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The U.S. Equal Employment Opportunity Commission

EEOC Office of Legal Counsel staff members wrote the following informal discussion letter in response to an inquiry from a member of the public. This letter is intended to provide an informal discussion of the noted issue and does not constitute an official opinion of the Commission.

ADA: Post-Offer, Pre-Employment Medical Exams

February 26, 2009

Dear _____:

This is in response to your letter dated January 5, 2009, asking whether the Americans with Disabilities Act (ADA) permits _____ to require its drivers to meet the same physical qualification standards that the Federal Motor Carrier Safety Administration (FMCSA) mandates for interstate commercial motor vehicle operators. You also ask whether _____ may conduct post-offer pre-employment medical examinations and require drivers who "exhibit behavior" or an inability to safely operate a motor vehicle to submit to a medical examination by a doctor of _____'s choice "according to U.S. DOT's requirements." Although you acknowledge that _____ is not obligated to comply with FMCSA's physical qualification standards, you state that your drivers are exposed to the same operating conditions and present a similar risk to themselves, their passengers, and the general public as drivers regulated by the FMCSA. You also note that _____ must comply with other FMCSA requirements, such as hours of service, vehicle pre-trip inspections, and alcohol and drug testing.

A. Qualification Standards

1. FMCSA's Physical Qualifications for Drivers

The FMCSA is responsible for the medical certification of drivers of commercial motor vehicles operating in interstate commerce as defined by 49 C.F.R. § 390.5. A commercial motor vehicle (CMV) is defined as any motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle generally has a gross weight of at least 10,001 pounds and is designed or used to transport more than eight passengers (including the driver) for compensation. *Id.*

According to FMCSA regulations, a person is physically qualified to drive a CMV if that person: (1) meets certain physical standards (e.g., has no missing foot, leg, hand, or arm or no impairment of a hand or finger that interferes with the normal tasks associated with operating a CMV; has no established medical history or diagnosis of diabetes currently requiring insulin for control; satisfies specific vision requirements; and has no medical history or diagnosis of certain heart conditions, high blood pressure, epilepsy, respiratory dysfunction, mental or nervous disorders, or arthritic or vascular diseases likely to interfere with his/her ability to operate a commercial motor vehicle)¹; and, (2) has a medical examiner's certificate indicating that he or she is physically qualified to drive a CMV. *Id.* at § 391.41(a) and (b). Drivers regulated by the FMCSA are required to have a medical examination and be recertified at least every two years.

2. Establishing Nondiscriminatory Qualification Standards and Selection Criteria Under the ADA

The ADA does not prohibit an employer from establishing job-related qualification standards, including education, skills, work experience, and physical and mental qualifications necessary for job performance, health, and safety. An employer, however, may not use qualification standards or other selection criteria that screen out or tend to screen out an individual with a disability or any class of individuals with disabilities, unless the standard or criterion is shown to be job-related and consistent with business necessity. 42 U.S.C. §§ 12112(b) (6) and 12113(a); 29 C.F.R. § 1630.10.

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Basically, this means that the standard accurately predicts an individual's ability to perform the essential functions of the particular position he or she holds or desires. 29 C.F.R. Part 1630, App. §1630.10. Even if the standard is shown to be job-related and consistent with business necessity, an employer still must consider whether there is a reasonable accommodation that will enable an otherwise qualified individual with a disability to satisfy it.

In order to establish that safety requirements that screen out or tend to screen out an individual with a disability or class of individuals with disabilities are job-related and consistent with business necessity, an employer must show that the individual excluded from the job poses a "direct threat" (i.e., a significant risk of substantial harm) that cannot be reduced or eliminated through reasonable accommodation. 29 C.F.R. Part 1630, App. § 1630.15 (b). The determination of whether an individual poses a significant risk of substantial harm must be made on a case-by-case basis by identifying the specific risk posed by the individual. In particular, an employer should consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and, (4) the imminence of the potential harm. *Id* at § 1630.2. The availability of any reasonable accommodation that would reduce or eliminate the risk also must be considered. This assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence. Relevant evidence may include input from the individual with a disability, the experience of the individual with a disability in previous similar positions, and opinions of medical doctors, rehabilitation counselors, or physical therapists who have expertise in the disability involved and/or direct knowledge of the individual with the disability. 29 C.F.R. Part 1630, App. § 1630.2(r).

Notwithstanding these requirements, an employer may assert as a defense to a claim of discrimination under Title I of the ADA that a qualification standard that screens out an individual with a disability is *required or necessitated* by another federal law. 29 C.F.R. § 1630.15 (e). This "conflict of federal laws" defense would not apply to _____ because you state that the vehicles operated by your drivers transport a maximum of seven passengers and do not meet the FMCSA's definition of a CMV. Therefore, you would have to establish that use of an FMCSA standard is job-related and consistent with business necessity by showing that any individual screened out by the standard would pose a direct threat.

B. Disability-Related Inquiries and Medical Examinations

1. Preemployment Stage

Title I of the ADA strictly limits the circumstances under which employers may make disability-related inquiries or require medical examinations of applicants and employees. In most instances, an employer may not ask applicants disability-related questions or require them to undergo medical examinations before a job offer is made. Once the employer has obtained and evaluated all non-medical information and has made a "real offer" of employment, it may require all entering employees in the same job category to answer disability-related questions or submit to medical examinations and may conduct medically related follow-up examinations. This means that, after extending an offer of employment, _____ could require all drivers operating the same type of vehicle to submit to the kind of medical examination required by the FCMSA. However, if _____ withdraws the offer from an individual with a disability, it must show that the individual is unable to perform the essential functions of the job or that the person posed a direct threat. See EEOC Enforcement Guidance: *Preemployment Disability-Related Questions and Medical Examinations (1995)*, available at <http://www.eeoc.gov/policy/docs/preemp.html>.

2. During Employment

Disability-related inquiries and medical examinations of employees generally are permitted only where they are job-related and consistent with business necessity. Usually, this means that an employer knows about a particular employee's medical condition, has observed problems, and reasonably can attribute the problems to a medical condition. An employer also may be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his ability to perform essential job functions or will pose a direct threat. See *EEOC*

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Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA) (July 26, 2000) (hereafter "Guidance"), <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>, at Q. 5. _____, therefore, may ask disability-related questions or require a medical examination of a specific driver when it observes problems or behavior indicating that the driver will be unable to perform the job or will pose a direct threat due to a medical condition.² However, if documentation or a medical examination establishes that the driver is able to drive safely, _____ cannot refuse to allow him or her to return to work or require the individual to submit to a medical examination every two years.

I hope that this information is helpful to you. This letter is an informal discussion of the issues you raised and does not constitute an official opinion of the EEOC. If you have any further questions, you may contact me at 202.663.4638.

Sincerely,

/s/
Joyce Walker-Jones
Senior Attorney Advisor
ADA Policy Division

Footnotes

¹ Drivers who have a loss or impairment of a limb may apply for a Skill Performance Evaluation certificate by providing certain documentation and satisfactorily completing a road test. The FCMSA also grants waivers or exemptions for some drivers with diabetes and those whose vision does not meet the established criteria. 49 C.F.R. § 391.45(c).

² An employer always is allowed to have an employee whom it reasonably believes is unable to work without posing a direct threat examined by a medical professional of the employer's choice. The employer, however, must pay for the cost of the medical examination.

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