



News & Types: Employment, Labor & Benefits Update

# Ninth Circuit Rules that Requiring Disabled Job Applicant to Pay for Post-Offer MRI Violates the ADA

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## EXECUTIVE SUMMARY

**Consider this scenario:** Your team previously interviewed a job applicant for an open position at your company. The applicant was intelligent, hardworking, experienced, and well-qualified for the position, and, after the interview, the company immediately extended an offer of employment to the applicant, contingent upon his passing a background check and satisfactorily completing a post-offer medical exam administered by the company. The medical exam is fairly standard for the position because a certain level of physical fitness is required to perform the essential functions of the job. Recently, however, the job applicant, while taking the medical exam administered by your company, disclosed that he was injured a few years prior and suffered back pain as a result. You are worried that the back injury may prevent the job applicant from performing certain duties and responsibilities of the position for which he is being hired, and want to require the applicant to take additional follow-up medical tests and exams at his own expense. Should you or should you not require that the applicant take these additional medical tests and exams at his own expense?

The answer to this question, at least according to the Ninth Circuit, is that you should not, as this may constitute a violation of the Americans with Disabilities Act of 1990 (“ADA”). In *EEOC v. BNSF Ry. Co.*, Case No. 16-35457, 2018 U.S. App. LEXIS 24534 (9th Cir. Aug. 29, 2018), job applicant Russell Holt (“Holt”) received a conditional job offer from Defendant-Appellant BNSF Railway Company (“BNSF”) for the position of Senior Patrol Officer that was contingent on Holt’s satisfactory completion of a post-offer medical review. During the medical review, Holt disclosed that he had injured his back four years prior, suffering a two-level spinal extrusion. Holt’s primary care doctor, his chiropractor, and the doctor that BNSF’s medical subcontractor had hired all determined that Holt had no current limitations due to his back, but BNSF decided that it wanted additional information before deciding whether Holt could perform the Senior Patrol Officer job and required that Holt submit an MRI of his back **at his own cost**. However, Holt could not afford to pay for the MRI, and BNSF revoked Holt’s job offer. The Ninth Circuit ruled that BNSF violated the ADA when it required job applicant Holt to submit an MRI of his back at his own cost.

Under ADA, employer medical inquiries are divided into three categories, each with different rules: (1) inquiries conducted before employer makes an offer of employment; (2) inquiries conducted after the employer has made an offer of employment, but before the start of employment; and (3) inquiries conducted on or after the start of employment. For the second kind of employer medical inquiry, which was at issue in the BNSF case, the inquiry need not be concerned solely with an applicant's ability to perform job-related functions or be consistent with business necessity. However, pursuant to section 12112(a) of the ADA, an employer is generally prohibited from discriminating against a qualified individual on the basis of disability with respect to job application procedures, hiring, and other terms, conditions, and privileges of employment. An employer prima facie violates section 12112(a) of the ADA where: (1) an individual has a disability within the meaning of the ADA; (2) the employer discriminates against the individual because of his disability; and (3) the individual is qualified for the position.

In the BNSF case, the Ninth Circuit found all three prongs required for a prima facie violation of section 12112(a) of the ADA had been met. First, the Court found that Holt had a disability within the meaning of the ADA because, in requesting that Holt submit an MRI due to his previous back issues, conditioning Holt's job offer on the completion of the MRI at his own expense, and revoking the job offer after Holt was unable to submit an MRI, BNSF demonstrated that it perceived Holt as having an impairment unless proven otherwise by the MRI. In other words, BNSF's perception of Holt as impaired was enough to bring Holt under the ADA's definition of a person with a "disability." Second, the Court found that BNSF had discriminated against Holt on the basis of his perceived disability when BNSF required Holt to pay for an MRI because BNSF imposed an additional financial burden on an individual with a perceived impairment that was not imposed on other individuals without any perceived disability. BNSF did not contest the third prong, i.e. that Holt was a qualified individual.

The BNSF case illustrates at least two important points for employers in the Ninth Circuit: First, under the ADA, an individual with a "disability" is defined to include an individual who is "regarded as having" an impairment. In other words, an employee need not actually have a disability; it is sufficient that the employee was perceived by his or her employer to have an impairment that was not transitory or minor. Second, while the ADA explicitly authorizes employers to require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, employers may not impose additional financial burdens, i.e. costs of a medical exam, on a person with a disability because of that person's disability.