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EVALUATING LEGISLATION: REGULATION OF PRE-EMPLOYMENT INQUIRIES

*Ann H. Britton**

Legislation regulating the type of information employers may ask of job applicants is difficult to draft and evaluate because of the complex competing interests of employers and employees that must be balanced. This Article proposes that a matrix can be built to chart and test different approaches to the problem. This matrix can then be used to track how the varied and competing interests are affected under proposed or existing legislation.¹ The method of evaluating legislation will be described and its usefulness demonstrated through a specific application of the matrix to answer the question of who should decide how much information about a job applicant's health and handicaps an employer may elicit.²

One benefit of constructing the chart to evaluate problematic legislation is that it stimulates thinking and, thereby, ensures that all affected interests are considered. The process also forces a thorough consideration of complex issues and viewpoints because it requires evaluating the effect of a specific statute on competing interests. Finally, each suggested approach considered in the process will be tested for its ability to accommodate the greatest number of interests while sacrificing the fewest. Reaching a conclusion about which is the best possible legislation should be made easier through the use of this analysis.

Of course, no legislation will be proposed or evaluated until someone identifies a problem area. Normally, such problems are presented to legislators by constituents and other interested parties. A survey of court decisions can also expose a need for reform or action either because a

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1. This matrix serves as a decision making device and draws on a combination of methods used in Derby, *An Analytical Framework for International Criminal Law: Realism and Interest Alignment*, 1 TOURO L. REV. 57 (1985) and Nagel, *Using Microcomputers and P/G% to Predict Court Cases*, 18 AKRON L. REV. 541 (1985) (proposing a microcomputer program to process a set of prior cases and predict the outcome of future cases).

2. This Article does not include coverage of a related, but distinct, issue; using physical or psychological tests to screen out legally protected groups. For example, personality and interest tests are questioned because of cultural bias in the tests that screen out female applicants. Cf. Annotation, *Requirement that Employee or Prospective Employee Take and Pass Physical Examination as Unlawful Employment Practice Violative of Title VII of Civil Rights Act of 1964* (42 U.S.C. §§ 2000e et seq.), 36 A.L.R. FED. 721 (1986) (requirement of physical examination is unlawful when used to discriminate against certain persons because it discloses physical infirmities more prevalent in one sex than the other).

court specifically requests legislative action or perceives a pattern of difficult issues.

The specific cases precipitating this Article will be described over the course of the discussion about permissible employer inquiries. In general, the cases involve instances where an employer has fired an employee because of false statements on an employment application concerning his or her health, and instances where an employer has rejected an applicant based on an answer concerning a handicapping condition.

A clarification of terms is in order. The author makes no distinction between the terms "handicap" and "disability." The Rehabilitation Act of 1973³ defines a disability as a handicap only when it substantially interferes with a major life activity.⁴ This definition can be fairly circular when the real problem lies not in any particular medical manifestations, but in the attitudinal barriers encountered by certain job applicants. For many disabilities, these barriers can interfere with a person's job performance to a greater extent than the underlying disability itself. In order to accommodate these attitudinal barriers, the statutory definition includes those who are "regarded as having such an impairment,"⁵ or, in other words, those who are perceived as being handicapped.⁶ This Article will use the terms handicap, impairment, and disability interchangeably, because so often the problems encountered in the pre-employment setting are caused by employers' assumptions about the effects of mental or physical conditions on job performance.

To evaluate the propriety of these assumptions, it is necessary to determine first exactly how much information about an applicant's physical and mental condition an employer needs to evaluate suitability for a job.⁷ This determination is essential in deciding what questions a prospective employer will be permitted to ask. "Ask" is used in its broadest sense of obtaining information. The restrictions on employer inquiries apply to the use of information obtained without deliberate effort (i.e., readily apparent disabilities like a wheelchair or a seeing-eye dog), or those discovered in a physical examination (i.e., evidence of surgery or blood and urine

3. 29 U.S.C. §§ 701-796 (1982).

4. *Id.* § 706 (7)(b).

5. *Id.*

6. See generally Osborne, *The Rehabilitation Act of 1973: Protections for Victims of Weight Discrimination*, 29 UCLA L. REV. 947 (1982) (proposing that obesity should be regarded as a physical handicap). For a perspective on the limits of this definition, see Hoffman, *Employment Discrimination Based on Cancer History: The Need for Federal Legislation*, 59 TEMP. L.Q. 1 (1986), where it is argued that the Cancer Patients Employment Rights Act of 1985 (H.R. 1294, 99th Cong., 1st Sess. (1985)) is needed because existing legislation, including the Rehabilitation Act of 1973, does not adequately protect cancer survivors.

7. This question should be distinguished from asking how much information is needed after employment is offered, e.g., to meet contingent health requirements, and how much is needed after an employee is hired, e.g., to assist first aid personnel.

test results).⁸ The restrictions apply to information solicited through specific questions about medical history⁹ such as alcoholism, ulcers, diabetes, coronary heart disease, and emotional disturbances.¹⁰ Regardless of how they come to an employer's attention, all disabilities need protection from the detrimental assumptions that may be drawn about their effect on job performance.

I. IDENTIFYING THE INTERESTS AT STAKE

How much an employer may ask an applicant varies according to whose interests are at stake. The first step in building a matrix to test the various approaches to this question is to generate a list describing the interests of job applicants, employers, other employees, insurance carriers, health care providers, and the general public. Compiling this list also involves an evaluation of the restrictions imposed on pre-employment inquiries by various laws and regulations now in force. The appropriate starting point for this inquiry is with the interests of the job applicant.

A. *Interests of the Applicant*

An applicant has an overriding interest in obtaining employment for both financial and psychological rewards. The importance of this interest can hardly be overestimated.¹¹ An applicant needs to be free from inappropriate exclusion from work if he or she is to satisfy this primary interest. Handicapped persons are often excluded from jobs because employers presume that a person's ability to perform a job or work safely with others will be affected by a handicapping condition. Obtaining accurate information about applicants' abilities and disabilities is critical to assure that applicants are not excluded from work which they can safely

8. See, e.g., Note, *Civil Rights: Termination of Employment for High Blood Pressure Constitutes Prohibited Discrimination Under the California Fair Employment & Housing Act*, 10 PEPPERDINE L. REV. 865 (1983).

9. See generally Comment, *Hidden Handicaps: Protection of Alcoholics, Drug Addicts, and the Mentally Ill Against Employment Discrimination Under the Rehabilitation Act of 1973 & the Wisconsin Fair Employment Act*, 1983 WIS. L. REV. 725 (discussing the burden of proof and protections afforded employees with "hidden handicaps" and an employer's duty to accommodate).

10. Interview with Philip L. Rothbart, M.D., J.D., Adjunct Professor, Delaware Law School of Widener University, in Wilmington, Delaware (Apr. 15, 1987).

11. As the Supreme Court observed:

Insofar as a man is deprived of the right to labor his liberty is restricted Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

Smith v. Texas, 233 U.S. 630, 636 (1914).

and adequately perform. This information must then be placed in the hands of employers who are the decision makers.¹²

The decision making process is complicated because it involves both an intellectual component and often a strong emotional component that must be addressed.¹³ Public concern over the spread of contagious diseases¹⁴ and employee use of controlled substances is an example of a strong emotional component potentially affecting hiring decisions.¹⁵ These emotional barriers are not unlike those that arise in the context of racial or sexual discrimination. Not surprisingly, the same kinds of anti-discrimination requirements applied in those situations are also being applied to disabled persons.¹⁶

The attitudinal barriers can be quite pernicious. They have been shown to be so resistant to change that one study concluded that subjective emotions and denials of bias make employers "almost impervious to conventional educational techniques designed to overcome the discrimi-

12. In a report of the Congressional Commission for the Control of Epilepsy and its Consequences, entitled *PLAN FOR NATIONWIDE ACTION ON EPILEPSY*, it was noted:

Despite the dramatic advances in treatment and rehabilitation making it possible for more than half of those with epilepsy to lead seizure-free lives, and another 35 to 40 percent to lead near-normal lives, and despite Federal legislation that prohibits discrimination in hiring because of handicapping conditions, the number of unemployed persons with epilepsy remains disproportionately high—over twice the national average

Perhaps even greater—and far more difficult to measure—is the number who are unemployed, working in low-paying, menial positions with little opportunity for advancement or change simply because they can find nothing else. The result is an immense waste of human potential among both those who have minimum disability and those who are severely handicapped.

U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUBLIC HEALTH SERVICE, *PLAN FOR NATIONWIDE ACTION ON EPILEPSY* 85, DHEW PUB. NO. (NIH) 78-277 (1978).

13. For example, strong sentiments may be aroused where the applicant has cancer or Acquired Immune Deficiency Syndrome (AIDS). Similarly, popularly associated characteristics may be imputed, such as criminal tendencies in the mentally retarded or mental deficiencies in the physically disabled.

14. See, e.g., Postell, *AIDS: A Legal, Medical and Social Problem*, 22 *TRIAL* 76 (Aug. 1986) (discussing blood testing and hiring of AIDS victims); see also *School Bd. of Nassau Co. v. Arline*, 107 S. Ct. 1123 (holding that persons suffering from contagious diseases are handicapped and fall within the protection of the Rehabilitation Act of 1973), *reh'g denied*, 107 S. Ct. 1913 (1987).

15. See *What ACLU Has To Say About . . . Drug Testing in The Workplace*, 357 *CIV. LIBERTIES* 5 (Spring 1986); Chineson, *Mandatory Drug Testing: An Invasion of Privacy?*, 22 *TRIAL* 91 (Sept. 1986) (drug testing in the workplace); *Mandatory Drug Testing in the Workplace*, 72 *A.B.A. J.* 34 (Aug. 1986) (arguing that civil liberties and workplace safety can best be promoted through supervisor surveillance rather than mandatory testing).

16. See Burgdorf & Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a "Suspect Class" Under the Equal Protection Clause*, 15 *SANTA CLARA L. REV.* 855 (1975) (handicapped persons merit special judicial attention within the equal protection clause).

nation.”¹⁷ It may well be that legal remedies are the only real avenue handicapped persons have for battling discrimination.

In addition to attitudinal barriers, other subtle pressures also work against a handicapped job applicant. For example, those persons who make the hiring decision are frequently unreliable. They may be misinformed and their judgment may suffer because they have not been trained to make medical evaluations.¹⁸ Even where the decision is made by a person with medical training, the applicant's condition may fall outside his or her area of expertise. Likewise, even a professional is subject to pressure to err on the side of conservative judgment.¹⁹

Factors that work in an applicant's favor include privacy rights²⁰ and public policy encouraging self-determination. The public health interest which seeks to prevent harm to an employee must be balanced against these rights and policies which allow for the self-determination of exposure to risk, a right especially important to handicapped persons who have been subjected to years of paternalistic attitudes.²¹ Part of the concept of equal opportunity is the option to try new opportunities, including those

17. Sands & Zalkind, *Effects of an Educational Campaign to Change Attitudes Toward Hiring Epileptics*, 13 *EPILEPSIA* 87, 94 (1972).

18. “Evaluating the meaning of past treatment is an ominous assignment for any mental health professional, and for the untrained person, virtually impossible.” National Association of Social Workers, Inc., *Statement in Reference to the Matter of Jean Ross' Certification for the New Jersey Bar 2*. See also Kovarsky & Hauck, *Arbitration and the Epileptic*, 28 *LAB. L.J.* 597 (Sept. 1977) (noting the difficulties arbitrators encounter in making medical judgments).

19. In an *amicus curiae* brief filed in *Glassman v. New York Medical College*, 64 Misc. 2d 466, 315 N.Y.S.2d 1 (1970), it was argued:

If the psychiatrist recommends admission of an applicant who subsequently has difficulties, he will be visibly [sic] and dramatically confronted by his mistaken judgment and perhaps by the criticism of his colleagues in the admission office and on the faculty. If, on the other hand, he erroneously recommends rejection of the applicant, he will never be confronted with error. This is so because the rejected applicant will never have an opportunity to demonstrate that the psychiatrist's judgement was wrong.

Amicus curiae Brief for the American Orthopsychiatric Association at 18, *Glassman v. New York Medical College*, 64 Misc. 2d 466, 315 N.Y.S.2d 1 (1970), reprinted in, 1 *LEGAL RIGHTS OF THE MENTALLY HANDICAPPED* 77, 96-97 (B. Ennis & P. Freidman ed. 1974).

20. See generally A. WESTIN, *PRIVACY AND FREEDOM* 7 (1967) (discussing individual's right to determine what information about him is disclosed); Beardley, *Privacy: Autonomy and Selective Disclosure in Privacy*, in *NOMOS XIII* 56 (J. Pennock & J. Chapman ed. 1971) (looking at the norms of privacy).

21. The developing concept of a “right to risk” can be traced out in the controversy surrounding the repeal of laws which require motorcyclists to wear protective helmets and the controversy over mandatory use of seat belts and other automotive devices. See Carter, *Auto Safety: Coleman to Act on Controversial Air Bag Issue*, 193 *SCI.* 1219 (Sept. 24, 1976); Haddon, *Passive vs. Active Approaches to Reducing Human Wastage* 15 (Newsletter of the American College of Preventive Medicine No. 2 1974), reprinted in, *J. TRAUMA* (Apr. 1974); *INSURANCE INSTITUTE FOR HIGHWAY SAFETY, STATUS REPORT*, Vol. 10, No. 11 (June 18, 1975).

also carrying a risk of failure.²² As a society, we do not want to risk being "protected" to the extent that we lose our freedom.

In general, certain protective measures are necessary to assure safe working conditions.²³ It must be kept in mind, however, that it is impossible to reduce the probability of work related accidents to zero, and a standard which comes close to this ideal may prove unreasonable.²⁴ For example, in *Foods, Inc. v. Iowa Civil Rights Commission*,²⁵ the Iowa Supreme Court held that it was unreasonable to fire a cafeteria worker who had epilepsy because she could have been assigned to washing dishes, working the cash register, and clearing tables, thereby avoiding any risks associated with working near the grill.²⁶

The growing body of privacy rights also offers some protection to job applicants. Privacy rights may be implicated whenever information is required to be disclosed.²⁷ Because it is difficult to identify abuses and

22. As one writer points out:

Most disabled children have their lives programmed for them by teachers, parents, therapists and doctors. Making independent decisions and dealing with the consequences may be new experiences for the disabled young adult. It was pointed out to me by one disabled young woman that she felt that people were always trying to protect her and that she was never given a chance to 'fail.' She felt that if she had been given the freedom to fail and recover early in life that she would have been better prepared to take the risks necessary for a full adult life.

DIEBLER, SERVICE NEEDS AND PROBLEMS OF DEVELOPMENTALLY DISABLED YOUNG ADULTS 9 (DD Themes and Issues, No. 7, Chapel Hill, N.C., Jan. 1977).

23. Common law protections, such as those applied in *Tucker v. Missouri & K. Tel. Co.*, 132 Mo. App. 418, 112 S.W. 6 (1908) (recognizing cause of action against employer for negligent employment and retention of incompetent fellow-servant), have been supplanted by legislation, i.e., Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1982), and state worker's compensation statutes. Cf. *In re Collingsworth*, 17 N.C. App. 340, 194 S.E.2d 210 (1973) (denying unemployment compensation to man fired for not wearing safety equipment; the employee said he was "willing to take the risk").

24. In a study to test the validity of rejecting borderline neuropsychiatric cases from military service, the author concluded, "If screening were to weed out anybody who might develop a psychiatric disorder, it would be necessary to weed out everybody." Berelin, *Psychiatric Aspects of Military Manpower Conservation*, 111 AM. J. PSYCH. 37, 94 (1954). In *Rhodes v. Longview Fibre Co.*, 2 Mental Disability L. Rep. (BNA) 14 (1977), the court noted that the level of hazard had been so over-emphasized by the employer that it appears that anyone subject to a sneeze would bring swift disaster in the mill. Likewise, Gerald Cohen, the arbitrator in *Samuel Bingham Co. & Teamsters Local 688*, 1 Mental Disability L. Rep. (BNA) 268 (1976-1977), declined to elevate safety to the status of a sacred cow.

25. 318 N.W.2d 162 (Iowa 1982).

26. *Id.* at 169. The court upheld a hearing officer's determination that the worker's discharge was not based upon the nature of her occupation, reinstated the officer's decision to rehire the worker, and awarded back pay minus unemployment compensation benefits received. The court stated that the evidence did not warrant the conclusion that the worker's epileptic condition presented a risk of danger to herself or others that could not reasonably be accommodated as required by law. *Id.*

27. Beardley, *supra* note 20, at 56. The disclosure of "private information about the plaintiff, even though it is true and no action would lie for defamation," is actionable as an invasion of privacy. W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 856 (5th ed. 1984).

obtain redress from those who violate a person's privacy, a strong public interest exists in denying access to information for those who have no need for it. In the case of a public employer, or any employer who is acting as an agent of the state, there must be a compelling state interest before violating an applicant's right to privacy. Private employers, on the other hand, may be liable for the common law tort of invasion of privacy if they abuse the information entrusted to them.

The likelihood of an invasion of privacy and the wrongful use of information by employers is increased by the use of collection systems that misrepresent an applicant's condition because the information is erroneous, incomplete, or outdated.²⁸ For example, does consultation with a guidance counselor or minister constitute treatment for a mental or emotional disorder? What if a diagnosis is made but the condition is so mild that no treatment is prescribed or necessary?²⁹ An employer may be liable for defamation if incorrect information about an applicant's condition is circulated.³⁰ If the employment is in the public sector, the additional constitutional protection governing state action may protect against invasions of privacy and the inappropriate use of an applicant's condition in the hiring process.³¹

In summary, the interests of job applicants include: (1) an opportunity to secure financially and psychically rewarding work; (2) freedom from attitudinal barriers and presumptions based on ignorance or emotions about their ability to perform tasks; (3) the right to a measure of self-

28. In recognition of the need for individuals to correct or update information held concerning them, Congress passed the Privacy Act of 1974, 5 U.S.C. § 552a (amended 1984).

29. This can happen when tests for certain antibodies are positive, i.e., a positive tuberculin skin test coupled with inconclusive x-rays.

30. With laboratory test accuracy rates as low as thirty-three percent, inaccurate reports are likely. Chineson, *supra* note 15, at 91. In *Cowper v. Vannier*, 20 Ill. App. 2d 499, 156 N.E.2d 761 (1959), the court held that the statement "Mr. Cowper is recovering from a mental illness" printed in a newsletter was defamatory.

31. In *Spencer v. Toussaint*, 408 F. Supp. 1067 (E.D. Mich. 1976), the plaintiffs brought suit under 42 U.S.C. § 1983 (1982), and unsuccessfully argued that,

in denying employment based on prior history of mental illness, the defendants impose an impermissible conclusive presumption on the class, thus denying plaintiffs due process of law. Third, they maintain that to deny persons who 'have been treated, voluntarily or involuntarily, for alleged or proven mental illness and who subsequently have been discharged from treatment or declared restored to soundness of mind by the State,' employment because of past mental illness while not examining other applicants to determine their mental health is a denial of equal protection, or of a due process right to fair consideration for public employment.

Id. at 1070-71. The court observed that the applicants had only been disqualified only from service as bus drivers, and held that due process hearings were not required because the plaintiffs were foreclosed only from a narrow range of employment opportunities. *Id.* at 1072. For cases where similar arguments were made, see *Capua v. City of Plainfield*, 643 F. Supp. 1507 (D.N.J. 1986); *Long Beach City Employees Ass'n v. City of Long Beach*, 41 Cal. 3d 937, 719 P.2d 660, 227 Cal. Rptr. 90 (1986); *Patchoque-Medford Congress of Teachers v. Board of Educ.* 70 N.Y.2d 57, 517 N.Y.S.2d 456, 510 N.E.2d 325 (1987).

determination as to what risks will be assumed; (4) reasonable safety precautions that do not unreasonably exclude handicapped workers; and (5) the protection of privacy rights in information revealed to employers.

B. *Interests of the Employer*

Primarily, an employer needs to know if an applicant has the ability to perform the tasks required by the job. Federal law limits employment to "otherwise qualified" applicants. Otherwise qualified applicants are described in the regulations as those applicants who are able to perform the tasks identified as essential to the position once reasonable accommodations have been made.³² Generally, state laws are interpreted consistently with this description.³³ No one seriously proposes that unqualified applicants should be hired.

At the outset, the problem lies in determining what skills or abilities are essential elements of specific positions so that "otherwise qualified" applicants can be identified. Employer safety manuals³⁴ and requests to hire aliens may be a ready source of such information. Another source is the thousands of individual job descriptions maintained by the United States Department of Labor.³⁵

In addition to matching a person's abilities to a particular position, an employer needs certain information from applicants to comply with the statutory requirements of affirmative action³⁶ and veteran's preference.³⁷ An employer also needs the specific information to make reasonable accommodations for disabilities³⁸ and to maintain a safe workplace,³⁹

32. 41 C.F.R. § 60-741.2 (1987); 45 C.F.R. § 84.3(k) (1987).

33. For example, in *In re Montgomery Ward & Co.*, 280 Or. 163, 570 P.2d 76 (1977), the court concluded that the Handicapped Persons Civil Right Act, OR. REV. STAT. § 659.425 (1985):

impose[d] upon an employer the obligation not to reject a prospective employee because of a physical or mental handicap unless there is, because of the defect, a probability either that the employee cannot do the job in a satisfactory manner or that he can do so only at the risk of incapacitating himself. The 'fullest participation in the . . . economic life of the state' and the 'reasonable demands of the position' would seem to require no less a standard.

Id. at 168-69, 570 P.2d at 79.

34. A. FRAGOMEN, JR. & S. BELL, *IMMIGRATION PRIMER* 43 (1985).

35. *EMPLOYMENT & TRAINING ADMIN.*, U.S. DEP'T OF LABOR, *DICTIONARY OF OCCUPATIONAL TITLES* (4th ed. 1977).

36. For example, employers with contracts in excess of \$2500 with any federal department or agency must take affirmative action to employ and advance in employment qualified handicapped individuals. 29 U.S.C. § 793 (1982). *See also* 29 U.S.C. § 791(b) (1982) (requiring federal agencies to implement affirmative action plans); 45 C.F.R. § 84.11(a)(2) (1987) (requiring "positive steps" to employ the handicapped).

37. *See, e.g.*, MONT. CODE ANN. § 39-30-107 (1984); N.D. CENT. CODE § 14.02.4-11 (1983).

38. 41 C.F.R. § 60-741.6(d) (1987) (federal contractors); 45 C.F.R. § 84.12 (1987) (recipients of federal grants).

39. Occupational Safety & Health Act of 1970, 29 U.S.C. § 651(b)(1)-(13) (1982).

including those safety measures required by union contracts.⁴⁰ Well defined job requirements are at the heart of efforts to meet safety requirements and provide reasonable accommodations for handicapped applicants.⁴¹ An employer may also need the information to comply with statutes protecting the public health by restricting who may work in certain positions.⁴²

The usefulness of complete, accurate, and easily accessible information cannot be underestimated. However, an employer needs to obtain this information in a reasonably low-cost manner. An extensive physical examination of each applicant would be prohibitively expensive, as would be the services of experts to determine a person's ability to perform a job. Costs associated with an expert evaluation of practical accommodations for particular disabilities would also be prohibitive. At the same time, however, an employer cannot afford to have a selection system that bypasses too many qualified applicants.

Once an employer determines the essential elements of a position, his next problem is to determine whether the applicant will be able to perform. In the past, various aptitude and intelligence tests have been relied upon to make this determination. However, these tests must be carefully administered and interpreted within informed guidelines because they have been shown to be unreliable in the context of race discrimination.⁴³ These guidelines will prove helpful in setting testing procedures for handicapped applicants because they demonstrate the pitfalls that should be avoided and reflect the attitude of the courts which have evaluated testing procedures.

A final, and significant, concern of employers is the possibility of increased costs from absenteeism and insurance if disabled persons join the work force. In *Chrysler Outboard Corp. v. Department of Industry*,

40. Federal contractors must notify unions with which they have collective bargaining agreements that they are bound by law to take affirmative action. 41 C.F.R. § 60-741.4(e) (1987). Likewise, recipients of federal financial assistance cannot participate in contracts or relationships, including labor unions, if it would discriminate against handicapped applicants. See 45 C.F.R. § 84.11(a)(4),(c) (1987).

41. The issue is similar to determining the bona fide occupational qualifications in sex and religious discrimination cases. See Lang, *Protecting the Handicapped from Employment Discrimination: The Job-Relatedness and Bona Fide Occupational Qualification Doctrines*, 27 DEPAUL L. REV. 989 (1978) (arguing that the doctrines used in Title VII Civil Rights adjudications can be applied to discrimination against the handicapped).

42. E.g., MASS. ANN. LAWS ch. 71, § 55B (Law. Co-op. 1986) (prohibiting employment in any public or private school of anyone with tuberculosis). The City of Miami requires food service workers to certify that they do not carry infectious disease. N.Y. Times, Oct. 26 1985, at 30, col. 1, cited in Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1274 n.3 (1986).

43. See B.L. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 6-10 (1983); GOLDSTEIN, FAIR EMPLOYMENT LAW AND THE USE OF TESTING IN MAKING EMPLOYMENT DECISIONS: AN INTRODUCTORY OUTLINE OF MAJOR ISSUES AND CONCEPTS, NAACP Legal Defense and Educational Fund, Inc. (1977).

Labor & Human Relations,⁴⁴ a Wisconsin court objected to speculation as to such costs because,

[a]t no point in this case did Chrysler contend that the complainant was unable to perform, at the standards set by the employer, the duties required by the job. Instead, the petitioner based his decision on the risk of future absenteeism and the higher insurance cost. Neither of these factors constitute a legal basis for discriminating against complainant.⁴⁵

The same court also rejected as immaterial the contention that the complainant may at some future date be unable to perform his job.⁴⁶ In sum, decisions such as *Chrysler* point to the need not only for reliable information about possible insurance and absenteeism costs, but also to the overall concern of employers to contain costs by being able to make hiring decisions based upon relevant and complete information about a potential employee.

C. *Interests of the Insurance Industry*

Insurance carriers, as well as employers, are interested in the possibility of increased insurance costs for handicapped employees because of the expenses of illness or accidents they would bear. Efforts by insurance carriers to protect their interests and intervene in the employment process are hampered, however, by the risk of liability for tortious interference with the business relationship between employer and employee.⁴⁷

Workers' compensation and disability insurance carriers want to minimize job accidents and maintain employee health. Accordingly, both such carriers would rather err on the side of not hiring in order to meet those goals. Both types of carriers, on the other hand, also seek to rehire or otherwise return to work previously injured employees, who are referred to as the "newly handicapped," as soon as possible to reduce the period of disability.

44. 14 Fair Empl. Prac. Cas. (BNA) 344 (Wis. Cir. Ct. 1976) (construing Wisconsin law).

45. *Id.* at 345.

46. *Id.*

47. See *Hickman v. Winston County Hosp. Bd.*, 508 So. 2d 237 (Ala. 1987). The *Hickman* court outlined the prima facie case for tortious interference with a business or contract relationship. The elements are:

- (1) The existence of a contract or business relation;
- (2) defendant's knowledge of the contract or business relation;
- (3) intentional interference by the defendant in the contract or business relation;
- and
- (4) damage to the plaintiff as a result of defendant's interference.

Id. at 238 (quoting *Lowder Realty, Inc. v. Odom*, 495 So. 2d 23, 25 (Ala. 1986)).

The *Hickman* court held that the tortious conduct must be conducted by a third party, outside of the business relationship. *Id.* Any interference by an insurance company in this context would fit the requirement of the rule outlined by the *Hickman* court.

Also, health and hospitalization carriers want workers' health and safety maintained. In order to contain costs, these carriers may require coverage waivers for employees with pre-existing conditions. The usefulness of such waivers is limited, however, since most often these carriers will be providing group policies. Under group policies, detailed inquiries about an individual applicant are not particularly useful because the health of an employee's dependents will be more determinative of the carrier's exposure to risk. Furthermore, predictions of future health for individuals are better made from information concerning the individual's family medical history than with only the individual's history.

Another group of insurers, liability insurance carriers, are interested in reducing the possibility of accidents to third parties. Liability carriers are concerned about increased risks of injury to customers, or perhaps other motorists involved in traffic accidents, caused by a handicapped employee while on company business. Hospitals and other health care providers have related concerns because they must absorb the costs of health care for both the applicant and the other members of the public who have neither insurance nor adequate income.

D. Interests of the General Public

Members of the public in general are concerned about the potentially double-edged tax burdens associated with the denial of jobs to "otherwise qualified" applicants. Not only is there the risk of increased taxes to fund unemployment, disability, and welfare benefits, but there is the burden of reduced tax revenue occasioned by less than full employment. The potential disability and welfare benefits include increased costs of Social Security Disability Insurance, food stamps, housing assistance, Medicaid, vocational rehabilitation, and job training and placement services. In addition to tax burdens, the public, as well as the potential co-workers of the applicant, have an interest in avoiding any threats to safety when in the presence of a handicapped worker.⁴⁸

II. EVALUATING CURRENT LIMITS ON PRE-EMPLOYMENT INQUIRIES

Having described the sometimes competing, sometimes concurrent interests of applicants, employers, insurers, and the general public, an analysis of the problems encountered by applicants will reveal whether these interests are optimally accommodated under the existing regulations and limitations which apply to pre-employment inquiries.

The application and interviewing process may present an applicant with difficult choices. When confronted with specific choices, an applicant may choose to answer truthfully or falsely, but sometimes the questions are so vague that a meaningful response is difficult. There are many examples

48. See *supra* note 42.

of individuals who did not disclose medical information out of fear of rejection, only to be fired later for falsifying their job application.⁴⁹ Employers usually rationalize this practice by claiming that it serves to weed out dishonest employees. The rationale could be applied as well to any information which is not a justifiable concern to the employer such as a person's political or sexual preferences.⁵⁰ The rationale has even been used to fire employees who had been satisfactorily performing their jobs.⁵¹ The practice of firing persons on the basis of false information in an application, however, is not only both over- and underinclusive, but fails to take into account the individual's right to withhold irrelevant or unnecessary information.

The ability to fire a person who gives false information on an application may be limited by legal doctrines and restrictions followed in other areas of the law. False statements are the very heart of misrepresentation cases, and the problems presented by false statements also arise in the context of insurance and will cases. The overarching theme is that a false statement must also be material to justify adverse action.⁵² The "false and material" test limits the consequences which may be imposed upon those who give false information and could be applied to cases involving handicapped applicants.

In addition to the false and material test, it is instructive to look at restrictions developed to prevent employment discrimination for reasons other than an applicant's medical condition.⁵³ These restrictions, for instance, may prohibit questions about whether an applicant has an arrest record⁵⁴ or whether an applicant has children.⁵⁵ The theme that unites

49. See EPILEPSY FOUND. OF AM., ANSWERS TO THE MOST FREQUENT QUESTIONS PEOPLE ASK ABOUT EPILEPSY 13 (1977). See also Kovarsky & Hauck, *supra* note 18, at 604-05.

50. *Contra* Konigsberg v. State Bar of Cal., 366 U.S. 36 (1961) (state may refuse admission to bar where applicant refuses to answer questions about political affiliations since it thwarted a full investigation into qualifications).

51. See *Horizon Mining Co.*, 72 Lab. Arb. (BNA) 1171 (1979) (LeWinter, Arb.) (employer may not discharge employee who had lied about prior injury on application when the employer had recalled employee back to work following an injury); *Iowa Beer & Liquor Control Dep't v. Iowa Civil Rights Comm'n*, 337 N.W.2d 896 (Iowa 1983) (falsifying of a job application does not preclude finding of disability discrimination).

52. See W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER & KEETON ON THE LAW OF TORTS 753 (5th ed. 1984) (misrepresentation); 1 PAGE ON WILLS § 14.3 (rev. ed. 1960); 2 RICHARDS ON INSURANCE §§ 306, 322 (W. Freedman 5th ed. 1952); *Gomogda v. Prudential Ins. Co. of Am.*, 501 P.2d 756, 758 (Colo. App. 1972).

53. See, e.g., Schreiber, *Employment Applications—What Massachusetts Employers Can and Cannot Ask*, 65 MASS. L. REV. 69 (1980) (reviewing state and federal limits on inquiries into marital status, pregnancy and children, height and weight, finances, relatives, education, criminal records, military records and security clearances, religion, handicaps and mental health, and citizenship).

54. See *Genz, Employer's Use of Criminal Records under Title VII*, 29 CATH. U.L. REV. 597 (1980); B.L. SCHLEI & P. GROSSMAN, *supra* note 43, at 173.

55. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1970) (reversing grant of summary judgment for defendants where employer indicated it would not hire women with pre-school-age children, but did employ similarly situated men).

these restrictions is job relevance.⁵⁶ Court decisions have developed a language for discussing whether the features of a job are material, in other words, whether the information requested is essential to the job. Such job essentials are commonly referred to as bona fide occupational qualifications (BFOQs).⁵⁷

Another principle borrowed from other discrimination cases is that of selective enforcement of administrative policies. Selective enforcement would “tend to screen out” the handicapped.⁵⁸ For example, an inference of selective enforcement would be warranted if individuals were fired for falsifying their job applications with respect to medical information, but were not fired for having given other false information.⁵⁹ A strong, but so far unsuccessful, argument has been made for considering the handicapped a suspect class.⁶⁰ If this argument succeeds, then courts would apply strict scrutiny to claims of discrimination which would afford handicapped persons a greater measure of protection.

A. Existing Case Law

The question of whether a false statement is material, and thus justifies discharge, has frequently arisen in cases involving workers with epilepsy. In the context of arbitration, it has been observed:

Some arbitrators—the number appears to be increasing—recognize the reason for denial and ‘forgive’ the ‘white lie.’ In other words, lying is not ‘just cause’ for discharge—the punishment does not fit the crime—given the needless industrial hostility faced by epileptics.⁶¹

In *Casias v. Industrial Commission of Colorado*⁶² a denial of unemployment benefits could not, standing alone, be based on the employee’s discharge for concealing a history of epilepsy on his employment application. The employee knew that his seizures were controlled by medication

56. *Cf. Williams v. Boorstin*, 633 F.2d 109 (D.C. Cir. 1980) (upholding firing of black man who had falsely claimed to have a law degree as not racially motivated), *cert. denied*, 451 U.S. 985 (1981).

57. *See Lang*, *supra* note 41, at 992.

58. Federal contractors are required to:

review . . . all physical and mental job qualification requirements to insure that, to the extent qualification requirements *tend to screen out* qualified handicapped individuals, they are consistent with business necessity and safe performance of the job.

41 C.F.R. § 60-741.6(c) (1987) (emphasis added). *See also* 45 C.F.R. § 84.13(a) (1987) (recipients of federal grants must not use selection criteria that “screens out or tends to screen out handicapped persons” unless certain exceptions are met).

59. *Cf. East v. Romine, Inc.*, 518 F.2d 332, 340 n.7 (5th Cir. 1975) (employer cannot justify refusal to hire based upon extensive investigation into work record if he conducts only limited investigation into work record of other applicants).

60. *See Burgdorf & Burgdorf*, *supra* note 16.

61. *Kovarsky & Hauck*, *supra* note 18, at 605 (citations omitted).

62. 38 Colo. App. 261, 554 P.2d 1357 (1976).

and would not affect his job performance. In fact, the employer only learned of the condition when a physician treated the employee for an on-the-job accident unrelated to the epilepsy. The *Casias* court required the false statements to be material before it would deny unemployment benefits.⁶³

Materiality can only be determined with knowledge of both the essential job requirements and the acceptable level of safety. Apparently suspicious of employer's exaggerated claims for safety, the arbitrator in *Samuel Bingham Co. & Teamsters Local 688*⁶⁴ declined to elevate safety to the status of sacred cow.⁶⁵ In a similar case, Kovarsky and Hauck note:

[T]he arbitrator in *Whitney Chain* reasoned that an epileptic should be permitted to fill any job which is no more hazardous than conditions encountered daily away from the plant. While this conclusion is debatable, at least to some extent, the arbitrator was more in tune with current medical opinion than others.⁶⁶

Other courts have also recognized the need to acknowledge that absolute safety cannot be attained, and that the critical determinant is present ability rather than past medical conditions.⁶⁷

Irrebuttable presumptions may also be used to discriminate against persons with potentially handicapping conditions. Automatic exclusion of a person with controlled epilepsy from a police position,⁶⁸ automatic exclusion of all diabetics from working in a shipyard,⁶⁹ and automatic

63. *Id.* at 264, 554 P.2d at 1360. *Accord* *Roundtree v. Board of Review*, 4 Ill. App. 3d 695, 281 N.E.2d 360 (1972) (denial of prior felony conviction constituted misconduct connected with work because the applicant was employed as security guard); *Collins v. Cherry Manor Convalescent Center*, 7 Kan. App. 2d 270, 640 P.2d 875 (1982) (handicapped employee's state of mind determinative of whether she "knowingly" misrepresented her condition); *Krauzer v. Farmland Indus., Inc.*, 6 Kan. App. 2d 107, 626 P.2d 1223 (1981) (accidental or mistaken misrepresentation of health is not a "knowingly" made misrepresentation). *See also* Annotation, *Right to Unemployment Compensation as Affected by Misrepresentation in Original Employment Application*, 23 A.L.R. 4th 1272 (1983).

64. 1 Mental Disability L. Rep. 268 (BNA) (1976-1977).

65. *Id.*

66. Kovarsky & Hauck, *supra* note 18, at 604.

67. *See infra* notes 68-75 and accompanying text.

68. The Court is of the opinion that the Medical Standards sweep too broadly and include within their ambit those individuals, like the plaintiff, whose history of epilepsy in no way infringes upon their present ability to perform the duties and tasks required by the position to which they have applied. Thus, . . . the absolute presumption established by standard K(4)(a) as applied to the plaintiff is violative of his due process rights.

Duran v. City of Tampa, 430 F. Supp. 75, 77-78 (M.D. Fla. 1977).

69. In *Fraser Shipyards v. Department of Indus., Labor & Human Relations*, 13 Empl. Prac. Dec. (CCH) ¶ 11,515 (Wis. 1976), the court observed:

The petitioner vigorously argues that because its expert testimony indicates that some diabetics may be a substantial hazard to themselves or fellow employees when working as welders in a shipyard, all diabetics may be disqualified from potential employment as a welder in that industry. This is precisely the type of rationale that

rejection of former drug users from municipal employment,⁷⁰ have all been struck down.⁷¹

In one case, the Federal Aviation Administration was not permitted to presume that a hearing-impaired Air Traffic Control Specialist would be unable to use the phone in a high noise level atmosphere, but instead had to determine his abilities when he used a hearing aid.⁷² Likewise, a railroad had to reinstate an employee with back pay, because it had failed to establish whether color blindness precluded satisfactory performance in a fireman's post.⁷³ Substantive due process is denied when employment decisions are based on information unrelated to present ability to perform the duties of a particular position.⁷⁴ Procedural due process is denied by vague and overbroad restrictions on employment.⁷⁵

In *Spencer v. Toussaint*,⁷⁶ plaintiffs argued that inquiry was made only about past mental health records as opposed to present ability to perform the duties of a position with the municipal transportation authority. The court responded that administering psychological tests for present functioning "might well be desired but it is not constitutionally required. The fact that the method results in some inequality does not authorize the Court to establish a superior one."⁷⁷ At the time of the *Spencer* decision, the same employer, the City of Detroit, had been conducting current

the Wisconsin Fair Employment Law is designed to overcome While the petitioner did demonstrate that individual diabetics may be unqualified . . . because of a history of blackouts or . . . [severe disability] . . . , the petitioner made no such showing with these claimants.

70. *Davis v. Bucher*, 451 F. Supp. 791 (E.D. Pa. 1978) (holding as overbroad and irrational regulation barring former drug users from city employment without considering each case individually).

71. *Contra Boynton Cab. Co. v. Department of Indus., Labor & Human Relations*, 96 Wis. 2d 396, 291 N.W.2d 850 (1980) (upholding refusal to hire taxi driver with only one hand despite the fact that an inexpensive device could have easily been added to cab without sacrificing passenger safety).

72. *Crane v. Lewis*, 551 F. Supp. 27 (D.D.C. 1983).

73. *Quinn v. Southern Pac. Trans. Co.*, 76 Or. App. 617, 711 P.2d 139 (1986).

74. The disclosure of all medical and psychological treatment records to a state board of bar examiners has been distinguished as not violative of substantive due process because a privilege, not a right was at stake. Thus, in *Florida Bd. of Bar Examiners re Applicant*, 443 So. 2d 71 (Fla. 1983), the court concluded that no constitutional rights of a bar applicant, including due process rights, privacy rights, or psychotherapist-patient privileges, were violated by the state bar's required release of such records. *Id.* at 76. See Comment, *Constitutional Law: Does a Privacy Right Protect a Bar Applicant's Mental Health Records from Complete Disclosure*, 36 U. FLA. L. REV. 537 (1984).

75. See, e.g., Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1279 (1986) (public hysteria and misconceptions about AIDS virus may result in policies that deny constitutional freedoms to AIDS carriers and homosexuals). But see *New York Transit Auth. v. Beazer*, 440 U.S. 568 (1979) (finding constitutional a blanket exclusion of methadone users from eligibility for employment with transit authority until applicants completed drug treatment program; distinction was rational and not a pretext for discrimination).

76. 408 F. Supp. 1067 (E.D. Mich. 1976).

77. *Id.* at 1074.

psychological testing for other positions, specifically, law enforcement. This decision is directly contrary to the federal regulations expressly adopted to discourage discrimination against certain governmental employees.⁷⁸ Since most transportation authorities receive federal financial assistance, they should use hiring practices that accord with federal regulations.⁷⁹ Unfortunately for the claimant, as well as others, the issue was not tried.

The importance of using the *present* capabilities of an applicant instead of some *past* occurrence seems to be a difficult attitudinal barrier to overcome.⁸⁰ In their review of twenty-eight published arbitration awards involving epilepsy, Kovarsky and Hauck discovered, "Only a few of the arbitrators seemed cognizant of the need to consider [the degree of seizure] control. While safety was important in twenty-five of the grievances, none of the arbitrators making decisions indicated that the probability of seizure on the job was considered."⁸¹ Federal and state legislation, and occasionally local ordinances,⁸² address to some degree the problem of overcoming the barriers that prevent the evaluation of applicants based upon their current ability to perform a job.

B. Federal Statutory Restrictions On Pre-Employment Inquiries

The principal federal statute that governs employment of handicapped persons is the Rehabilitation Act of 1973.⁸³ Generally, the Act prohibits employment discrimination based upon handicap. Its provisions, which are commonly referred to by their section numbers, cover various employers: section 501 covers the federal government as an employer;⁸⁴ section 503 covers employers with government contracts in excess of \$2500;⁸⁵ and section 504 covers recipients of federal financial assistance such as grants and subsidies.⁸⁶ The Act defines "handicapped person" as one who (1)

78. See *infra* notes 83-86 and accompanying text.

79. See *infra* note 86 and accompanying text.

80. See *supra* text accompanying notes 5-6. Epileptics whose seizures are under control by medication frequently encounter this barrier. For example, in *Chicago & Northwest R.R. v. Labor & Indus. Comm'n*, 98 Wis. 2d 592, 297 N.W.2d 819 (1980), the court held that there was sufficient evidence to support the commission's determination that a welder's epileptic seizure disorder did not pose a reasonable hazard on the date of his disqualification from employment.

81. Kovarsky & Hauck, *supra* note 18, at 603.

82. See, e.g., Fair Practices Act, PHILADELPHIA, PA, CODE ch. 9-1100 (1982).

83. 29 U.S.C. §§ 701-796 (1982 & Supp. III 1985).

84. *Id.* § 791.

85. *Id.* § 793.

86. *Id.* § 794. See Annotation, *Construction and Effect of § 504 of the Rehabilitation Act of 1973 (29 U.S.C. § 794) Prohibiting Discrimination Against Otherwise Qualified Handicapped Individuals in Specified Programs or Activities*, 44 A.L.R. FED. 148 (1979); Wegner, *The Antidiscrimination Model Reconsidered: Ensuring Equal Opportunity Without Respect to Handicap Under Section 504 of the Rehabilitation Act of 1973*, 69 CORNELL L. REV. 401 (1984) (arguing that section 504 is a useful tool for advancing Congress's equal opportunity objective, however, it is not fully understood by the courts who treat the mandate as unitary rather than multifaceted).

has a physical or mental impairment substantially limiting a major life activity, (2) has a record of such impairment, or (3) is regarded as having such an impairment.⁸⁷ Major life activities involve daily functions such as caring for oneself, walking, talking, seeing, learning, and working.⁸⁸

The regulations issued by the then existing Department of Health, Education and Welfare (DHEW) to implement section 504 served as the model for other government agencies.⁸⁹ As these were the model regulations, and since DHEW was the major donor of federal grants, these regulations have been the subject of numerous court decisions. Both the DHEW regulations and those promulgated by the Department of Labor's Office of Federal Contract Compliance Programs for section 503 limit pre-employment inquiries.

Section 503 regulations include suggested personnel procedures to achieve compliance with the regulations.⁹⁰ As part of their affirmative action obligation, federal contractors must review their personnel processes and review physical and mental job qualifications. "[T]o the extent that qualification requirements tend to screen out qualified handicapped individuals," they must be job related and consistent with business necessity and safe performance of the job.⁹¹ There is no objective way to determine whether or not the motives of an employer who seeks information about medical conditions are for purposes of affirmative action. Regulations under the Act address this uncertainty by placing the burden on the federal contractor "to demonstrate that it has complied with the requirements of this paragraph."⁹²

Section 504 regulations specifically prohibit pre-employment medical examinations or inquiries except under specific enumerated situations.⁹³ Recipients of federal financial assistance "may not make use of any employment test or other selection criterion that screens out handicapped persons" unless the criterion is job related, and the alternatives that do not screen out or tend to screen out applicants are unavailable.⁹⁴ Section 504 does permit an employer to condition an offer of employment on the results of a medical examination, provided, however, that all applicants are subject to the requirement.⁹⁵

87. 29 U.S.C. § 706(7)(B) (1982); 41 C.F.R. § 60-741.2 (1987); 28 C.F.R. § 41.31(a) (1987).

88. 28 C.F.R. § 41.31(2) (1987); 45 C.F.R. § 84.3(j)(2)(ii) (1987).

89. The responsibility for coordinating consistency of regulations among various government agencies under section 504 has since been transferred to the Department of Justice. Exec. Order No. 12,250, 3 C.F.R. 298 (1980). Final Department of Justice rules can be found at 28 C.F.R. §§ 41, 42 (1987).

90. 41 C.F.R. § 60-741.6(b) (1987).

91. *Id.* § 60-741.6(c).

92. *Id.* § 60.741.6(c)(2).

93. 45 C.F.R. § 84.14 (1987).

94. *Id.* § 84.13(a).

95. *Id.* § 84.14(c).

Both sections limit disclosure of the information to: (1) supervisors and managers who will need the information to determine what reasonable accommodations and restrictions are necessary; (2) first aid and safety personnel, if needed to provide for possible emergencies; and (3) government officials investigating compliance with the Act.⁹⁶ In other words, the release of the information is always contingent upon a specific need to know. If there are no job related consequences, but the information is needed to guard against emergencies, then only first aid personnel, not supervisors or managers, may be told.⁹⁷ Similarly, first aid personnel are not to be informed where only job restructuring is required.⁹⁸

One of the differences between federal contractors and recipients of federal grants is that the latter may, but are not required to, invite disclosure of conditions that may invoke the statute's protection.⁹⁹ In neither case, however, is the employer authorized to compel disclosure. In order to make this voluntary disclosure meaningful, applicants should be given some sort of summary of the affirmative action program and the reasons why disclosure of certain information is sought. Without this, the individual lacks the information necessary to make an informed choice about whether to release the information.

One suggestion offered in the regulations to avoid this problem is for the employer to state: (1) the purpose of asking for the information; (2) the intended use; (3) whether giving the information is mandatory or voluntary; (4) and the consequences of not complying with the request.¹⁰⁰ A second practice is to assure applicants that the reports filed for affirmative action purposes will not contain references by which the applicant could be identified.¹⁰¹ To this end, the affirmative action could be requested on a sheet separate from the application.¹⁰² If either of these practices is followed, consent should be obtained for any additional uses of the information.

Occasionally attempts are made to distinguish between situations involving a medically trained interviewer as opposed to ordinary personnel officers. In reality, this distinction is not valid because the medical officer is an agent of the employer and the issues remain the same. As one commentator observed:

While the acceptance of this medical testimony is proper and entitled to careful evaluation, arbitrators are aware, or should be aware, that company doctors testifying are expected to display allegiance to the firm. Many company doctors are unnecessarily conservative when eval-

96. 41 C.F.R. § 60-741.6(c)(3) (1987); 45 C.F.R. § 84.14(d) (1987).

97. 41 C.F.R. § 60-741.6(c)(3)(i) (1987); 45 C.F.R. § 84.14(d)(1) (1987).

98. 41 C.F.R. § 60-741.6(c)(3)(ii) (1987); 45 C.F.R. § 84.14(d)(2) (1987).

99. 45 C.F.R. § 48.14(b) (1987).

100. 5 U.S.C. § 522a(e)(3) (1982); 45 C.F.R. § 84.14(b) (1987).

101. 5 U.S.C. § 522a(b)(5) (1982); 45 C.F.R. § 84.14(d) (1987).

102. 45 C.F.R. § 84.14(d) (1987).

uating employees, choosing to err on the side of their employers.¹⁰³

Furthermore, the medical officer will not have expertise in the full range of medical evaluations that arise, since psychiatry, neurology, cardiology, endocrinology, and other medical specialties are likely to be involved in a full evaluation of an applicant with a medical condition.

Use of an employment agency to make the initial interview does not free the employer from responsibility or change the issues since the agency acts as an agent for the employer.¹⁰⁴ An agency may also be a state employment service which receives federal financial assistance, and, therefore, would be limited by section 503 and other federal regulations. An agency may be considered a federal subcontractor if it makes too many placements with federal contractors, and likewise, subject to section 504 restrictions. In no event may a section 503 employer continue to use an agency that has discriminated against handicapped applicants because to do so would amount to use of a personnel procedure that would screen out or tend to screen out handicapped applicants.¹⁰⁵

Another employer practice that could be used to evade the Act is requiring a handicapped applicant to waive insurance or sick pay benefits. This practice violates the requirement that employees receive equal benefits.¹⁰⁶ These practices, and others like them, must be closely monitored or restricted to prevent discrimination against handicapped applicants. Overall, the Rehabilitation Act is a remedial statute that must be liberally construed to counter any hiring practices that circumvent its goals.¹⁰⁷

C. State Statutory Protection of Applicants

A variety of state statutes and regulations address the problem of the permissible scope of pre-employment inquiries. Most states have provisions

103. Kovarsky & Hauck, *supra* note 18, at 602.

104. Under regulations formulated by the Department of Health and Human Services, a recipient of federal monies thereunder cannot participate in a contractual relationship with employment or referral agencies if the effect is discrimination against the handicapped. 45 C.F.R. § 84.11(a)(4) (1987).

105. 41 C.F.R. § 60-741.6(c)(2) (1987); 45 C.F.R. § 84.13(a) (1987).

106. Federal contractors are required to include in their contracts and subcontracts a provision which forbids discrimination which includes unequal pay or benefits for handicapped employees. 41 C.F.R. § 60-741.4(a) (1987). Federal contractors and aid recipients are specifically forbidden to use any practice which denies equal pay and benefits to handicapped employees. *Id.* § 60-741.6(a); 45 C.F.R. § 84.11(b) (1987). State laws may, however, allow such exclusions or practices. The Wisconsin Fair Employment Law once allowed such practices, but they are no longer authorized under the statute as amended. *See* WIS. STAT. ANN. § 111.32(5)(f) (West 1974), *amended by* WIS. STAT. ANN. § 111.321 (West 1986) (discrimination now includes contributing lesser amount to fringe benefits, including insurance coverage, for handicapped employees).

107. N. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 60.01 (4th ed. Supp. 1986).

that prevent employment discrimination based on handicaps in general.¹⁰⁸ Other state provisions only address the problem in the context of recipients of state funds.¹⁰⁹ Some provisions are general and only apply by implication to pre-employment inquiries.¹¹⁰ Several others specifically address the pre-employment inquiry,¹¹¹ including some which explicitly employ standards based on BFOQs.¹¹²

Ohio's pre-employment inquiry statute deserves special attention because it contains an apparently unique provision. Ohio law prohibits inquiries unless they are based on a BFOQ certified in advance by the Ohio Civil Rights Commission.¹¹³ A few states have statutes which specifically relate to information about Acquired Immune Deficiency Syndrome (AIDS) or other infectious diseases.¹¹⁴

States whose statutes do not specifically address the pre-employment inquiry may have regulations that implement the more general statute by placing specific limits on pre-employment inquiries.¹¹⁵ Even in states without specific implementing regulations, the general prohibition embodied in the statute can be applied to regulate pre-employment inquiries.¹¹⁶

108. A regularly updated collection of state statutes can be found in 8A Lab. L. Rep. (CCH) 451:1-457:3515. See also Annotation, *Construction and Effect of State Legislation Forbidding Job Discrimination on Account of Physical Handicap*, 90 A.L.R. 3d 393 (1979); Nichols, *Iowa's Law Prohibiting Disability Discrimination in Employment: An Overview*, 32 DRAKE L. REV. 273 (1982-1983).

109. See *supra* note 108.

110. See *Silverstein v. Sisters of Charity*, 43 Colo. App. 466, 449, 614 P.2d 891, 894 (1980) (legislature intended to penalize employers who discriminate against handicapped); *Chicago, Milwaukee, St. Paul & Pacific R.R. Co. v. Washington State Human Rights Comm'n*, 87 Wash. 2d 802, 557 P.2d 307, 308 (1977) (unfair for any employer to discriminate on basis of physical handicap). *Contra Hurlley v. Allied Chemical Corp.*, 262 N.E.2d 757, 765 (W. Va. 1980) (private cause of action may be inferred from state law, but no protection for person without employment status).

111. KY. REV. STAT. ANN. § 207.140 (Baldwin 1982); LA. REV. STAT. ANN. § 46:2254(C)(8-10) (West 1985); ME. REV. STAT. ANN. TIT. 5, § 4572(1)(A) (1980); MICH. STAT. ANN. § 3,550 (206)(2) (Callaghan 1985); N.M. STAT. ANN. § 28-1-7(D) (1983); N.Y. EXEC. LAW § 296.1(D) (McKinney 1982); OR. REV. STAT. § 659.425(5) (1985); PA. STAT. ANN. TIT. 43, § 955(b)(1) (Purdon 1985); WASH. REV. CODE § 49.60.180(1) (1985).

112. ALASKA STAT. § 18.80.220(6) (1986); COLO. REV. STAT. § 24-34-402(d) (1982); IOWA CODE ANN. § 601A.6(1)(c) (West 1983); MD. ANN. CODE ART. 100, § 95(A) (1985); MASS. ANN. LAWS CH. 151B, § 9A (Law. Co-op. 1984); MINN. STAT. §§ 363.02(7)(i) - (iii) (1984); MO. REV. STAT. § 213.055(3) (1986); N.C. GEN. STAT. § 168A-5 (b)(5) (1985); R.I. GEN. LAWS 28-7-4(D) (1986); WASH. REV. CODE § 49.60.180(4) (1985); W. VA. CODE § 5-11-9(d)(4) (1979).

113. OHIO REV. CODE ANN. § 4112.02(E)(3) (Anderson 1986).

114. CAL. HEALTH & SAFETY CODE § 199.20 (West 1985) (AIDS); FLA. STAT. § 381.606 (1985); ME. REV. STAT. ANN. TIT. 5, § 170011-6 (1986) (AIDS); WIS. STAT. ANN. § 103.15 (West 1985) (AIDS).

115. See *supra* note 108 and authorities cited therein for particular state statutes.

116. In cases involving discharge grievances of employees with epilepsy it has been argued that "when a 'just cause' provision of a contract is interpreted by an arbitrator, public policy is often accorded considerable weight; after all, employers and unions are required to abide by the law." Kovarsky & Hauck, *supra* note 18, at 599.

In *Montgomery Ward v. Bureau of Labor*,¹¹⁷ the Oregon Supreme Court relied on the public policy expressed in the state statute to protect an employee's overall well being. The court stated:

The reference [by the legislature] to the participation of [handicapped] persons in the social and economic life of the state seems to include a concern with their own health as well as with the merely economic interest of the employer in effective performance. Accordingly, we believe that the possibility that a particular job might be seriously injurious to a handicapped person's health comes within the terms of [the statute] as well as the person's outright inability to perform it.¹¹⁸

The seriousness of the potential for injury to an applicant is, however, highly relevant. The appellate court in *Montgomery Ward* described the criterion for determining the disability which justifies an employer's refusal to employ as "a reasonable medical *possibility* that the applicant *might* . . . experience injury as a result of attempting to perform the job."¹¹⁹ The state supreme court stated that the appellate court's criteria set the standard "too low," while the labor commission's "high probability" went beyond the statute's policy goals.¹²⁰

III. USE OF THE MATRIX TO EVALUATE THE EXISTING APPROACHES

With an overview of the usual approaches in hand, each approach can be evaluated to determine which of the existing legal doctrines, laws, and regulations are best suited to the problem of pre-employment inquiries. A matrix can now be constructed to keep track of the various interests involved, and used to assess the effect of each proposed solution. If this evaluation reveals that none of the existing solutions are acceptable, the matrix should, in any event, reveal which interests are most compromised or best served by the existing solutions. A solution can then be generated which pays particular attention to the identified problem areas.¹²¹

In order to construct the matrix we must list the interests in a concise fashion. Recalling to mind the interests described in some detail earlier, they are:

APPLICANTS—gainful employment, protection of privacy, freedom from vague questioning, personal safety, safety of others who could file personal injury claims against him or her, and reasonable medical and insurance costs;

117. 280 Or. 163, 570 P.2d 76 (1977).

118. *Id.* at 168, 570 P.2d at 78.

119. *Id.* at 165, 570 P.2d at 77 (emphasis in original).

120. *Id.* at 168, 570 P.2d at 78.

121. In the context of discrimination against AIDS carriers, some authorities regard the problem as settled. It has been stated that "[i]f AIDS is a handicap, and if handicapped employees are protected by law, then a single job applicant cannot be asked whether he or she has AIDS. Nor can all applicants be asked routinely whether they have AIDS." "AIDS" in *the Workplace: A Special CCH Report, quoted in, AIDS in the Workplace*, 22 TRIAL 82, 82 (Jan. 1986).

EMPLOYERS—qualified employees, low costs for hiring process, contained costs for insurance and sick leave, low employee turnover rate, and compliance with statutory requirements for safety and nondiscrimination;

INSURANCE CARRIERS—large premium base accompanied by low payouts, maintenance of employee safety and health, avoiding liability claims by third parties, returning injured employees to work;

TAXPAYERS—full employment which lowers welfare, disability, medical, and job placement related expenses supported by tax dollars;

OTHERS—payment of indigent hospital and medical expenses, and safety for the general public and co-workers.

This list must be culled to reveal which interests are inextricably intertwined. Several of these interests can be expressed as a desire to have reliable selection criteria. Several more can be grouped as an interest in lower costs and increased safety. Evaluating the interests to determine where they overlap yields a clearer picture of the relative weight each interest should be accorded. For example, the interest in reliable selection criteria should be accorded considerable weight because all parties share that interest. The distilled list of interests yielded through this process comprises one axis of the matrix.

Accepting that pre-employment inquiries should be limited to only material information, the critical question is who should decide what information is material. Little guidance is available to resolve this question because most of the law addresses the interests at stake rather than which procedure should be used.

Obviously, a complicated balancing of numerous interests is called for to arrive at a method which determines the materiality of pre-employment information.¹²² One federal district court simply stated that "the applicant's right to privacy must be subordinated to the interests of the employer in obtaining such information."¹²³ The court identified the employee's privacy concern and the employer's need to know, but left unclear just who determines the critical portion of the balancing test, namely, what information is material.¹²⁴

Certainly employers can invite applicants to volunteer information that will qualify them for affirmative action. In fact federal contractors must

122. See McGarity & Schroder, *Risk Oriented Employment Screening*, 59 TEX. L. REV. 999 (1981) (exploring the problems of employment discrimination as employers develop and implement risk-oriented screening processes for hiring); Janis, *A Unified Theory for Section 504 Employment Discrimination Analysis: Equivalent Cost-Based Standards for "Otherwise Qualified" & Reasonable Accommodation*, 43 WASH. & LEE L. REV. 63 (1986) (proposing a standard cost-based analysis to determine whether or not an employer should be required to hire a particular handicapped applicant).

123. *Spencer v. Toussaint*, 408 F. Supp. 1067, 1074 (E.D. Mich. 1976). See *supra* notes 76-77 and accompanying text.

124. See generally Comment, *Handicapped Workers: Who Should Bear the Burden of Proving Job Qualifications*, 38 ME. L. REV. 135 (1986) (developing an analytical model to address the problems caused when fair employment opportunity laws protect handicapped individuals as well as other persons).

allow for voluntarily provided information.¹²⁵ Contractors must assure the applicant that the information will remain confidential, that a refusal to provide the information will not have adverse consequences, and that the information will only be used in accordance with the anti-discrimination laws and regulations.¹²⁶ None of these provisions, however, assist in determining who determines whether particular information is material.

One alternative is to allow the applicant to determine what information is material. If an applicant is only invited and never compelled to disclose his or her handicap, the applicant would be the final authority on materiality. Under this approach, there is a way to ask questions that produce better results than generally phrased questions. If instead of asking for a laundry list of "have you ever had's," specific information could be sought, e.g., "A park ranger must walk about six miles cross country daily. Will you be able to meet that requirement?" There may be applicants who overestimate their abilities, but it will be readily apparent to applicants that misrepresented abilities will not go undiscovered.

A second alternative is to allow the employer to determine materiality since he knows the demands of the position. This system, however, is too close to the current system which has proven to be unsatisfactory, as the litigation and regulations described above demonstrate. The potential for invasions of privacy and for unreliable results simply cannot be ignored.

A third approach, suggested by the Ohio statute discussed previously,¹²⁷ allows a governmental agency to determine materiality.¹²⁸ Employers could submit BFOQs for each position and receive prior approval from a governmental agency such as the state department of labor, human rights commission, or other appropriate agency. At first blush, this system appears expensive, but costs should be contained by use of the company's own safety and operating procedure manuals and the U.S. Department of Labor's *Dictionary of Occupational Titles*,¹²⁹ which contains thousands of detailed job descriptions.

A final illustrative, albeit unrealistic example, is to determine materiality by lots. Suppose, for example, the need to disclose information about a handicap was determined by a throw of dice—those with odd numbered results would be required to disclose, while those with even numbers would not.

The second axis of the matrix is comprised of these four possible methods for determining the scope of pre-employment inquiries: the applicant determines; the employer determines; a government agency determines; or a throw of the dice determines. The matrix will plot the interests against

125. Appendix B to 41 C.F.R. § 60-741 (1987) provides employers with a suggested form that may be used to solicit the information.

126. 41 C.F.R. § 60-741.5(c)(1) (1987).

127. See *supra* note 113 and accompanying text.

128. OHIO REV. CODE ANN. § 4112.02(E)(3) (Anderson 1986).

129. See *supra* note 35.

the methods and assign one of three values at each intersection of interest and method. Those values are: (1) the interest is served by the method; (2) the interest is sacrificed by the method; or (3) the interest is placed at risk by the method. We can now test each method to see where the strengths and weaknesses of each method lie.

INTERESTS

M E T H O D	APPLICANT		OTHER	EMPLOYER		INSURERS	
	Privacy	Not Re-jected if qualified	Lower Taxes & Assured Safety	Not over look qual-ified Apl'nts.	Not Hire anyone unquali-fied	Lower Risk	Rate Competi-tive
H D I C E	?	-	?	-	-	-	?
O A P L ' N T.	+	+	?	?	?	?	+
E M P L R.	-	-	-	-	+	?	-
G O V ' T.	+	+	+	+	+	?	+

Key + Interest is served
 - Interest is sacrificed
 ? Interest is at risk

IV. ASSESSMENT OF MATRIX RESULTS

The matrix reveals that the use of dice is an unacceptable alternative. Its use would have a mixed effect on invasion of privacy and qualified persons would be rejected. While administrative costs are low, safety is sacrificed. Insurers' interests would not be substantially affected because their interests are tied to an applicant's hereditary makeup and dependents, information not usually asked of job applicants.

Allowing the applicant to determine what must be disclosed probably would result in a greater number of applicants being hired. This alternative would reduce hiring costs and costs to taxpayers in the form of reduced welfare and related benefits. This approach, however, would sacrifice safety and ignores the employers' need to hire qualified applicants.

If the employers decide what must be disclosed, every interest would be sacrificed except that of assuring only qualified applicants are hired. It appears from the matrix that the greatest number of interests are served when a government agency determines what questions may be asked of applicants.¹³⁰

Although a government agency appears best suited to address the problems associated with pre-employment inquiries, a shortcoming of this choice is not revealed by the matrix: bias on the part of the agency that

130. A similar system was upheld in *McCrea v. Cunningham*, 202 Neb. 638, 641, 277 N.W.2d 52, 58 (1979) (involving challenge to minimal visual acuity tests for certain municipal employees; held not arbitrary or capricious requirement).

approves BFOQs. If the agency is responsible for enforcing anti-discrimination laws or reducing unemployment, employers may be concerned that there is a bias in an applicant's favor. On the other hand, if the agency has a close working relationship with industry, applicants may fear bias which favors employers. Can this problem be solved?

A solution is readily available in the form of a tripartite commission. If the commission has members from the state agency concerned with industrial safety; from an agency that serves handicapped persons;¹³¹ and from an agency that represents both interests such as an agency concerned with vocational rehabilitation, any fears of bias would be quelled. The size of the commission could be expanded to gain fair representation for all viewpoints. Since the interests of the separate types of insurance carriers act to cancel one another out, i.e., disability versus unemployment carriers, the office of the state insurance commissioner could be a source of a neutral representative. Overall, the commission could be composed such that it fairly and expediently accommodates the interests of the public, insurers, employers, and employees.

CONCLUSION

Employers, applicants, legislatures, and the courts could all benefit from a close look at this matrix or similar ones constructed to suit their particular needs. The analysis undertaken here has demonstrated that employers must not rely on their own preconceived ideas about an individual's capabilities. Employers must ground their employment decisions on demonstrable evidence, even for those employees or applicants whom they regard as having "an impairment."¹³²

Careless pre-employment inquiries will cause difficulties of proof when a challenge is later brought to particular employment decisions. If information about pre-employment inquiries is sought, the employer should be prepared to support the decision to ask certain questions. In their work on employment discrimination, Schlei and Grossman suggest two basic rules that will assure that application forms and other methods of pre-employment inquiry are lawful: (1) do not ask for information that will not be used, and (2) determine beforehand whether the question can be lawfully asked of an applicant.¹³³

131. For example, the protection and advocacy system created in each state under the Developmentally Disabled and Assistance Bill of Rights Act of 1975, 42 U.S.C. §§ 6000-6083 (1982 & Supp. III 1985), or even a private, nonprofit agency, i.e., American Coalition of Citizens with Disabilities.

132. In *Zorick v. Tynes*, 372 So. 2d 133 (Fla. Dist. Ct. App. 1979), a blind man challenged the decision to refuse him employment as a physical education teacher. The court stated:

The decision to withdraw the employment offer was based, not on any identifiable experience of school administrators . . . , not on a test or interview of Zorick or any trial of his abilities, but on ordinary preconceptions of sighted administrators [which is contrary to the statute].

Id. at 142.

133. B.L. SCHLEI & P. GROSSMAN, *supra* note 43, at 582.

If employers altered their present hiring procedures they would also protect themselves from discrimination claims.¹³⁴ Often the person who initially screens applicants is not the same person who makes the hiring decision. Attitudinal barriers and bias could be avoided if the data initially collected in regard to handicapping conditions is segregated from the other application data so that subsequent interviewers would not have access to the information. Those making the hiring decision should have an opportunity to form a first impression without prior knowledge of any handicapping condition. This is particularly important for applicants with readily visible handicaps. This suggestion would be easily implemented through a review of applications in advance of any personal interviews with the applicant.

Applicants could also contribute to the hiring process and avoid problems if they viewed questions in applications as asking whether their condition would "have a material effect on job ability." Another alternative, but riskier, is to refuse to answer certain questions. A third suggestion is for the applicant to request an explanation of the question's relevance to the position. "Why would that be relevant to this job?" is an assertive but not abrasive reply."¹³⁵

Legislators also play a vital role in assuring that only material questions are asked of applicants. Legislation which conforms to the Ohio statute,¹³⁶ tailored to each state's particular agencies and needs, should be enacted and enforced. Finally, the courts have to contribute by ruling that pre-employment inquiries about handicaps are proper only when material to the position sought. The federal statute that prohibits giving false information on job applications,¹³⁷ and any similar statutes, should be interpreted to apply only to statements that are both false and material.

The problem of attaining as full employment as safety permits while providing job opportunities to the handicapped is complicated but not insoluble. When all parties understand how their interests are being served by the system, cooperation should be forthcoming and the parties ready to create and implement fair procedures.

134. The testing procedures would have to be evaluated and changed where necessary. In *Stutts v. Freeman*, 694 F.2d 666 (11th Cir. 1983), the written test given to a man with dyslexia did not satisfy the obligation to expand employment opportunities for the handicapped under the Rehabilitation Act of 1973.

135. *Interview Questions: Which Are Legal, Which Are Not*, 82 *GLAMOUR* 218 (Nov. 1984), condensed from, SACK, *DON'T GET TAKEN* (1985).

136. See *supra* note 113.

137. 18 U.S.C. § 1001 (1982). See *Bryson v. United States*, 296 U.S. 64 (1969) (upholding conviction for "false and fraudulent" denial of Communist Party affiliation on NLRB affidavit).