

HR QUESTION ? of the month



While in the process of interviewing for a new position to be filled in the next month, a candidate has disclosed an injury requiring 4-6 months of rehab. How do we proceed?

Question: Our firm is in the process of interviewing candidates for an associate position. We have held phone interviews with several candidates and selected some of them for in-person interviews. One of the candidates selected for an in person interview has shared the following information with us: *Thank you for confirming. Before we meet, I'd like to disclose a recent injury. Approximately 3 weeks ago while playing recreational basketball, I suffered a ruptured Achilles and subsequently had surgery performed. I have been using PTO from work since the injury and will be on doctor ordered leave for at least the next week or two. An Achilles rupture is a very serious injury and I will be facing anywhere from 4-6 months of rehab going forward. The description of the position seems like such a great opportunity that I didn't want to pass up the offer for a phone interview. I hope this will not hinder the process but I wanted to make sure you knew my situation up front.* We have mentioned to all candidates that we seek to have the new position filled in the next 4 weeks. If the person is on medical leave, I'm not sure they will be able to come in to our office for an interview. How would you suggest we handle this situation?

Response: As you may be aware, disability discrimination laws prohibit employers from making employment decisions on the basis of a candidate's disability or other physical impairment, or indication that he may need to take job protected leave in the future, which may be the case here given the recent surgery and anticipated physical therapy. You indicate that an applicant had disclosed a medical issue that requires rehabilitation post-surgery. We would discourage the employer from disqualifying the candidate from the employment opportunity he seeks solely on this basis. That said, at the pre-hire stage, employers are not without rights relative to ensuring that candidates for employment are fit for the job they seek. Indeed, an employer CAN let candidates know what the essential job functions are for the position they seek including the timing of when such position is set to commence and then ask whether the candidates can perform them, with or without a reasonable accommodation. This must be a yes/no question and asked of all candidates for the same position. If he cannot do the job, you need go no further. But if he can do the job and indicates an accommodation may be necessary such as a delayed start date, the employer should engage him in an interactive discussion about whether such

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accommodation exists and is otherwise reasonable for the employer to provide. Keep in mind, though, that even if you lawfully ask such questions, if you seek to rescind a job offer (or refuse to make one) based on the discovery of a medical condition, such a decision, without more, would be violative of the ADA. Indeed, once you are on notice of an applicant's medical condition, he can accuse the employer of making subsequent decisions (including a decision not to extend an offer) on the basis of such information. And whether or not that is actually true, the possibility of the claim exists once the information is obtained. In this regard and as noted above, if a candidate is otherwise qualified for the position sought, it would not be lawful to disqualify him from employment (or make any other employment decision) based on the fact that he has a medical issue that would require him to be reasonably accommodated with time off in the future for physical therapy. However, ultimately, if it is not reasonable for the employer to delay the start date for 6 to 8 weeks, for example, regardless as to the reason for which the applicant has requested the delay then should the employer seek to rescind the offer (or fail to extend an offer) and it is later challenged, so long as the employer's reason for rescission (or failure to hire) is based solely on legitimate business reasons of needing the applicant to start immediately then the employer ought to be able to defend itself against any such potential discrimination claim.

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