

August 23, 2005

MANAGERS, HUMAN RESOURCES (AREA)  
MANAGERS, HUMAN RESOURCES (DISTRICT)

SUBJECT: Associate Supervisor Program (ASP) Suitability Review

As you know, the Family Medical Leave Act (FMLA), the Rehabilitation Act, and the Uniformed Services Employment and Reemployment Rights Act (USERRA) affect the way employers can screen candidates applying for competitive employment positions. Among other things, these laws restrict an employer's ability to obtain information regarding a candidate's sick leave. Consequently, these laws have a direct impact on the ASP internal and external candidate suitability review process.

Effective immediately, please review the attached guidance document from the headquarters Law Department concerning leave and reasonable accommodation inquiries, as well as information on wrongfully regarding an individual as disabled; and make sure that local managers of Labor Relations, ASP Coordinators, review committees, selecting officials, and others who may be involved with suitability reviews of internal and external applicants, understand these issues and comply. We will update the ASP Coordinator's Guide to reflect this information in the near future.

Also please remember that Injury Compensation records must not be part of the suitability review. Likewise, remember that leave approved under the Uniformed Services Employment and Reemployment Act (USERRA) for individuals serving on active duty in the uniformed services must not be considered in the suitability review - and that USERRA guarantees employees on military duty the same opportunity for promotion that they would have had, but for the military duty.

We understand that review of a candidate's sick leave in particular has traditionally been a factor in determining suitability; however the practice of asking about "sick leave" will need to shift to asking about "leave" or "absences" in line with the attached guidance to avoid unlawful inquiries and liability.

Should you have any questions, please consult with your local Law Department.

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Manager

Selection, Evaluation, and Recognition

## **Associate Supervisor Program (ASP) Guidance on Obtaining Suitability Information**

The Rehabilitation Act (the Act), the Family and Medical Leave Act (FMLA), and the Uniformed Services Employment and Reemployment Rights Act (USERRA) affect how employers can screen candidates applying for competitive employment positions. Simply put, these laws restrict the employer's ability to obtain information regarding a candidate's sick leave. In addition, USERRA prohibits employers from considering an employee's military service adversely in determining the employee's suitability for the Associate Supervisor Program.

### The Rehabilitation Act

#### *Employees and Applicants*

The Act prohibits employers from asking a job applicant disability-related questions until after it makes a conditional job offer to that applicant. 42 U.S.C. 12112(d)(2). When *current* employees are applying competitively for a new job, they must also be treated as an applicant. Therefore, an employer is prohibited from asking disability-related questions before making the employee a conditional offer of the new position. *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA (July 26, 2000)*.

#### *Disability-related Inquiries*

A disability-related inquiry is any question that "is likely to elicit information about a disability." *EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations (October 1995)*. Among the questions specifically prohibited are questions concerning how many days a person was sick last year, whether a person has ever filed for workers' compensation, or questions about information contained in an Injury Compensation Department record. Inquiring about sick leave relates directly to the severity of an individual's impairments and therefore, is not permissible.

#### *Attendance*

There is some leeway for employers to obtain information about whether a person can meet attendance requirements because there are many reasons, unrelated to disability or illness, why a person may be absent. Therefore, an employer can ask whether an applicant can satisfy its attendance requirements and more importantly, can ask how many days the applicant was absent from his/her last job.

### *Leave Abuse*

An employer can also ask questions designed to detect whether an applicant abused leave because again, these questions are not likely to elicit information about a disability. For example, an employer may ask “How many Mondays or Fridays were you absent last year on leave other than for vacation?”

### *Regarded as Disabled*

The Act prohibits discrimination against those “regarded as” disabled by an employer. This means, for example, that if the employer believed an employee/applicant was substantially limited in working due to poor attendance and therefore, did not promote him/her, the employee could prevail on a discrimination claim. Likewise, simply assuming that an employee/applicant’s physical or mental condition would prevent the individual from performing certain essential functions and therefore excluding that person from job consideration could also lead to a “regarded as” claim. The individual need not actually be disabled to bring such a cause of action on this basis.

### *Reasonable Accommodation*

If an employer already has medical information about a current employee applying for a new position and this information gives the employer a reasonable belief that the individual needs a reasonable accommodation to perform the functions of the new job, the employer may ask what type of reasonable accommodation would be needed to perform those functions, before extending a job offer. *However, the fact that the individual will need an accommodation in the new position cannot be a basis to deny him/her the new job unless the employer can show that the accommodation would cause an undue hardship.*

In an interview, the Review Committee or Selecting Official may inform an employee/applicant that if he or she is selected and reasonable accommodation will be needed to perform the Associate Supervisor job or participate in the 16-week course, a request describing the type of accommodation needed should be made immediately so it can receive timely consideration by the Reasonable Accommodation Committee.

### FMLA

The FMLA regulations state, at 29 C.F.R. 825.220(c), that:

An employer is prohibited from discriminating against employees or prospective employees who have used FMLA leave. . . [E]mployers cannot use the taking of FMLA leave as a negative factor in employment actions, such as hiring, promotions or disciplinary actions.

To the extent an employer wishes to look at absences in assessing the reliability/suitability of a candidate for a position, any absences protected by the FMLA cannot be considered.

### USERRA

USERRA specifically states that,

A person who is a member of, applies to be a member of, or performs, has performed, or applies to perform service in the uniformed services shall not be denied initial employment . . . promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, or application for service, or obligation.  
(38 U.S.C. § 4311(a))

USERRA prohibits an employer from considering an employee's absence for military service, or the possibility that the employee may be called to active military service, adversely in making any employment decisions, including deciding whether an employee is suitable for entry into the ASP.

USERRA also requires that employers consider employees for promotional opportunities during their absence on military service, or, if not possible during the period of their military service due to the nature of the consideration process, immediately on their return. Therefore, an employee who applies for the ASP must be considered during his/her absence, if possible, or if not possible, immediately on their return from military service. HR should be consulted whenever an employee wants to be considered for ASP and the employee is on military duty, or has just returned from military duty.