

## AB 2028: Background, Purpose and Impact

### Introduction

With the passage of AB 2028, Section 1031.2 is added to the Government Code, to read:

***GC 1031.2*** *Consistent with the Americans with Disabilities Act of 1990 (Public Law 101-36) and paragraph (3) of subdivision (3) of Section 12940, the collection of nonmedical or nonpsychological information of peace officers, in accordance with a thorough background investigation, as required by subdivision (d) of Section 1031, may be deferred until after a conditional offer of employment is issued if the employer can demonstrate that the information could not have reasonably been collected prior to the offer.*

The intent of AB 2028 is to enable California law enforcement agencies to meet two conflicting statutory obligations: (1) the conduct of thorough peace officer background investigations, as mandated by Government Code 1031(d), and (2) the lawful sequencing of medical and non-medical inquiries per the California Fair Employment and Housing Act (FEHA). The enactment of this bill into law will permit law enforcement agencies to extend conditional offers of employment *prior* to any portion of the peace officer background investigation that may involve medical or psychological inquiries or is otherwise unreasonable to conduct prior to the offer.

### Background

Employment provisions in both the U.S. Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act (FEHA) stipulate that the hiring process must be separated into two phases, punctuated by a conditional offer of employment (COE). This separation of the hiring process into two phases is intended to enable job applicants and the courts to determine whether a denial of employment was based on impermissible disability-related motives or considerations. Consequently, all components of the hiring process must be conducted prior to the offer, except those that address medical, mental, physical, or emotional conditions or other protected areas, unless the employer can show that it is not feasible to do so. Protected areas include past illegal drug dependence or addiction, current or past alcoholism, and learning disabilities.

In most instances, the sequencing of the hiring steps is clear-cut. With respect to POST peace officer selection requirements, the reading and writing test and the oral interview are to be conducted pre-offer, since neither focuses on medical or other disability-related issues. Alternatively, medical and psychological examinations *must* be deferred until the post-offer phase, given the express intent of these assessments.

The location of the peace officer background investigation is another matter. On one hand, the “determination of good moral character,” [Govt. Code 1031(d)] and “verifying the absence of past behavior indicative of unsuitability to perform the duties of a peace officer,” (Commission Procedure C-2) would not appear on its surface to require inquiries into medical, psychological or other disability-related areas. As such, the background investigation should be conducted prior to the conditional offer.

In reality, however, the background investigation can and does include inquiries prohibited at the pre-offer phase. Prohibited topics include histories of legal and illegal substance abuse (both

drugs and alcohol), behaviors resulting from problems with stress tolerance and other psychological stability concerns, and learning disabilities as they relate to educational and employment history, to name a few. Having the investigator avoid these topics at the pre-offer stage is not a solution, since this type of information can arise in volunteered statements by the numerous references contacted during the investigation, including past and current employers, family members, friends, roommates, neighbors, etc. Background investigators are legally barred from pursuing this line of questioning, regardless of job-relevance or business necessity.

POST has suggested separating the background investigation into two phases – pre and post offer; however, in practice, bifurcation has been shown to be inefficient and ineffective. Compounding the problem further is continued confusion and disagreement – even among legal experts – as to whether certain inquiries are prohibited or permissible at the pre-offer stage, such as those regarding substance use vs. dependence, and personality traits vs. psychological conditions.

### Purpose

In order to clarify and promote efficiency in the peace officer hiring process, POST submitted a written request to the Equal Employment Opportunity Commission (EEOC), describing in detail the peace officer hiring process and asking whether the background investigation could lawfully be conducted *after* a COE. In the response, the EEOC stipulated that, at the pre-offer stage, the investigator should request official documents such as DMV records, birth certificates, and credit reports, since the information on these documents do not touch on medical or other prohibited topics and they are readily obtainable. However, the EEOC concluded that most of the background investigation could be deferred until the post-offer stage, namely: (1) the receipt and evaluation of official documents that cannot be obtained in a timely manner during the pre-offer period and (2) contacts and interviews with references.

Since FEHA provides disability protection beyond that afforded by the ADA, it could not be safely assumed that the practice condoned by EEOC was equally lawful under state law. AB 2028 was therefore developed to provide statutory assurance that the guidance afforded by the EEOC could be followed in the conduct of peace officer background investigations in California.

### Impact

With the addition of California Government Code 1031.2, law enforcement agencies are provided with greater latitude to situate the background investigation within the larger peace officer hiring process. Although agencies must continue to obtain documents pre-offer that can be acquired expeditiously and that do not contain medical or other disability-related information, they are now free to extend the COE *prior* to: (1) the collection of documents that may include protected information, (2) the receipt of documents or other written information that require several weeks or more to arrive; and (3) the conduct of the “physical investigation” i.e., contacts and interviews with relatives, friends, employers, and other references. By conducting interviews post-offer, investigators are free to ask whatever is necessary to complete a thorough investigation, as long as the inquiries are job-related and consistent with business necessity.

In addition to pursuing any line of questioning that is job-related and consistent with business necessity, at the post-offer stage the background investigator is free to provide information to, or receive information from, the screening psychologist and physician. In addition to ensuring that

all evaluators have complete information as relevant for their purposes, exchanges like this comport with the POST requirement that “background investigators work cooperatively with the examining physician and psychologist to ensure that each evaluator has the information necessary to make their respective assessment” (POST Procedure C-1).

Government Code 1031.2 is a permissive law. Agencies are free to conduct the entire background investigation pre-offer if they chose. However, the intent of AB 2028 was to help improve the effectiveness and efficiency of the peace officer hiring process by removing unnecessary restrictions associated with the thorough evaluation of candidate suitability.

Attachments:

POST's request letter to EEOC, January 16, 2008 (Page 4)

EEOC's response, May 1, 2008 (Page 12)

## COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING

*The mission of the California Commission on Peace Officer Standards and Training is to continually enhance the professionalism of California law enforcement in serving its communities.*

January 16, 2008



Reed Russell, Legal Counsel  
Equal Employment Opportunity Commission  
1801 L Street, N.W.  
Washington, D.C. 20507

Dear Mr. Russell:

The California Commission on Peace Officer Standards and Training (POST) is an administrative body charged with establishing minimum selection and training standards for California law enforcement officers. The peace officer selection standards, policies, and guidelines developed by POST serve the over-600 law enforcement agencies in the POST program.

In the course of conducting research into improved officer selection standards and procedures, POST staff has regularly sought advice from your office, in particular from senior EEOC attorney Sharon Rennert, on the proper interpretation of the ADA with respect to a wide array of pre-employment issues. This past June, Ms. Rennert participated in a series of POST workshops, along with the Chief Counsel for the California Department of Fair Employment and Housing (FEHA) and POST senior consultant Shelley Spilberg. The topic of these workshops was the impact of the ADA and the California Fair Employment and Housing Act on law enforcement hiring and training.

A number of issues were brought up during those workshops. One issue regarding the implication of the pre-offer inquiry prohibition on the timing of the peace officer background investigation is the subject of this request for guidance. Specifically:

**Would a conditional offer of employment extended *prior* to the conduct of a peace officer background investigation be considered “bona fide?”**

We are especially eager to receive clarification from your office on this important issue as we are currently revising the POST peace officer selection standards and associated guidance. Thank you in advance for your help.

Attached is information on California peace officer background investigation requirements and the impact of the ADA pre-offer inquiry prohibition on the peace officer hiring process. Please contact Dr. Spilberg (916-227-4824/[Shelley.spilberg@post.ca.gov](mailto:Shelley.spilberg@post.ca.gov)) if you have any questions or require additional information.

Sincerely,

PAUL A. CAPPITELLI  
Executive Director

Attachment

Arnold Schwarzenegger  
Governor

Jerry Brown  
Attorney General

## **California Commission on Peace Officer Standards and Training Information Request - Supporting Information**

### Background

California law (Government Code § 1031) stipulates minimum peace officer standards related to age, citizenship, and education, and mandates the conduct of a background investigation (including a fingerprint check), and a medical and psychological evaluation. POST was established by the California Legislature and charged with establishing minimum peace officer selection standards related to physical, mental and moral fitness for those agencies participating in the POST program.

POST peace officer selection standards require candidates to undergo the following:

- Reading and Writing Skill Assessment
- Oral Interview
- Background Investigation
- Psychological Evaluation
- Medical Examination

[NOTE: Law enforcement agencies can and often do include additional steps in their individual hiring processes, such as physical ability testing and polygraph examinations].

The first two required hiring phases – Reading & Writing Assessment and the Oral Interview – are clearly pre-offer assessments. Equally clear-cut is the post-offer timing of the Medical and Psychological Evaluations. The timing of the background investigation - pre-offer or post-offer - is much more ambiguous, due to the myriad of areas and issues addressed during the investigation.

### The California Peace Officer Background Investigation

The pre-employment background investigation of California peace officers is regulated by both California law and POST requirements. The background investigation commonly begins with the verification of the statutory (i.e., GC § 1031) minimums related to age, citizenship, and education. These verifications involve a fairly straightforward check of the appropriate official documents (e.g., birth certificates, school transcripts). As noted above, we believe these can and should be done pre-offer.

Much more challenging is satisfying the express purpose of the background investigation, specified in GC § 1031(d) that all peace officers be found to be "... of good moral character, as determined by a thorough background investigation." The POST standards further define the purpose of the background investigations as "verifying the absence of past behavior indicative of unsuitability to perform the duties of a peace officer." POST requirements specify that the background investigation cover the following *Areas of Investigation*:

- Relatives and other Personal References
- Educational History
- Residential History
- Military Experience
- Financial History
- Employment History
- FBI, DOJ, and Local Law Enforcement Agency Records
- Driving History

The assessment of these Areas of Investigation requires contacts with numerous references, including past and current employers, family members, friends, roommates, neighbors, etc. A background investigation commonly requires well over 40 hours of an investigator's time.

On its face, assessing these areas would not appear to involve medical issues or disability-related issues, and therefore it would appear that they should appropriately be investigated prior to a conditional offer. However, it is important to realize that the Areas of Investigation merely provide the *contexts* for assessing an applicant's moral character and general suitability. The actual *constructs* underlying moral character and suitability are embodied in the 10 **POST Background Dimensions** - character attributes that have been identified by POST to be essential to peace officer performance: **(1) Integrity, (2) Stress Tolerance, (3) Conscientiousness, (4) Decision-Making/ Judgment, (5) Impulse Control, (6) Interpersonal Skills, (7) Substance Abuse and other Risk-Taking Behavior, (8) Confronting and Overcoming Problems, Obstacles, & Adversity, (9) Learning Ability, and (10) Communication Skills.**

The Background Dimensions "define" moral character and general suitability for peace officers, and as such serve as the true evaluative criteria for the background investigation.

Assessment of the Background Dimensions often necessitates inquiries into prohibited pre-offer topics. For example, the investigation of "Integrity" as well as "Substance Abuse and Other Risk-Taking Behavior" often includes prohibited pre-offer inquiries (as specified in the EEOC Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations) about history of illegal drug use, and history and current abuse of alcohol. Inquiries associated with "Stress Tolerance" can require delving into issues that touch on psychological stability and could easily involve questions likely to reveal a mental illness; and assessing "Learning Ability" can require questions that are likely to reveal whether the candidate has a learning disability, and as such all of these questions are illegal pre-offer.

Virtually every Area of Investigation can provide a context for the investigation of any given Background Dimension, which can include both allowable and prohibited pre-offer inquiries. Per the earlier example, inquiries regarding history of illegal drug use and alcohol abuse can be made of neighbors (Residential History), based on DUI's (Driving History), military infractions and bases for discharges (Military History) and through suspicious sources of income and expenditure (Financial History).

It is important to note that the need to ask prohibited pre-offer questions during the background investigation is due in good part to the purpose of the background investigation itself. The background investigation is intended to *screen-out* rather than *select-in*; that is, the focus is on identifying and disqualifying *unsuitable* applicants, rather than assessing the relative qualifications of those found acceptable. Given this screen-out orientation, it is not at all surprising that background investigation inquiries designed to reveal unsuitability would also yield indications of behavior that suggest psychological or other disorders. When conducted at the pre-offer phase (as is common), the background investigator cannot pursue any line of questioning prompted by indications of psychological or other disorders, regardless of job-relevance or business necessity.

The identification of unsuitable applicants, in particular those who are predicted to engage in ineffective and/or counterproductive job behavior, is a goal shared by both the background investigation and the (post-offer) psychological evaluation. Both evaluations also share a reliance on personal history information in an attempt to screen out applicants who manifest unsuitable character attributes. A comparison of the POST Background and Psychological Dimensions best illustrates the construct overlap between these two assessments:

**POST Background and Psychological Dimensions**

Background Dimensions	Psychological Dimensions
<b>Integrity</b>	<b>Integrity</b>
<b>Stress Tolerance</b>	<b>Stress Tolerance/Emotional Regulation</b>
<b>Conscientiousness</b>	<b>Conscientiousness/Dependability</b>
<b>Decision-Making/Judgment</b>	<b>Decision-Making/Judgment</b>
<b>Impulse Control/Attention to Safety</b>	<b>Impulse Control/Attention To Safety</b>
<b>Substance Abuse and Other Risk-Taking Behavior</b>	<b>Substance Abuse And Other Risk-Taking Behavior</b>
Interpersonal Skills	Teamwork
Communication Skills	Social Competence
Confronting and Overcoming Problems, Obstacles, & Adversity	Adaptability/Flexibility
Learning Ability	Assertiveness/Persuasiveness

The six dimensions common to the background investigation and the psychological evaluation is another clear illustration of the need for the background investigation to be coordinated and conducted in concert with the psychological evaluation. This need is also reinforced by the POST requirement that the background investigator “work cooperatively with the examining physician and psychologist to ensure that each evaluator has the information necessary to make their respective assessment.”

## ADA Enforcement Guidance

POST's proposed position that the entire background investigation can lawfully occur at the post-offer phase of hiring is based in good part on the information provided in the "ADA Enforcement Guidance on Preemployment Disability-Related Questions and Medical Examinations (1995)." In that Guidance, the EEOC acknowledged a variety of instances where it is not always possible or appropriate to obtain and evaluate all non-medical information at the pre-offer stage, such as the provision allowing an employer to comply with an applicant's request to defer any contact with a current employer until the post-offer phase.

*"An applicant might state that his current employer should not be asked for a reference check until the potential employer makes a conditional job offer. In this case, the potential employer could not reasonably obtain and evaluate the non-medical information from the reference at the pre-offer stage."*

Specific to law enforcement, the Enforcement Guidance acknowledges the excessive cost that would be incurred if law enforcement employers were required to administer both a pre and a post-offer polygraph examination, given that polygraph questions often include drug history and other prohibited inquiries:

*"It may be too costly for a law enforcement employer wishing to administer a polygraph examination to administer a pre-offer examination asking non-disability-related questions, and a post-offer examination asking disability-related questions. In this case, the employer may be able to demonstrate that it could not reasonably obtain and evaluate the non-medical polygraph information at the pre-offer stage."*

Comparisons between the polygraph and the larger background investigation are particularly relevant here. Like the Areas of Investigation, the polygraph examination merely provides a *context* for making inquiries; the *content* of the inquiries is dependant upon the *constructs* to be assessed, which in the case of peace office background investigations are the POST Background Dimensions.

In discussing the lawfulness of extending more conditional offers than current or anticipated vacancies, the EEOC appears to acknowledge that peace office background investigations (referred to as "security checks") are conducted at the post-offer stage:

*"A police department may be able to demonstrate that it needs to make offers to 50 applicants for 25 available positions because about half of the offers will likely be revoked based on post-offer medical tests and/or **security checks**, and because some applicants may voluntarily withdraw from consideration" (emphasis added).*

In 1997, the U.S. Department of Justice (DOJ) issued ADA enforcement guidance specific to the law enforcement selection: "Questions and Answers: the Americans with Disabilities Act and Hiring Police Officers." That guidance cites similar instances when the pre-employment background checks of peace officers can be deferred until after the post-offer stage:

***“May a police department wait to conduct a background check on applicants until after the information from the medical exam has been reviewed -- which is after a conditional offer of employment has been made?”***

*Yes, in certain circumstances. In general, a job offer is not viewed as "bona fide" under the ADA, unless an employer has evaluated all relevant non-medical 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.*

*Federal investigators will carefully scrutinize situations in which a police department withdraws an offer after a post-offer background examination to determine whether the withdrawal was based on non-medical information in the background check or on information obtained through post-offer medical examinations and disability-related inquiries. If it is determined that the offer was withdrawn because of the applicant's disability, then the police department must demonstrate that the reasons for the withdrawal are job-related and consistent with business necessity.”*

#### Adverse Consequences Resulting from Bifurcating the Peace Officer Background Investigation

The strictest interpretation of the pre-offer inquiry prohibition necessitates the bifurcation of the background investigation into a pre-offer and a post-offer phase. However, this approach is cumbersome, expensive, and in fact threatens the validity and comprehensiveness of the background investigation process:

- **Cost**: The cost of a non-bifurcated peace officer background investigation averages over \$1700. A two-stage process in which the investigator must interview the same contacts and references twice substantially increases the cost.
- **Time**: A non-bifurcated background investigation requires an average of over 33 days to complete; the entire hiring process can take upwards of one year. A bifurcated process can protract the background investigation process by an estimated 50%. This jeopardizes more than efficiency. There are currently over **15,000** vacancies for peace officers statewide; these numbers are only expected to rise, as 14% of the current peace officers are 50 years old or older and therefore eligible to retire. Filling peace officer vacancies is extraordinarily time and resource consuming, with only one out of every 100 applicants actually completing the hiring process and graduating from the academy. Any delay in processing applicants has a direct impact on law enforcement's ability to provide adequate protection to public health and safety.

- Effectiveness: In practice, the majority of peace officer background investigations are conducted entirely pre-offer. Some investigators may unwittingly ask about drug history and other prohibited topics at the pre-offer stage; others avoid any such inquiries during the background investigation. As a result, important areas of investigation may be asked in violation of the law or risk being overlooked altogether.

Applying these serious considerations to the guidance offered by EEOC and DOJ as quoted above, and noting the critical importance of doing a thorough investigation that adequately follows up on all potentially exclusionary information, it would seem appropriate to conduct the background investigation post-offer (statutory age, citizenship and education minimums would continue to be verified pre-offer). It is our belief that the statutory and regulatory requirements associated with the California peace officer background investigation, including the required areas of investigation, character attributes (i.e., background dimensions) that must be assessed, the “screen-out” orientation of the investigation, and the nexus between the investigation and the post-offer psychological screening together more than satisfy the “certain circumstances” referred to in the above DOJ response, as well as the EEOC Enforcement Guidance. More specifically, we believe the significant increase in costs and time necessary to do a bifurcated background investigation are similar to the EEOC’s example that concludes it is untenable to bifurcate a polygraph examination because both disability and non-disability questions must be asked. Indeed, we believe we have a stronger rationale because, unlike a polygraph examination where questions are developed in advance, a background investigator may have to add questions depending on what information is initially obtained. Thus, it is impossible to know in advance when disability-related questions may become relevant to pursue in light of statements made by applicants, employers, family, neighbors, or others.

### Leonel v. American Airlines

In seemingly diametric opposition to the EEOC and DOJ enforcement guidance, the decision rendered in *Leonel v. American Airlines, Inc.* (400 F.3d 702, 2005) appears to dictate that the background investigation must always be administered during the pre-offer phase of the hiring process. In its decision, the 9<sup>th</sup> Circuit Court of Appeals offered an example of an alternate (albeit more complex) hiring process:

*“For instance, (American Airlines) has not shown why it could not expeditiously have issued two rounds of conditional offers--the first, after the interviews, informing applicants that they had reached the final stages of the application process and would be hired absent problems with their background checks or medical examinations; and the second, after completion of the background checks, ensuring employment if the applicant passed the medical examination.”*

The Leonel decision is especially precedential for California POST, given that it emanates from the 9<sup>th</sup> Circuit. It is possible that the background investigation required for flight attendants may be significantly different than that required for peace officers and thus Leonel may have its limits. Our attempt to resolve the implications of this ruling with the guidance offered by EEOC has lead us to this request for clarification on the lawful timing of the peace officer background investigation relative to the conditional offer of employment.

Note that, although we seek clarification, we are not without an opinion on this issue. That opinion is based on over 15 years of trying to offer guidance to our constituent agencies on the lawful selection of California peace officers in light of these and other provisions of the ADA. POST has historically recommended that the background investigation be bifurcated. However, this approach has proved to be fraught with ambiguity, inefficiency and ineffectiveness. On the surface, many of the areas of inquiry underlying the background investigation do not appear to involve topics that are medical in nature. However, as we hope we have illustrated above, in practice the thorough background investigation as required by state law commonly requires inquiries that are arguably if not unquestionably prohibited prior to a conditional offer.

### Conclusion

To comply with state law (GC 1031), peace officers must meet citizenship, age, and education requirements, the verification of which can be assessed pre-offer, in compliance with the ADA and California FEHA. Conversely, the statutory requirement of medical and psychological evaluations must inarguably be conducted post-offer. However, the remaining statutory requirement -- the determination of good moral character as determined by a thorough background investigation -- involves issues and areas of investigation that are both medical and non-medical in nature. Experience in attempting to separate the background investigation into pre and post offer phases has been shown to be inefficient, ineffective, and a threat to public health and safety. Therefore, in light of the specific circumstances and requirements associated with California law and POST regulations, and the specific information provided on how a bifurcated background investigation significantly increases both the cost and time involved in such efforts, it would appear lawful to extend a bona fide conditional offer of employment prior to the conduct of the background investigation. We look to your office for confirmation and/or clarification.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION  
Washington, D.C. 20507

Office of  
Legal Counsel

May 1, 2008

*Commission on Post*  
**MAY 05 2008**

Paul A. Cappitelli  
Executive Director  
Commission on Peace Officer Standards and Training  
1601 Alhambra Boulevard  
Sacramento, California 95816-7083

Dear Mr. Cappitelli:

Thank you for your letter of January 16, 2008, in which you asked whether a conditional offer of employment extended prior to conducting a peace officer background investigation could be considered a "bona fide" job offer. Specifically, your letter asks whether the state-mandated background investigation conducted by law enforcement agencies for peace officers – which includes inquiries that are medical and non-medical in nature – may be conducted post-offer consistent with the ADA.

The term "background investigation" encompasses a number of specific tasks that can vary among law enforcement agencies, and thus it 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, discussions with our staff, and the applicable legal standards, 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.

The conclusions reached in this letter are based on information you provided concerning the peace officer hiring process in your state; thus any changes in this information or additional facts could alter our views. Furthermore, 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.

**I. Relevant Regulatory Provisions and Federal Guidance**

Your letter raises issues under Title I of the Americans with Disabilities Act (ADA), specifically 42 U.S.C. § 12112(d), and EEOC's implementing regulations, 29 C.F.R. §§1630.13(a) and 1630.14(a) and (b). As you know, an employer may not conduct a medical examination or inquire whether an applicant is an individual with a disability prior to making a job offer. Section 1630.14(b) states that an employer may require a medical examination and/or make disability-related inquiries only after extending a conditional offer of employment. If the results of the medical examination or inquiries demonstrate that the candidate (1) cannot perform the essential functions of the position with or without reasonable accommodation, or (2) poses a

direct threat that cannot be reduced or eliminated with reasonable accommodation, the employer may withdraw the job offer. See “*EEOC Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act*” (October 1995), available at [www.eeoc.gov/policy/docs/preemp.html](http://www.eeoc.gov/policy/docs/preemp.html) [hereinafter “EEOC Guidance”].

The ADA’s requirement that disability-related questions and medical examinations be made in the post-offer period prevents employers from focusing prematurely on an applicant’s disability rather than his qualifications, and ensures that an applicant will know whether he is being rejected for reasons related to his disability.

The post-offer stage begins after a “real” job offer is made. The EEOC Guidance states that a “job offer is real if the employer has evaluated all relevant non-medical information it reasonably could have obtained and analyzed prior to giving the offer.” However, the EEOC Guidance recognizes that there are limited circumstances where non-medical information must be obtained and/or evaluated after a conditional offer of employment.

Both the EEOC Guidance and a U.S. Department of Justice (DOJ) publication, *Questions and Answers: the Americans with Disabilities Act and Hiring Police Officers*,<sup>1</sup> acknowledge that employers in general, and law enforcement agencies in particular, may sometimes justify obtaining and analyzing non-medical information at the post-offer stage. EEOC’s Guidance recognizes that it may be too costly for a law enforcement agency to administer a polygraph test twice – once at the pre-offer stage to ask questions that are not disability-related, and again post-offer to ask disability-related questions. Additionally, we agree with your observation that language in the EEOC Guidance explaining why a law enforcement employer may need to extend more job offers than available positions implies that a background investigation (or portions of it) may be conducted post-offer. The EEOC Guidance acknowledges that the employer may be able to demonstrate that a significant number of offers “will likely be revoked based on post-offer medical tests *and/or security checks*.” (emphasis added).

Similarly, the DOJ publication explains that “in certain circumstances” a police department may conduct a background check on applicants after the information from the medical examination has been reviewed. DOJ notes that “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.”

## **II. The Peace Officer Hiring Process in Your State**

Your letter explains that state law establishes minimum peace officer standards related to age, citizenship, and education, and mandates a background investigation and a medical and

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<sup>1</sup> Available at [www.usdoj.gov/crt/ada/copsq7a.htm](http://www.usdoj.gov/crt/ada/copsq7a.htm).

psychological evaluation. Peace officer candidates must also undergo reading and writing skill assessments and an oral interview.<sup>2</sup>

We agree with the observations in your letter that the reading and writing skill assessments and oral interview are pre-offer assessments, and that the psychological evaluation<sup>3</sup> and medical examination are post-offer assessments.

Your letter indicates that state law and agency requirements regulate the background investigation for peace officers, and that its purpose is to verify “the absence of past behavior indicative of unsuitability to perform the duties of a peace officer.” Investigators must evaluate 10 character attributes that your agency has deemed essential to successful peace officer performance. These include stress tolerance, impulse control, decision-making/judgment, and substance abuse and other risk-taking behavior. Investigators review these attributes in the context of examining several areas of a candidate’s life: Relatives and Other Personal References; Educational History; Residential History; Military Experience; Financial History; Employment History; Records from the FBI, DOJ, and Local Law Enforcement Agencies; and Driving History. Review of these attributes requires the investigator to request and examine a range of official documents, such as records regarding citizenship, education, financial history, and military experience. The background investigation also requires “contacts with numerous references,” which may include but are not limited to “past and current employers, family members, friends, roommates, neighbors, etc.”

### **III. Application of Legal Principles to Your State’s Background Investigations for Peace Officers**

Your letter states that the background investigation generally begins with verification of statutory minimums related to age, citizenship, and education. We agree with your conclusion that this verification process must be done pre-offer because it concerns non-medical information and involves a “straightforward check of the appropriate official documents.” Nevertheless, for the reasons set forth in the following sections, we conclude that at the post-offer stage certain “official documents” containing non-medical information may be evaluated, and reference checks potentially involving both disability-related and non-disability-related questions may be conducted.

#### **A. Requesting and Evaluating “Official Documents”**

It is our understanding that law enforcement agencies in compliance with your standards are expected to *request* all official documents at the pre-offer stage, including documents from the FBI and DOJ, other law enforcement agencies, and military records. You point out, however, that some requests for documents may go unanswered for weeks or months, making their evaluation at the pre-offer stage difficult.

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<sup>2</sup> Your letter notes that law enforcement agencies in your state may impose additional hiring requirements.

<sup>3</sup> You indicated that the psychological examination is a medical examination as defined in the EEOC Guidance and must be administered post-offer.

The ADA would require law enforcement agencies to request all official documents at the pre-offer stage because these are *not* requests for disability-related information. Any documents received in a timely manner must also be evaluated during the pre-offer stage. However, a law enforcement agency may proceed to the post-offer period, assuming all other pre-offer hiring components have been completed, if it can show that waiting for the remaining official documents will cause an unreasonable delay in completing the entire hiring process.

An unreasonable delay may exist where a responding agency routinely takes several weeks or months to provide documents and waiting for these official documents will significantly increase the length of the entire hiring process. Your letter notes that the background investigation alone takes “an average of over 33 days to complete” and the entire hiring process can take over one year. You also explain that delays in completing the hiring process affect how quickly vacant peace officer positions can be filled. You state that, currently, there are over 15,000 vacancies statewide and that any further delays in completing the entire hiring process (pre- and post-offer phases) will exacerbate the ability of law enforcement agencies to fill these positions and provide sufficient protection for the public.

This information supports a conclusion that there would be an unreasonable delay in the hiring process if a law enforcement agency had to wait for all official documents before extending a conditional job offer.

#### B. Contacting References

Law enforcement background investigations in your state require contacting “numerous references, including past and current employers, family members, friends, roommates, neighbors, etc.” Other individuals who may be contacted include landlords and property managers, coworkers, creditors, commanding officers, high school counselors and teachers, and arresting officers and probation officers. This part of the investigation requires investigators to query relevant individuals who have observed the candidate in various settings – e.g., school, military, employment, residential – and thus can provide specific information about whether a candidate has the character attributes essential to successful performance as a peace officer.

To this end, contacts are asked both **disability-related** and **non-disability-related** questions. For example, questions about “substance abuse” would be disability-related if they involved inquiries about alcoholism and past drug addiction,<sup>4</sup> or the extent of alcohol use or past drug use.<sup>5</sup> You explain that the need to ask disability-related questions regarding alcoholism or drug addiction also arises in assessing another character attribute, “integrity.”

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<sup>4</sup> The ADA does not cover a person who currently engages in the illegal use of drugs. Hence, pre-offer questions aimed at determining such use would be permissible. Questions about *past use* of illegal drugs also would be permissible pre-offer because mere use does not signal addiction, an impairment which might be a disability. But, asking whether an applicant was *ever* a drug addict would be a disability-related question because a recovered addict may be a person with a disability.

<sup>5</sup> Unlike questions that focus on the extent of use, and thereby could elicit information as to whether the applicant has a disability, questions that focus only on current or past *use* of alcohol or drugs would not be considered disability-related.

Questions about other character attributes may also lead to disability-related questions. For example, you say that assessing a candidate's "stress tolerance" can require questions related to psychological stability that would be likely to elicit information regarding mental illness (i.e., disability-related questions). Similarly, assessing a candidate's "learning ability" can involve questions that are likely to reveal whether the candidate has a learning disability. Disability-related questions may also be necessary when assessing impulse control and communication skills. In some instances, you note that disability-related inquiries may follow up on information learned from answers to questions that are not disability-related.

You reference several factors from the EEOC Guidance and the DOJ publication that may support contacting references post-offer for the purpose of asking both disability-related and non-disability-related questions. We consider each of those factors below.

### *1. Cost*

One factor that you argue may justify contacting references post-offer is cost. The EEOC Guidance's polygraph example focuses on the extra cost involved in conducting separate pre- and post-offer polygraph examinations as justification for a law enforcement agency's decision to conduct the entire examination post-offer. Similarly, the DOJ publication notes that when a background investigator must use information from a medical examination during the background check, including consultation with medical records and personnel, doing the "background check" at the post-offer stage "saves the police department the cost of doing a second background check."

Your letter notes that the cost of a non-bifurcated background investigation averages over \$1,700 per applicant, and that a bifurcated investigation (pre- and post-offer) would "substantially increase the cost" because the investigator would have to re-interview the same witnesses in order to ask disability-related questions.<sup>6</sup> You explain that your standards require law enforcement agencies to seek extensive information from a wide variety of sources. If a large number of these references would need to be re-interviewed using a bifurcated process, the costs would increase significantly, thus justifying a single comprehensive post-offer interview.

The DOJ publication links the increase in cost to the need for a background investigator to consult medical records and personnel and to use the information from a medical examination during the background check. Your letter addresses these points, emphasizing the need for the background investigator, the psychologist, and the physician to assist each other in collecting, sharing, and analyzing critical information. You emphasize that six of the ten character attributes that investigators must evaluate are also the focus of the psychological examination, and that this overlap requires "the background investigation to be coordinated and conducted in concert with the psychological evaluation." If the cooperative working arrangement means the investigator needs to (a) obtain the results of the medical or psychological examination, (b) potentially consult with the physician or psychologist about those results, and (c) then contact

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<sup>6</sup> In comparison, polygraph examinations generally cost less than \$300.

references based on information from the examination, it would provide additional support for a conclusion that the reference contacts may be conducted post-offer.<sup>7</sup>

## 2. *Additional Time Required*

A significant increase in cost may not be the only justification for obtaining non-medical information at the post-offer stage. Other considerations, especially when combined with cost, may be relevant. Both the EEOC Guidance and the DOJ publication implicitly acknowledge the additional time involved in conducting a second polygraph examination or second background check. As with the increase in cost, 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.

The timing considerations discussed in Section III.A. in connection with an unreasonable delay in waiting to receive certain official documents also apply to a bifurcated contact process. Thus, if the background investigation alone takes “an average of over 33 days to complete” and the entire hiring process can take over one year, any significant increase in length of time required for a bifurcated process would be unreasonable. In support of this conclusion, you note that an investigator generally spends “well over 40 hours” completing all elements of the background investigation, with most of this time being spent contacting references. A “bifurcated process can protract the background process by an estimated 50%.”

Given that the entire hiring process can take more than a year, anything that increases the time required to complete the process will result in additional delays in filling over 15,000 vacancies for peace officers. You emphasize that the number of vacancies is expected to rise in the coming years as 14% of the current peace officers become eligible for retirement, prompting concerns that a bifurcated process will exacerbate problems connected with such a large and growing number of vacancies. Furthermore, delays in completing the hiring process have an especially significant impact on filling vacancies given that only one out of every 100 applicants actually completes the hiring process and graduates from the academy. Thus, the additional time required for a bifurcated process further supports the position that it would be permissible to contact references at the post-offer stage to seek both disability-related and non-disability-related information.

## 3. *Efficiency and Effectiveness*

Your letter notes that a bifurcated contact process adds a high level of inefficiency and may undermine the effectiveness of the background investigation. This inefficiency appears to be closely related to the added cost and delay in completing the background investigation.

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<sup>7</sup> We are not suggesting that law enforcement agencies must show that a bifurcated contact process is both “too costly” and that the increased cost is associated with the need to consult medical records and personnel as part of the background investigation. 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.

Reference contacts, like polygraph examinations, may involve a set of predetermined questions. It is inefficient for a background investigator -- like a polygraph examiner -- to divide questions into those that are disability-related and those that are not, and then seek out a reference twice. Adding to the inefficiency is that investigators often do not know in advance when disability-related questions may be relevant for particular references. "Unlike a polygraph examination where questions are developed in advance, a background investigator may have to add questions depending on what information is initially obtained." For example, the medical or psychological examination may reveal information that would require contacting certain references. (This is the scenario mentioned in the DOJ publication.) Or, a reference may unexpectedly reveal medical information, thus requiring an investigator to ask follow-up questions. If the background reference contacts are conducted in their entirety at the post-offer stage, then an immediate follow-up inquiry might make clear that disability is not an issue. The applicant also could be questioned further which would permit an investigator more efficiently to determine that the matter needs to be referred to the physician or psychologist, that other references need to be questioned, or that the issue does not need to be pursued further.

You also express concern that a bifurcated process may result in investigators neglecting to follow up on important information that a reference discloses, either by failing to re-interview the reference or failing to provide critical information to the physician or psychologist. This failure could seriously undermine the effectiveness of the background investigation and the reliability of the hiring decision. Thus, conducting reference checks pre-offer would appear to diminish the efficiency of the background investigation and undermine the important purposes to be achieved through extensive reference checks. Accordingly, the efficiency and effectiveness concerns identified here also support contacting references in the post-offer period.

## **Conclusion**

Based on information you provided regarding background investigations for peace officers, and consistent with the ADA and the principles articulated in the EEOC Guidance and DOJ's publication, we conclude that law enforcement agencies complying with your state regulations and your agency's selection standards may evaluate certain official documents and contact references at the post-offer stage. Accordingly, a law enforcement agency's offer of employment would be considered a "real" offer despite the fact that certain non-medical information would be obtained and evaluated at the post-offer stage.<sup>8</sup>

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<sup>8</sup> Your letter expresses concern that the decision in Leonel v. American Airlines, Inc., 400 F.3d 702, 709-10 (9th Cir. 2005) may be inconsistent with the EEOC Guidance and DOJ's publication. We do not think Leonel is inconsistent with the positions taken by EEOC and DOJ. In Leonel, American Airlines made a conditional job offer to several applicants for flight attendant positions, but at the post-offer stage it conducted a "background check" that appears to have consisted of an employment history verification and a criminal history records check. Reversing summary judgment, the court found that American Airlines failed to establish that "it could not reasonably have completed the background checks before subjecting the appellants to medical examinations and questioning." Our position is also that the employer must demonstrate the need to conduct post-offer components of a background investigation that seek non-disability-related information. The court, which followed EEOC's guidance, required American Airlines to justify why it needed to make a non-medical inquiry at the post-offer stage, and found the company's reasons insufficient. The court noted that American Airlines might well be able to justify seeking non-medical information at the post-offer stage, but it had not done so for the purpose of its motion for summary judgment.

Please note, however, that it would be insufficient for a law enforcement agency to justify seeking non-medical information at the post-offer stage merely by claiming that it would save money and time and avoid inefficiency. A law enforcement agency would need to offer evidence similar to that provided in your letter that details a significant increase in costs and/or significant delays in carrying out the hiring process. Similarly, the designation “background investigation” should not prompt a law enforcement agency to assume that it automatically may be done post-offer. Rather, it is important to break down the components of the background investigation and focus on circumstances that might allow a law enforcement agency to conduct specific non-medical components of the background investigation post-offer.

Finally, we note that EEOC investigators would carefully scrutinize a charge filed against a law enforcement agency that revoked a conditional offer of employment to determine whether the revocation was based on non-medical information obtained during the post-offer portions of the background investigation or on information obtained from the medical or psychological examinations. If it is determined that a law enforcement agency withdrew a job offer because of an applicant’s disability, the agency would need to show that the reasons for the withdrawal are job-related and consistent with business necessity.

We hope that this information is helpful. For further information, you may contact Christopher Kuczynski, Assistant Legal Counsel, or Sharon Rennert, Senior Attorney Advisor, at 202-663-4638.

Sincerely,

A handwritten signature in black ink, appearing to read "Reed L. Russell". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Reed L. Russell  
Legal Counsel