The Americans with Disabilities Act, a Decade Later  
December 31, 2000

It has been ten years since President George Bush signed into law the Americans With Disabilities Act of 1990 (the "ADA" or the "Act"), 42 U.S.C. §§ 12201-12213, which prohibits discrimination in employment based on disability and affirmatively requires "reasonable accommodation" in the workplace of persons with disabilities. When the ADA was enacted, it was estimated that as many as 43 million Americans might fall within the statute's protections and, as anticipated, the law has had a dramatic effect on the workplace. The ADA has also become fertile ground for employment litigation: over 17,000 charges of discrimination under the ADA were filed with the Equal Employment Opportunity Commission (the "EEOC") during its last fiscal year.

The basic obligations imposed by the ADA have become familiar to employers. In addition to the non-discrimination and reasonable accommodation requirements, the statute prohibits retaliation against any person who opposes, or participates in the opposition of, unlawful practices under the ADA. Title I of the ADA (the employment-related provisions) applies only to employers with 15 or more employees, and certain groups (including the United States, Indian tribes, and private clubs) are specifically exempt from coverage under the Act.

To bring a claim against an employer for disability discrimination under Title I of the ADA, an employee must demonstrate that he or she was wrongfully discriminated against by showing he or she was disabled, as defined by the ADA; possessed an ability to perform the essential functions of the job, with or without reasonable accommodation; and was terminated, or otherwise negatively treated, because of the disability.

Even after ten years, the law in this relatively nascent area is rapidly evolving. This article summarizes some of the more significant of these recent legal developments, particularly in the Second Circuit Court of Appeals (which includes New York and Connecticut) and the Ninth Circuit Court of Appeals (which includes California). Finally, this article highlights certain important revisions to California's state law regarding disability discrimination.

EEOC Issues Enforcement Guidance Concerning Disability-Related Inquiries and Medical Examinations of Employees Under the ADA

In July 2000, the EEOC issued enforcement guidance addressing the ADA's limitations on disability-related inquiries and medical examinations during employment, all of which must be "job-related and consistent with business necessity" to be permissible under the ADA. 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c). A disability-related inquiry or medical exam is job-related and consistent with 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 (2) an employee's medical condition will pose a direct threat to others.

The EEOC's recently published enforcement guidance gives examples of the kinds of questions that are and are not "disability related" and examples of tests and procedures that generally are and are not "medical." According to the EEOC, "disability-related" inquiries are those questions that are likely to elicit information about a disability, including, for example, questions that seek to elicit information regarding an employee's prior workers' compensation history, use of prescription medications, or genetic information. The EEOC defines a "medical examination" as a procedure that seeks information about an individual's physical or mental impairments or health, including vision tests; blood, urine and breath tests to check for alcohol use; blood pressure screening; cholesterol testing; and psychological tests designed to identify a mental disorder or impairment. The following generally are not considered "medical examinations": tests to determine the current illegal use of drugs; physical agility tests; psychological tests that measure personality traits, preferences, and habits; and polygraph tests.

Consistent with the EEOC's enforcement guidance, employers may be justified in asking employees disability-related questions or requiring employees to submit to a medical examination under a variety of circumstances, such as when a reasonable accommodation is requested by an employee whose disability or need for accommodation is not obvious. Generally speaking, however, employers may not require employees to undergo routine, periodic medical examinations.

Finally, it is important for employers to recognize that any employee, not only those with disabilities, may challenge a disability-related inquiry or medical examination that is not job-related and consistent with business necessity.

**Mental and Physical Disabilities Do Not Require the Provision of Identical LTD Benefits, According to the Second Circuit**

The Second Circuit Court of Appeals in New York recently determined that the ADA is not violated by the adoption of a long term disability ("LTD") plan which provides less generous benefits to those suffering from mental and emotional disabilities than to those suffering from physical disabilities. See *EEOC v. Staten Island Bank* and *EEOC v. Chase Manhattan Bank* (consolidated for appeal), 207 F.3d 144 (2d Cir. 2000).

One of the two LTD plans at issue on appeal provided benefits to employees with physical disabilities until retirement age, but provided a maximum of 18 months of benefits to those suffering from mental or emotional disabilities. The other plan placed no cap on benefits payable to those with physical disabilities, but imposed a cap of two years on
benefits payable to those with mental disabilities. The EEOC brought suit against both employers, contending that an LTD plan which provides less generous LTD benefits for mental disabilities than for physical disabilities violates the ADA, since such a plan, in effect, discriminates against employees who suffer from mental disabilities "because of" their disability.

The Second Circuit affirmed the dismissal of the EEOC's complaint in each case. The court reasoned that the ADA requires only that employers offer the same LTD plan to all employees irrespective of their disability status, not that employers offer identical LTD benefits to those with different disabilities. In other words, the ADA regulates only "equal access" to the LTD plan sponsored by an employer; it does not require that the plan provide equal benefits for different conditions. Thus, because the LTD plans at issue offered all employees (whether non-disabled, physically disabled or mentally disabled) access to the same protections against the risk of becoming unable to work, the Second Circuit determined that the plans did not violate the ADA. The court's decision was consistent with prior decisions of several other federal appellate courts, including a decision earlier this year by the Ninth Circuit in San Francisco, Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104 (9th Cir. 2000).

Second Circuit Requires Plaintiffs to Show Existence of Reasonable Accommodation

In another ADA decision favorable to employers, the Second Circuit affirmed the district court's judgment for the employer in a disability discrimination case because the plaintiff, who sought a transfer to a different position as an accommodation of his disability, failed to meet his burden of demonstrating that a vacancy existed in the position he sought. Jackan v. New York State Department of Labor, 205 F.3d 562 (2d Cir. 2000).

In Jackan, the plaintiff satisfactorily performed his desk job with minor accommodations for his persistent eye condition, arm and leg problems, and back injury. In 1993, plaintiff requested a transfer to a non-desk position; his employer granted this request. Following spinal surgery in 1995, plaintiff suffered severe neck and back complications and was absent from work as a result. He requested a transfer to a desk job. This request was denied, due to the lack of vacancies and to provisions of New York civil service laws which bar transfers to positions for which "preferred lists" or "reemployment rosters" exist.

After a bench trial, the district court dismissed plaintiff's ADA claim. First, plaintiff failed to demonstrate that an accommodation existed which would permit him to perform the essential function of the field job. Second, plaintiff was not entitled to a transfer to a desk job because he did not show the existence of a vacancy, and because civil service
In reviewing the lower court's decision on appeal, the Second Circuit applied a two-step burden-shifting process to determine whether the employer's failure to accommodate constituted a violation of the ADA. Under this approach, the plaintiff bears the initial burden of proving that an accommodation exists that permits him or her to perform the job's essential functions. If the plaintiff meets this initial burden, the burden shifts to the employer to demonstrate that the proposed accommodation is not reasonable. In applying this test to the specific facts presented in Jackan, the Second Circuit concluded that plaintiff failed to fulfill his initial burden of proof because he was unable to establish the existence of a vacancy. Accordingly, the Court found in favor of the employer without reaching the issue of whether the requested accommodation was reasonable.

Consistent with the Second Circuit’s decision in Jackan, employees seeking to invoke the protections of the ADA must do more than merely speculate as to the availability of a reasonable accommodation for their disability; they must identify a specific accommodation. In the case of a request for a job transfer, this threshold burden requires a showing that an appropriate vacancy exists; a request that the employer create a position where none exists will not suffice to meet the plaintiff’s burden. If an employee seeking a transfer as a reasonable accommodation cannot identify a vacant position for which he or she is qualified, the court can be expected to find for the employer, without reaching the question of the reasonableness of the employee's proposed transfer.

**Ninth Circuit Interprets Narrowly the "Direct Threat" Defense**

While the ADA generally prohibits discrimination against applicants and employees because of their disabilities, the Act provides explicitly for an affirmative defense which permits employers to impose a "requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113. Until recently, many employers (especially those in safety-sensitive industries where potential exposure to tort liability is a major concern) had interpreted this affirmative defense to mean that they could legitimately deny employment to prospective employees based on a concern that they would pose a direct threat to their own health and safety if hired.

However, the United States Court of Appeals for the Ninth Circuit, in San Francisco, has ruled that the "direct threat" defense does not apply to employees or job applicants who pose a threat solely to their own health and safety, and not that of others in the workplace. *Echazabal v. Chevron USA, Inc.*, 226 F.3d 1063 (9th Cir. 2000). The court in *Echazabal*
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noted that the historical application of paternalistic rules (such as one permitting employers to deny employment to a person whose own health or safety is thought to be at risk) have often resulted in exclusionary practices. The court further opined that disabled persons should be left to determine for themselves what kinds of risks are worth taking.

The plaintiff in Echazabal worked at a Chevron oil refinery, where he was exposed to various solvents and chemicals. Twice, he applied for employment directly with Chevron, and twice, he was offered the position contingent on his satisfactory completion of a pre-employment physical examination. On both occasions, Chevron revoked its conditional offers of employment after concluding that Echazabal’s liver might be damaged by continued exposure to the solvents and chemicals.

Eventually, Echazabal lost his job because of his liver condition and sued for disability discrimination under the ADA. In response, Chevron claimed that its actions were justified under the "direct threat" affirmative defense, because continuing employment at the refinery posed a threat to Echazabal’s health. The district court agreed and granted summary judgment to Chevron.

The Ninth Circuit reversed the district court’s decision, concluding that the "direct threat" defense does not apply where the employment at issue poses a direct threat only to the employee or job applicant’s own health or safety, and not that of other employees. Interestingly, several months after the Ninth Circuit’s opinion was filed, one member of the three-judge panel, Hon. Stephen S. Trott, added a dissenting opinion in which he expressed concern that the court was ignoring reality and that the majority’s position was untenable (e.g., an employee could not lawfully be deemed incapable of performing the essential functions of his job, even though, as a result of his disability, performing those essential functions would kill him). Judge Trott concluded his dissent by noting the existence of a conflicting decision of another federal appeals court (Moses v. American Nonwovens, Inc., 97 F.3d 446 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997)).

This apparent split in the Circuits on the scope of the "direct threat" defense may prompt further examination of the issue by the U.S. Supreme Court, or it may result in legislative action. Until then, however, employers should consult counsel before rejecting for employment a candidate whose disability poses a direct threat only to his or her own health and safety.
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**Ninth Circuit Holds That Refusal to Rehire Without a Medical Release Does Not Constiitute an Illegal Pre-Offer Medical Inquiry**

In *Harris v. Harris & Hart, Inc.*, 206 F.3d 838 (9th Cir. 2000), the Ninth Circuit concluded that an employer did not violate the ADA by refusing to rehire an employee with a known disability without a medical release authorizing his return to work. The plaintiff in *Harris* was a sheet metal worker who had previously resigned because his employer allegedly failed to reasonably accommodate his carpal tunnel syndrome. The court ruled that because the plaintiff was a former employee with a known recent disability, the ADA did not preclude his employer from making appropriate inquiries to determine what accommodations might be necessary upon the employee's rehire. The court also noted that it is sensible to permit employers under such circumstances to request a medical release prior to rehiring a disabled former employee, just as employers are unquestionably permitted to require employees injured on the job to provide a medical release before returning to work.

**Major Amendments to California State Law Provide New and Broader Protections to Employees and Job Applicants**

The California Fair Employment and Housing Act ("FEHA") prohibits discrimination against employees and job applicants on several bases, including medical condition or disability. Recent FEHA amendments have substantially broadened the protections for individuals with disabilities and imposed additional obligations on employers.

These new protections, which take effect on January 1, 2001, include expanded definitions of the types of mental or physical conditions that qualify as disabilities under FEHA and a relaxation of the standard for establishing that a particular mental or physical impairment meets FEHA's definition of "disability." For example, under current law, a condition constitutes a protected "disability" only if it "substantially limits" a major life activity. Under FEHA as amended, however, an impairment constitutes a disability if it merely makes "the achievement of a major life activity difficult." In addition, the definition of "major life activity" under the newly-amended FEHA includes "physical, mental, social and employment-related activities," and an individual will be considered "disabled" if he or she is limited in performing a specific job (rather than a broad range of jobs, as required by the ADA).

Moreover, the amendments to FEHA preclude employers from making disability-related inquiries to any employee or job applicant, except in accordance with the conditions set forth in the ADA. The newly amended statute also places a duty on employers to engage in a timely, good faith and interactive process at the request of a disabled employee or job applicant to determine whether any reasonable accommodations exist. Finally, the new law will shift the burden of
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proof to the employer to defend any adverse action taken with respect to a disabled individual. Previously under FEHA, the burden was on the employee or job applicant to prove that the challenged adverse action was based on a disability.