

May 14, 1996

This responds to your March 7, 1996, letter to Regional. Attorney Jerome Rose regarding the Americans with Disabilities Act (ADA) of 1990. Your letter asks whether it would violate the ADA for the _____ temporary employment agency to conduct reference checks when you are unable to contact an: applicant's references during the initial application interview.

The Relevant ADA and EEOC Enforcement Guidance Provisions

As you know, the ADA prohibits employers and employment agencies from conducting medical examinations or making disability-related inquiries before an applicant is extended a conditional offer of employment. 42 U.S.C. QO 12112 (d) (2) and (3); 29 C.F.R. 8B 1630.13, 1630.14. These prohibitions are meant to ensure that an individual's non-medical qualifications are considered before his/her medical condition is evaluated. They also ensure that, if a job offer is withdrawn after a medical examination/inquiry, the applicant is aware that the reason for the withdrawal relates to his/her medical condition, and not to non-medical qualifications.

In the October 10, 1995, Enforcement Guidance on pre-employment inquiries referenced in your letter, the Commission stated that there are limited situations in which an employer can demonstrate that it could not reasonably obtain and evaluate all non-medical information before making a conditional offer. If an employer so demonstrates, the Enforcement Guidance indicates that it would not violate the ADA for the employer to obtain and evaluate the non-medical information that it could not reasonably obtain/evaluate pre-offer at any time during the post-offer stage, including after the completion of a required medical questionnaire. Enforcement Guidance at 18.

As one example, the Enforcement Guidance-notes that individual law enforcement employers may be able to demonstrate that it is too costly for them to obtain/evaluate polygraph and/or other non-medical information prior to the post-offer stage. In such cases, the individual employers would be able to obtain/evaluate that information during the post-offer stage. Enforcement Guidance at 18-19.

According to your letter, applicants who come to your offices are asked to complete a non-medical job application, and are, immediately thereafter, interviewed and given orientation training. While an applicant is being interviewed and trained, his/her references are contacted. If the references are favorable, the applicant is given a conditional offer of employment, and is then asked to complete a medical questionnaire. This process generally takes approximately 1.5 hours.

Your letter states that there are times when you are unable to successfully contact an applicant's references during the 1.5 hour application process. On these occasions, your letter asks, would it violate the ADA for you to make the conditional offer before completing the reference check, so that the applicant can complete the medical questionnaire while at your offices.

In the absence of a thorough investigation by the Commission, we are unable to state definitively how the Commission would view your company's situation. However, based on the information in your letter, it is unlikely that you would be able to demonstrate if challenged, that you cannot reasonably conduct the required reference checks before making a conditional Offer of employment. Nothing in your letter indicates that it is too costly for you to delay completion of the medical questionnaire until after references have been successfully contacted. Nor does your letter indicate that such occasional delays disrupt your business in significant way.

Instead, your letter indicates only that it is somewhat inconvenient for you to be unable to complete the processing of every applicant within a single 1.5 hour session. Such mere inconvenience is not sufficient to demonstrate that you cannot reasonably obtain and evaluate non-medical information at the pre-offer stage as required by the Commission's Enforcement Guidance.

We hope this information is helpful to you. If we can be of additional assistance to you, please contact Naomi Levin of my staff at (202) 663-4503. This letter is an informal discussion of the issues you raised and is not an official opinion of the Equal Employment Opportunity Commission. In addition, our failure to address other matters that may

have been presented in your letter should not be construed as agreement with statements or analysis related to those matters.

Sincerely,

Peggy R. Mastroianni
Associate Legal Counsel
Coordination and Guidance Services