

[send to a friend](#) 

## ADA and the Hiring Process

*By Martin J. Mayer, Jones & Mayer Law Firm and General Counsel, California Police Chiefs Association, Fullerton, California*

**P**rocessing applicants for law enforcement is time consuming and costly. Because of the length of time it takes to conduct the process, including the costly background investigation, departments are interested in making a conditional job offering to hold the applicant's commitment to the department before finishing the processing of applications. In California, the question was recently raised if it is legally necessary to finish the background investigation before making a conditional offer of employment under the Americans with Disabilities Act<sup>1</sup> and the equal employment opportunity laws.<sup>2</sup> In the January 2009 issue of the *Police Chief*, [this column](#) updates readers on amendments to the Americans with Disabilities Act.<sup>3</sup> This month's column focuses on preemployment screening.

### The Legal Principles

In "ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations," the U.S. Equal Employment Opportunity Commission (EEOC) states that under the Americans with Disabilities Act of 1990 (ADA), "[a] job offer is real if the employer has evaluated all relevant non-medical information which it reasonably could have obtained and analyzed prior to giving the offer."<sup>4</sup>

Despite the general principle that all nonmedical information should be gathered before the conditional job offer is made, some attorneys are advising law enforcement agencies that they have a right to conduct a sizeable part of the peace officer background investigation, which would include nonmedical inquiries, after a conditional offer of employment has been extended to the candidate.

Since many members of the California Police Chiefs Association (CPCA) sought clarification on this advice, as CPCA's legal counsel, we took a close look at the effect on local departments. At the end of our inquiry, we concluded that the burden will be on the employer to justify deviating from the established practice of making all nonmedical inquiries before making the conditional offer of employment. In our opinion, the risk is significant any time such a deviation occurs, and the employer faces the burden of litigation to prove it didn't violate the ADA requirements. Departments are encouraged to secure a formal opinion from their agency's legal counsel before conducting the background investigation after the conditional job offer is made.

### ADA, EEOC, and the Hiring Process

The EEOC Employment Guidance sets forth the EEOC's position under the ADA, on what preemployment disability-related questions and medical examinations are permitted.

The EEOC guide states further that, "[i]n the past, some employment applications and interviews requested information about an applicant's physical and/or mental condition" which "was often used to exclude applicants with disabilities before their ability to perform the job

was even evaluated.” The guide continues: “As a result, Congress established a process within the ADA to isolate an employer’s consideration of an applicant’s non-medical qualifications from any consideration of the applicant’s medical condition.”<sup>5</sup>

In other words, the process was designed to allow the prospective employer to first evaluate all nonmedical aspects of the applicant in order to determine whether or not this was a person the employer wanted to hire. After evaluating the applicant, and once the employer decides this is a desirable person to hire, a conditional offer of employment is made; the condition being that the applicant is physically and mentally capable of performing the essential job functions.

Then, at that time, and only at that time, would the employer be permitted to make medically related inquires. Additionally, those questions and medical evaluations must be relevant to the essential functions of that particular job and must be required of all applicants applying for that job category, not just those with disabilities.

### Seeking Clarification for Today’s Hiring Process

In January of 2008, California’s executive director of the Commission on Peace Officer Standards and Training wrote to Reed Russell, legal counsel for the EEOC, to ask whether “a conditional offer of employment extended prior to the conduct of a peace officer background investigation [would] be considered ‘bona fide.’”<sup>6</sup> The objective is to free background investigators from the need to bifurcate the investigation into a pre-offer phase addressing nonmedical issues and a post-offer phase investigating medical concerns, broadly defined to include history of illegal drug use and alcoholism. According to the California POST, experience has shown the pre-offer and post-offer phases are costly, ineffective, and a significant public safety issue.<sup>7</sup>

EEOC’s legal counsel responded in May 2008 and stated, initially, that the term “‘background investigation’ . . . is too broad for us to state that the entire background investigation may or may not be conducted at the post-offer stage consistent with the ADA. Nevertheless, based on the information in your letter, . . . we conclude that a law enforcement agency complying with your state’s regulations and your agency’s selection standards may properly perform the following at the post-offer stage: (1) evaluate certain ‘official documents’ that cannot be obtained in a timely manner during the pre-offer period and (2) contact references.”<sup>8</sup>

The legal counsel goes on to say that “this response does not constitute an official opinion of the U.S. Equal Employment Opportunity Commission (EEOC), but is intended to provide informal guidance on the questions you raise.”<sup>9</sup>

This disclaimer by EEOC is of monumental importance, since no one can follow the informal guidance of EEOC, and then, if sued, raise a defense that they were relying on this informal guidance as legal advice.

### Exceptions to the Rule

The informal guidance from EEOC’s legal counsel notes that the EEOC guide acknowledges “that employers in general, and law enforcement agencies in particular, may sometimes justify obtaining and analyzing non-medical information at the post-offer stage.”<sup>10</sup> EEOC legal counsel then refers to the cost of certain parts of the hiring process as justification for deviating from the general policy of putting off all medical inquiries until after the job offer has been made.

According to the U.S. Department of Justice publication *Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers*, “In general, a job offer is not viewed as ‘bona fide’ under the ADA, unless an employer has evaluated all relevant nonmedical information which, from a practical and legal perspective, could reasonably have been analyzed prior to extending the offer. However, a law enforcement employer may be able to demonstrate that a proper background check for law enforcement personnel could not, from a practical perspective, be performed pre-offer because of the need to consult medical records and personnel as part of the security clearance process. Where the police department uses the information from the medical exam during the background check, doing the background check at the post-offer stage saves the police department the cost of doing a

second background check.”<sup>11</sup>

From the perspective of this author, one who defends law enforcement agencies in suits alleging violations of ADA, this creates a quandary. Since the law is clear that a decision must first be made based on nonmedical factors, how can one justify using “information from the medical exam during the background check”?

### Delays in the Process

One other area of concern raised by California POST and addressed by the EEOC legal counsel deals with “significantly increasing the length of the entire hiring process” by not making the offer of employment early on in the process. California POST stated that securing official documents, such as records from the FBI, the Department of Justice, other law enforcement agencies, and the military, may take weeks or months and in some cases the entire hiring process can take more than one year.

In 2005, a California Chiefs of Police Association survey of more than 850 peace officer basic training academy recruits collected from 14 California peace officer academies revealed that the two issues applicants had the most difficulty with were the following:

- Time—the selection process took too long to complete.
- Communication—lack of contact during the process.

### Contacting References

One of the most difficult points to reconcile with the ADA itself and one addressed by the EEOC legal counsel has to do with contacting references after the conditional offer of employment has been made.

The EEOC counsel states that it is acceptable for the background investigator to ask references, such as past employers, family members, friends, and so forth, “both disability-related and non-disability-related questions.” He states, in a footnote, that “we believe significant cost increases incurred for any reason (such as the need to re-contact most or all references or close coordination is required between a background investigator and medical personnel) would suffice to justify making all of the contacts post-offer.”<sup>12</sup>

To further confuse the situation, the EEOC counsel states that “the delay inherent in conducting a bifurcated contact process depends significantly on the number of references that must be contacted and the number of questions to be asked.”<sup>13</sup>

### *Leonel v. American Airlines, Inc.*

California POST in its letter to the EEOC cited a decision from the Ninth Circuit U.S. Court of Appeals, *Leonel v. American Airlines, Inc.* (2005) 400 F.3d 702, which appeared to hold that background investigations must be conducted prior to the conditional offer of employment.

The *Leonel* court stated that “[o]ther courts have found offers not real, and medical examinations thus unlawfully premature, when an offer remained contingent upon a polygraph test, personal interview and background investigation,

. . . or upon completion of an application form, criminal background check and driver's test.”<sup>14</sup> These are exactly the types of background investigation issues discussed by the EEOC legal counsel in his letter to California POST.

The employer in *Leonel* also stated a desire to reduce the delay in processing applicants, one of the same issues raised by California POST. The court noted that, “[a]s justification for accelerating the medical examinations, American's Manager of Flight Service Procedures . . . explained that the company found it important to minimize the length of time that elapsed during the hiring process in order to compete for applicants. But competition in hiring is not in itself a reason to contravene the ADA's and FEHA's [California Fair Employment and Housing Act] mandates to defer the medical component of the hiring process until the non-medical component is completed.”<sup>15</sup>

The court ruled that American Airlines had to justify why it needed to make nonmedical inquiries at the post-offer stage and that it had failed to do so adequately for a summary judgment motion.

## Conclusion

“As legal counsel to the California Police Chiefs Association, it is our opinion that the risk is significant any time such a deviation occurs, and the employer faces the burden of litigation to prove it didn't violate the ADA.”

Therefore, prior to following such a practice, a written legal opinion should be secured from the law enforcement agency's attorney. Remember, the legal counsel of the EEOC stated that his letter “does not constitute an official opinion” of EEOC and “is intended to provide informal guidance” only. ■

## Notes:

<sup>1</sup>ADA (Americans with Disabilities Act) Amendments Act of 2008, <http://www.ada.gov/pubs/adastatute08.pdf> (accessed July 20, 2009).

<sup>2</sup>U.S. Equal Employment Opportunity Commission, “Federal Equal Employment Opportunity (EEO) Laws,” Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, the Age Discrimination in Employment Act of 1967, Titles I and V of the Americans with Disabilities Act of 1990, Sections 501 and 505 of the Rehabilitation Act of 1973, and the Civil Rights Act of 1991, [http://www.eeoc.gov/abouteeo/overview\\_laws.html](http://www.eeoc.gov/abouteeo/overview_laws.html) (accessed July 20, 2009).

<sup>3</sup>John M. Collins, “Americans with Disabilities Amendments Acts: What It Means for Law Enforcement Agencies,” *The Police Chief* 76 (January 2009): 12-13.

<sup>4</sup>U.S. Equal Employment Opportunity Commission, “ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations,” (October 10, 1995) <http://www.eeoc.gov/policy/docs/preemp.html> (accessed July 20, 2009).

<sup>5</sup>Ibid.

<sup>6</sup>Paul A. Cappitelli, Executive Director, California Commission on Peace Officer Standards and Training, to Reed Russell, Legal Counsel, Equal Employment Opportunity Commission, January 16, 2008, [http://www.post.ca.gov/bulletin/doc/AB\\_2028/2008-22-Supplement.pdf](http://www.post.ca.gov/bulletin/doc/AB_2028/2008-22-Supplement.pdf) (accessed July 20, 2009).

<sup>7</sup>California Police Officers Standard and Training Commission, Administrative Progress Report, January 2008. [http://www.post.ca.gov/bulletin/APRS/January\\_2008\\_apr.pdf](http://www.post.ca.gov/bulletin/APRS/January_2008_apr.pdf) (access July 14, 2009).

<sup>8</sup>Reed L. Russell to Paul A. Cappitelli, May 1, 2008, [http://www.post.ca.gov/bulletin/doc/AB\\_2028/2008-22-Supplement.pdf](http://www.post.ca.gov/bulletin/doc/AB_2028/2008-22-Supplement.pdf) (accessed July 20, 2009).

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.

<sup>11</sup>Disability Rights Section, Civil Rights Division, U.S. Department of Justice, *Questions and Answers: The Americans with Disabilities Act and Hiring Police Officers*, (March 25, 1997) <http://www.ada.gov/copsq7a.htm> (accessed July 20, 2009).

<sup>12</sup>Reed L. Russell to Paul A. Cappitelli, May 1, 2008, 6n. 7, [http://www.post.ca.gov/bulletin/doc/AB\\_2028/2008-22-Supplement.pdf](http://www.post.ca.gov/bulletin/doc/AB_2028/2008-22-Supplement.pdf) (accessed July 20, 2009).

<sup>13</sup>Reed L. Russell to Paul A. Cappitelli, May 1, 2008.

<sup>14</sup>*Leonel v. American Airlines, Inc.*, 400 F.3d 702, 709 (9th Cir. Cal. 2005).

<sup>15</sup>*Id.* at 710.

---

## POST SCRIPT TO THE CHIEF'S COUNSEL COLUMN

**By Paul A. Cappitelli, Executive Director, California Commission on Peace Officer Standards and Training, Sacramento, California.**

**T**he California Commission on Peace Officer Standards and Training (POST) acknowledges attorney Martin Mayer's different perspective regarding the sequencing of background investigations with reference to bona fide conditional offers of employment (COE). POST does not dispute that a COE is only “real” if the employer has evaluated all relevant nonmedical information which it *reasonably* could have obtained and analyzed prior to giving the offer. But the issue in question is: *What is “reasonable”?*

Mayer, POST, and the EEOC agree that it is *not* reasonable to conduct the *entire* background investigation post-offer. POST also agrees with Mayer's statement that “competition in hiring is not itself a reason to contravene the ADA's and FEHA's mandates to defer the medical component of the hiring process until the nonmedical is completed.” Rather than competition, POST's concern regarding unnecessarily long delays in the peace officer selection process focuses around the public health and safety implications resulting from insufficient staffing of peace officer positions.

POST sought guidance from the EEOC based on observing the challenges and frustration faced by background investigators not only due to excessive delays, but also surrounding the conduct of pre-offer interviews of relatives, employers, neighbors, and others. For example, certain POST-mandated areas of inquiry (such as substance abuse) are unquestionably medical in nature and thereby must be deferred until the post-offer phase. However, other seemingly nonmedical areas can also give rise to medical issues. For example, evaluating stress tolerance may necessitate inquiries related to psychological stability; learning ability inquiries may reveal learning disabilities.

Previously, POST addressed this issue by recommending the bifurcation of background investigations into pre-offer and post-offer phases. However, needing to parse out what is an acceptable versus unlawful pre-offer question, as well as the need for multiple interviews with the same individuals left investigators confused and frustrated. As a result, POST observed that some investigators unwittingly asked unlawful questions at the pre-offer stage; others avoided such inquiries at any time during the background investigation, risking job offers based on less than complete information.

POST sought clarification from the EEOC on behalf of its client agencies. That clarification was provided by the EEOC chief counsel. Although not an official opinion, POST felt it was reasonable to both seek and rely on the expertise of the agency responsible for enforcing the ADA.

The EEOC response echoes Mayer's assertion that a law enforcement agency should investigate everything that it reasonably can at the pre-offer stage, and further, that any employer—including law enforcement agencies—must justify the deferral of any part of the background.

However, experience has shown that a complete and thorough peace officer background investigation—as required by state law and POST regulations—may well provide such justification to selected aspects of that investigation.

The goal of POST is not to dictate, but rather to educate—offering guidance in the form of bulletins, good practice manuals, and training—to help our client agencies understand and appreciate the costs and benefits surrounding the sequencing of their hiring process. All of these materials and training repeatedly emphasize the most critical area of agreement between POST and Mayer; namely, the importance of heeding the advice of one's legal counsel, since, as this issue illustrates, laws by their very definition are subject to interpretation and spirited debate among legal experts.

*Editor's Note: The author and editor shared the September 2009 Chief Counsel column with the California POST since the subject was addressing the POST's communications with the Equal Employment Opportunity Commission. Paul A. Cappitelli, Executive Director of California POST, offered his observations in this post script.*

[Top](#)

From The Police Chief, vol. LXXVI, no. 9, September 2009. Copyright held by the International Association of Chiefs of Police, 515 North Washington Street, Alexandria, VA 22314 USA.

[Return to Article](#)

[send to a friend](#) 

The official publication of the International Association of Chiefs of Police.

The online version of the Police Chief Magazine is possible through a grant from the IACP Foundation. To learn more about the IACP Foundation, click [here](#).

All contents Copyright © 2003 - 2012 International Association of Chiefs of Police. All Rights Reserved.  
Copyright and Trademark Notice | Member and Non-Member Supplied Information | Links Policy

515 North Washington St., Alexandria, VA USA 22314 phone: 703.836.6767 or 1.800.THE IACP fax: 703.836.4543  
Created by Matrix Group International, Inc.®