for more than that and should make it clear that the requested examination is for only the limited purpose stated. Several laws prohibit the hospital from requesting Mary's full medical records, which are likely to contain information unrelated to whether she can perform her essential job duties.

Temporarily Relieve Mary of Her Patient Care Duties

It will be wise for ABC Hospital to place Mary on a paid leave of absence. Taking this approach delivers two benefits. It does not

exacerbate a potentially dangerous situation, and it eliminates the possibility that Mary could claim lost wages damages if she files an ADA lawsuit.

The hospital should be prepared to make a financial commitment to protecting patients and its bottom line. The employer may have to accept that the examination may not happen as quickly as it would like. Working with clients in similar situations over many years, I have seen that it can take some time to identify a health care provider who is willing to conduct a one-time medical examination, particularly when potential mental-health issues are involved.

Communicate About the Medical Examination With Mary in Writing

Documenting each step of the process is important for keeping Mary informed and for helping to ensure her attendance at meetings with the health care professional. The hospital should make every effort to keep these communications confidential and to assure Mary that it is doing so. Most importantly, the information received from the health care professional should only be shared on a very limited basis with those who have a provable need to know.

Follow the Findings and Recommendation of the Health Care Professional

Under the ADA, an employer must follow the recommendation of the health care professional even if their opinion is contrary to what the employer hoped. In the scenario presented, ABC Hospital would have to reinstate Mary if the health care professional recommends doing that regardless of what hospital managers and the HR team wanted to hear.

Although the ADA's direct threat assessment process does not receive the attention of other issues, it is a useful tool for employers who need to manage difficult situations involving employee behavior. Following the steps laid out in this article will permit an employer to make effective use of a direct threat medical examination.

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