

A Matter of Life and Death - Why the ADA Permits Mandatory Periodic Medical Examinations of "Remote-Location" Employees

Jarod S. Gonzalez

Repository Citation

Jarod S. Gonzalez, *A Matter of Life and Death - Why the ADA Permits Mandatory Periodic Medical Examinations of "Remote-Location" Employees*, 66 La. L. Rev. (2006)
Available at: <https://digitalcommons.law.lsu.edu/lalrev/vol66/iss3/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at LSU Law Digital Commons. It has been accepted for inclusion in Louisiana Law Review by an authorized editor of LSU Law Digital Commons. For more information, please contact kreed25@lsu.edu.

A Matter of Life and Death*—Why the ADA Permits Mandatory Periodic Medical Examinations of “Remote-Location” Employees

Jarod S. Gonzalez**

TABLE OF CONTENTS

I.	Introduction.....	682
II.	The EEOC’s Interpretation	684
	A. Medical Examinations Under the ADA	684
	B. Medical Examinations of Employees—The EEOC’s View	694
III.	A Better Approach	697
	A. Legitimate Business Purpose Standard	697
	B. Periodic Medical Examinations of Remote- Location Employees.....	709
	C. Creating the Remote-Location Exception Through Case Law.....	716
	D. Taking Adverse Employment Action	718
IV.	Paternalism and Economic Efficiency	722
	A. Reasoned Paternalism in the Name of Safety is not a Vice 722	
	B. The Efficiency of Periodic Medical Examinations	727
V.	Conclusion	731

Copyright 2006, by LOUISIANA LAW REVIEW.

* No reference to *A Matter of Life and Death* (Sony Pictures 1946), the wartime fantasy film designed to ease relations between Britain and America after World War II, is intended by the use of this title.

** Assistant Professor of Law, Texas Tech University School of Law; B.B.A., *summa cum laude*, University of Oklahoma, 1997; J.D., *with highest honors*, University of Oklahoma College of Law, 2000. In the interest of full disclosure, as an associate in the Labor & Employment section at Thompson & Knight LLP, I helped represent an offshore drilling company that sought to conduct across-the-board periodic medical exam examinations of all offshore drilling employees located on rigs in the Gulf of Mexico. My work during the representation and the Equal Employment Opportunity Commission’s response to our client’s business interests served as the genesis for this article. I would like to thank William Lovelace for assisting in the research for this article and Marc Klein, Jim Eissinger, Susan Saab Fortney, Brian Shannon, and Sandra Sperino for their comments and suggestions concerning prior drafts of this article. Any mistakes or errors in this article are mine and mine alone.

I. INTRODUCTION

Imagine the following situation: a driller is operating the drawworks¹ on an offshore oil rig deep in the waters of the Gulf of Mexico. He has a massive heart attack and loses control of the drawworks. The weight attached to the drawworks' cable plunges downward and lands on several roustabouts² who are connecting pipe. The roustabouts are instantly killed and several rig workers are seriously injured. The driller is incapacitated. The offshore drilling company exercises immediate emergency procedures and arranges for a Mexican helicopter to medivac the injured employee to the nearest Mexican hospital. But thunderstorms delay the rescue process. The injured workers do not arrive at the hospital until forty-eight hours after the accident. Many of the injured workers cannot be saved because of the delay.³

Marc Klein, my former colleague, and I outlined the doomsday scenario mentioned above in a request for technical assistance letter sent to the Equal Employment Opportunity Commission (EEOC) in March 2004 on behalf of our client—an offshore

1. The "drawworks" is the machine on an oil rig consisting of a large diameter steel spool, brakes, a power source, and assorted auxiliary devices. The primary function of the drawworks is to reel out and reel in the drilling line, a large diameter wire rope, in a controlled fashion. The drilling line is reeled over the crown block and traveling block to gain mechanical advantage in a "block and tackle" or "pulley" fashion. This reeling out and reeling in of the drilling line causes the traveling block, and whatever may be hanging underneath it, to be lowered into or raised out of the wellbore. The reeling out of the drilling line is powered by gravity and reeling in by an electric motor or diesel engine. Schlumberger Oilfield Glossary, *available at* <http://www.glossary.oilfield.slb.com>.

2. A "roustabout" is an unskilled manual laborer on the rig site. A roustabout may be part of the drilling contract workforce or may be on location temporarily for special operations. Roustabouts are commonly hired to ensure that the skilled personnel that run an expensive drilling rig are not distracted by peripheral tasks, ranging from cleaning up the location to cleaning threads to digging trenches to scraping and painting rig components. Although roustabouts typically work long hard days, this type of employment can lead to more steady employment on a rig crew. Schlumberger Oilfield Glossary, *available at* <http://www.glossary.oilfield.slb.com>.

3. Letter from Marc Klein, Thompson & Knight L.L.P., Request for Technical Assistance under the ADA, to Joyce Walker-Jones, Senior Attorney Advisor, ADA Policy Division, Equal Employment Opportunity Commission (March 18, 2004) (on file with the Equal Employment Opportunity Commission and the author).

drilling company.⁴ The company had experienced several close calls in which offshore employees had experienced life-threatening medical emergencies while on the rig.⁵ These emergencies placed the lives of the affected individuals in grave danger.⁶ While the aforementioned nightmare scenario was hypothetical, it was grounded in reality. This situation, or some variation thereof, could happen in the future. To reduce the risks of the occurrence of such a catastrophic incident and to protect the health and safety of its offshore employees, the company desired to adopt a policy requiring all offshore employees to undergo periodic medical examinations.⁷

The request for technical assistance letter contended that the company's proposed policy complied with the Americans with Disabilities Act of 1990 (ADA) in that the policy was both job-related and consistent with business necessity.⁸ The EEOC, citing its own *EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*, disagreed.⁹

This article explains why across-the-board mandatory periodic medical examinations for employees working at dangerous jobs in remote locations, such as offshore drilling workers, do not violate the ADA—the EEOC's unofficial position notwithstanding. Part II of this article discusses the ADA provisions regarding medical examinations during various stages of the employment process. It also addresses the EEOC's interpretation of the statutory language concerning medical examinations of existing employees.

4. *Id.* at 1.

5. *Id.*

6. *Id.*

7. The proposed periodic medical examinations included tests in the following areas: hearing, heart (including EKG), and blood pressure. *Id.*

8. *Id.* at 6.

9. Letter from Joyce Walker-Jones, Senior Attorney Advisor, ADA Policy Division, Equal Employment Opportunity Commission, to Marc Klein, Thompson & Knight LLP, (September 10, 2004) (on file with the Equal Employment Opportunity Commission and the author) ("We believe that the situation you have described does not fit within existing Commission policy as set out in Questions 8 and 18 of the [EEOC Enforcement Guidance]. Interpreting the ADA to allow periodic medical examinations in the manner you suggest would require the Commission to make new policy."). *See also Employer Cannot Require Offshore Workers to Have Periodic Medical Exams, EEOC Says*, Daily Lab. Rep. (BNA) No. 228, at A-3 (Nov. 29, 2004) (an informal guidance letter is not an official EEOC opinion).

Part III of the article advocates a better approach than the one taken by the EEOC. Instead of limiting the employer's ability to require medical examinations of employees to (i) instances in which an employer has specific evidence that an individual has a medical condition that prohibits him or her from safely performing the job or (ii) only those individuals who work in public safety positions, the "business necessity" defense in 42 U.S.C. § 12112(d)(4)(A) should allow employers to require periodic medical examinations of all employees that work at dangerous jobs in remote locations. The approach I advocate is consistent with the language of the statute and addresses the legitimate safety concerns of employers who require employees to perform dangerous jobs in remote locations.

Part IV is a preemptive response to those in the labor and employment law community who may believe this proposed approach imprudently permits an employer to engage in "workplace paternalism." In my view, workplace paternalism in this particular situation is no vice and does not constitute disability discrimination. I will explain why I believe the underlying rationale for my approach is consistent with the Supreme Court's decision in *Chevron U.S.A., Inc. v. Echazabal*,¹⁰ reflects a sound policy choice that is permitted by the statute, and is economically efficient.

II. THE EEOC'S INTERPRETATION

A. Medical Examinations under the ADA

On July 26, 1990, President George Herbert Walker Bush, the forty-first President of the United States of America, signed the ADA into law.¹¹ Title I of the ADA prohibits an employer from discriminating against a job applicant or employee because of his or her disability.¹² The prohibition against disability

10. 536 U.S. 73, 122 S. Ct. 2045 (2002).

11. The Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1995). President Bush's statement upon signing the ADA into law can be found in the permanent edition of the *United States Code Congressional and Administrative News*. See Statement by President George Bush Upon Signing S. 933, 26 Weekly Comp. Pres. Doc. 1165 (July 30, 1990).

12. 42 U.S.C. § 12112(a) provides:

General rule.—No covered entity shall discriminate against a *qualified individual with a disability* because of the disability of such individual in regard to job application procedures, the hiring, advancement, or

discrimination includes medical examinations and inquiries.¹³ But this prohibition is not absolute. The relevant statutory provision, 42 U.S.C. § 12112(d), provides the employer with varying levels of discretion to require medical examinations, depending on the stage of the employment process.¹⁴ Section 12112(d) provides as follows:

(d) Medical Examinations and Inquiries

(1) In general.—The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.—

(A) Prohibited examination or inquiry.—Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry.—A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

(3) Employment Entrance Examinations.—A covered entity may require a medical examination after an offer of

discharge of employees, employee compensation, job training and other terms, conditions, and privileges of employment. (emphasis added).

“The term ‘covered entity’ means an employer, employment agency, labor organization, or joint-labor management committee.” *Id.* § 12111(2). In general, an “employer” is “a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person” *Id.* § 12111(5)(A). A “qualified individual with a disability” is “an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires.” *Id.* § 12111(8).

13. *Id.* § 12112(d)(1) states: “In general.—The prohibition against discrimination as referred to in [§ 12112(a)] shall include medical examinations and inquiries.”

14. See *Harris v. Harris & Hart, Inc.*, 206 F.3d 838, 841 (9th Cir. 2000) (noting that “[w]ith regard to an employer’s request for medical examinations and inquiries, the ADA sets up separate rules for pre-offer job applications [§ 12112(d)(2)], post-offer pre-employment examinations [§ 12112(d)(3)], and inquiries of current employees [§ 12112(d)(4)].”). See also *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 671 (1st Cir. 1995); *Pouliot v. Town of Fairfield*, 226 F. Supp. 2d 233, 244 (D. Maine 2002); Gary Phelan & Janet Bond Arterton, *Disability Discrimination in the Workplace* § 6:1 (2003).

employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if:

(A) all entering employees are subject to an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that:

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

(4) Examination and Inquiry.—

(A) Prohibited examinations and inquiries.—A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries.—A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement.—Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).¹⁵

Section 12112(d) creates three categories of medical examinations and inquiries by employers: (1) preemployment examinations and inquiries in § 12112(d)(2); (2) employment

15. 42 U.S.C. § 12112(d).

entrance examinations in § 12112(d)(3); and (3) employee examinations and inquiries in § 12112(d)(4).¹⁶ Preemployment examinations and inquiries are those conducted prior to an offer of employment. Employment entrance examinations are those conducted after an offer of employment has been made but before the start of job duties. Employee examinations are those conducted of current employees.¹⁷ For clarity and ease of understanding, I will refer, as many commentators do, to these three stages throughout the remainder of this article as pre-offer, post-offer, and post-employment.¹⁸ The following lays out the three stages, the varying levels of prohibition established by (d)(2), (d)(3), and (d)(4), and the interpretations of the courts and the EEOC.

1. Pre-Offer Medical Examinations—Complete Prohibition

Section 12112(d)(2) completely prohibits employers from requiring job applicants to submit to medical examinations¹⁹ before

16. See *Norman-Bloodshaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1273 (9th Cir. 1998).

17. *Id.*

18. See Phelan & Arterton, *supra* note 14, at § 6:1.

19. The ADA does not define the term “medical examination.” The EEOC defines “medical examination” as “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual’s physical or mental impairments or health.” See EEOC, *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act (ADA)* (July 26, 2000), at Question 2, available at <http://www.eeoc.gov/policy/docs/guidance-inquiries.html> [hereinafter EEOC, *Questions and Answers*]. The EEOC states that seven factors should be considered in determining whether a test or procedure is a medical examination. They are: (1) whether the test is administered by a health care professional; (2) whether the test is interpreted by a health care professional; (3) whether the test is designed to reveal an impairment or physical or mental health; (4) whether the test is invasive; (5) whether the test measures an employee’s performance of a task or measures his or her physiological responses to performing the task; (6) whether the test is normally given in a medical setting; and (7) whether medical equipment is used. One factor alone could be sufficient to classify a procedure as a medical exam, but in most cases a combination of the factors will decide the question. *Id.* According to the EEOC, blood pressure screening, blood and urine tests, vision tests, cholesterol tests, x-rays, and magnetic resonance imaging (MRI) are all “medical exams,” while physical agility tests and psychological tests that measure personality traits are not. *Id.*

the employer makes the applicant an offer of employment.²⁰ The plain language of the provision does not provide any exceptions to this rule. However, the statute itself creates an exception to the general rule barring pre-offer medical *inquiries*.²¹ An employer may make pre-offer medical inquiries when those inquiries relate to the ability of an applicant to perform job-related functions.²² Two other exceptions to the general rule barring pre-offer medical inquiries also have been recognized by the EEOC and the courts: (i) when an employer could reasonably believe that an applicant's known disability will interfere with the performance of a job-related function²³ and (ii) when an applicant requests a reasonable accommodation for the application process or for the job itself.²⁴

20. 42 U.S.C. § 12112(d)(2)(A) (“A covered entity shall not conduct a medical examination”); H.R. Rep. No. 101-485 (III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 466 [hereinafter House Judiciary Report] (employers may not conduct a medical examination of an applicant prior to an offer of employment); H.R. Rep. No. 101-485 (II) (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 355 [hereinafter House Labor Report] (“In order to assure that misconceptions do not bias the employment selection process, this section sets up a process that begins with the prohibition on pre-employment medical examinations or inquiries.”).

21. 42 U.S.C. § 12112(d)(2)(B).

22. *Id.* (“A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.”). *See Harris v. Harris & Hart*, 206 F.3d 838, 842 (9th Cir. 2000) (noting the statutory exception). The EEOC has interpreted this exception to require the employer to narrowly tailor their inquiry to the essential job-related functions. According to its regulation, an employer “may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.” 29 C.F.R. § 1630.14(a) (2005).

23. *See Interpretive Guidance on Title I of the Americans with Disabilities Act*, 29 C.F.R. pt. 1630 app. § 1630.14(a) (2004). The EEOC provided the following example of a permissible pre-offer medical inquiry: “an employer may ask an individual with one leg who applies for a position as a home washing machine repairman to demonstrate or to explain how, with or without reasonable accommodation, he would be able to transport himself and his tools down basement stairs.” *Id.*

24. *See EEOC, ADA Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations*, (Oct. 1995), available at <http://www.eeoc.gov/policy/docs/preemp.html> (an employer may request that the applicant provide documentation from a medical professional concerning his or her disability when the applicant requests a reasonable accommodation to complete the application process or perform the job). The courts have applied this exception in an interesting line of cases involving employees of companies, known by the companies to have disabilities, who leave the employment of the

2. Post-Offer Medical Examinations—No Prohibition

After an employer decides that the applicant is the person it wants to hire for the position, the employer must extend what is called a conditional job offer to the applicant.²⁵ The conditional offer commences the next stage in the process.²⁶ After the extension of the conditional offer, the employer may require that the applicant undergo a medical examination or respond to medical inquiries and may condition the final offer of employment on the results of those medical tests, so long as all applicants in the same job category are subjected to such an examination, regardless of disability.²⁷ The medical examination results must be kept confidential and can only be used in a manner that is consistent with the ADA.²⁸ In short, the employer may withdraw the

companies and later reapply for a position with the respective company. Invariably, the company requires the “applicant” to sign a medical release and provide it with documentation from a physician that the applicant is fit to perform the essential job functions, with or without a reasonable accommodation—just as it would if an injured employee were returning to work after a leave of absence. The “applicant” then sues for violations under 42 U.S.C. § 12112(d)(2)(B), alleging the documentation request is an impermissible pre-offer medical inquiry. The argument, though clever, has not won the hearts and minds of the federal judiciary. *See Harris*, 206 F.3d at 845 (company’s request for a medical release as a prerequisite to hiring the applicant, a former employee with a known disability, did not “run afoul of the ADA”); *Grenier v. Cyanamid Plastics, Inc.*, 70 F.3d 667, 678 (1st Cir. 1995) (ADA does not require an employer to wear blinders to a known disability at the pre-offer stage; ADA not violated when company required former employee with a recent known disability applying for re-employment to provide medical certification as to ability to work with or without reasonable accommodation, and as to the type of any reasonable accommodation necessary, as long as the certification is relevant to the assessment of ability to perform essential job functions); *Brumley v. Pena*, 62 F.3d 277, 279 (8th Cir. 1995) (Federal Aviation Administration did not violate the Rehabilitation Act when it required the former employee to submit to a psychological examination; although the Rehabilitation Act prohibits employers from requiring pre-employment physical examinations, the former employee was not an outside job applicant seeking employment for the first time, but was instead seeking re-employment).

25. *See Phelan & Arterton*, *supra* note 14, at § 6:6.

26. *Id.*

27. *Id.* *See also* David G. Evans, *Federal and State Guide to Employee Medical Leave Benefits & Disabilities Laws* § 5:32 (2d. ed. 2002).

28. *See Evans*, *supra* note 27, at § 5:32.

conditional job offer from the applicant if the results from the medical examination indicate that the applicant is not qualified to perform the job.

Notably, there is no “job-validation” or “business necessity” requirement placed on post-offer medical examinations.²⁹ The two-step process—complete prohibition of medical examinations at the pre-offer stage and allowance of medical examinations at the post-offer stage without regard to whether such examinations are job-related and consistent with business necessity—follows the regulations that the Department of Health, Education, and Welfare (HEW) issued in 1977 to implement Section 504 of the Rehabilitation Act.³⁰ The ADA’s drafters chose to incorporate the Section 504 process into the ADA to balance the concerns of people with disabilities and employers. The two-step process benefits the applicant with a disability by allowing him to isolate whether the employers’ decision not to hire him was based on his disability.³¹ Before the ADA, an employer could ask the applicant at the initial application stage about his medical conditions. The applicant had to answer the medical questions truthfully. After the applicant completed the remainder of the application process, the employer might deny him the job. If the denial occurred, the applicant would not know whether his disability, or some other legitimate, non-discriminatory reason, led to the employer’s decisions not to hire him. The two-step process takes this uncertainty out of the disabled applicant’s mind.³²

29. 42 U.S.C. § 12112(d)(3) (1995); 29 C.F.R. § 1630.14(b)(3) (2005) (“Medical examinations conducted in accordance with this section [post-offer medical examinations] do not have to be job-related and consistent with business necessity.”); House Labor Report, *supra* note 20, at 73; S. Rep. No. 101-116, 101st Cong., 1st Sess. 39 (1989) [hereinafter Senate Labor Report]; *O’Neal v. City of New Albany*, 293 F.3d 998, 1008 (7th Cir. 2002) (post-offer medical examinations do not have to be job-related); *Norman-Bloodshaw v. Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1273 (9th Cir. 1998) (ADA does not limit the scope of post-offer medical examinations to matters that are job-related and consistent with business necessity); Chai Feldblum, *Medical Examinations and Inquiries under the Americans with Disabilities Act: A View From the Inside*, 64 Temp. L. Rev. 521, 537 (1991) (“After a conditional job offer has been made, the ADA allows the employer to require all forms of medical examinations and to make all types of inquiries of job applicants. There is no ‘job-validation’ requirement for these examinations or inquiries.”).

30. See Feldblum, *supra* note 29, at 532, 537.

31. *Id.* at 533.

32. *Id.* at 531–32.

The process also benefits applicants with disabilities by prohibiting the employer from using the results of the medical examinations as a reason to withdraw the conditional job offer unless the examination results show that the applicant cannot perform the essential functions of the job with, or without, a reasonable accommodation.³³ From the employer's perspective, the process is helpful because it permits the employer to discover, prior to the applicant commencing job duties, whether the applicant's medical condition prevents him from performing the job.³⁴

3. Post-Employment Medical Examinations—Something in Between?

Section 12112(d)(4)(A) provides that a current employee shall not be required to undergo a medical examination "unless such examination is shown to be job-related and consistent with business necessity."³⁵ It is curious that the "business necessity" language—language typically associated with disparate impact claims under Title VII of the Civil Rights Act of 1964—would be used by the ADA's drafters to limit medical examinations of current employees. What explains this choice of language and what does "job-related and consistent with business necessity" mean in the context of post-employment medical examinations of

33. For example, assume that the post-offer medical examination reveals that the applicant has an arthritic condition that prevents her from standing on her feet for eight hours a day. If the job is a sedentary, secretarial position, the employer could not withdraw the conditional job offer. On the other hand, assume the applicant has the same condition, but the job is a warehouse position that requires the employee to be standing for the entire shift. The conditional job offer could be legitimately revoked in that situation, so long as the standing requirement is an essential job function and cannot be modified to accommodate the applicant's disability. *Id.* at 537–38 (providing an example of an applicant who applies for a truck driver position and submits to a post-offer medical examination; if the examination reveals that a person has a disability that does not affect the applicant's driving ability, the employer cannot withdraw the conditional job offer without violating the ADA). *See also* 29 C.F.R. § 1630.14(b)(3) (2005) (stating that if certain criteria are used to screen out an applicant because of the results of a post-offer medical examination, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation).

34. *See* Feldblum, *supra* note 29, at 533.

35. 42 U.S.C. § 12112(d)(4)(A) (1995).

current employees? A partial answer to this question can be found through an understanding of the legislative history surrounding this part of the Act and a recollection of the political fervor surrounding disparate impact law circa 1989.

Professor Feldblum, lead legal counsel for the disability and civil rights communities in Washington, D.C. during the three-year negotiations on the Americans with Disabilities Act, explains that the ambiguity in § 12112(d)(4)(A) resulted from a substantial policy disagreement between the Bush Administration negotiators and the Senate sponsors of the ADA concerning the *Wards Cove* issue—a policy disagreement that both the Administration negotiators and Senate sponsors chose not to resolve through the text of the statute.³⁶ The Administration and Senate negotiators intended to devise a standard in which employers could demand that an employee undergo a medical examination if the examination would help determine whether the employee could actually continue to perform the essential functions of the job.³⁷ But they found it difficult to set forth the standard in a few words.³⁸

The problem the Administration faced was that the standard was to be used for two purposes: (i) as a limitation on medical examinations and inquiries of current employees; and (ii) as the standard for determining whether neutral qualification standards had a disparate impact on people with disabilities.³⁹ The Administration did not want to have any language in the ADA that would adversely affect its stance that the United States Supreme Court, in *Wards Cove Packing Co. v. Atonio*,⁴⁰ had correctly

36. See Feldblum, *supra* note 29, at 546–47.

37. *Id.* at 546.

38. *Id.* An earlier ADA bill stated that any medical examination used had to be shown by the employer “to be necessary and substantially related to the ability of the individual to perform the essential functions of the particular employment position.” 135 Cong. Rec. S4979-02, S4989 (May 9, 1989).

39. See, e.g., Feldblum, *supra* note 29, at 546–47.

40. 490 U.S. 642, 109 S. Ct. 2115 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Cota v. Tuscon Police Dept.*, 783 F. Supp. 458 (D. Ariz. 1992). In *Wards Cove*, the Supreme Court determined that neutral business practices that had a discriminatory racial impact were permissible so long as the challenged practice served the legitimate goals of the employer in a significant way. *Id.* at 659, 109 S. Ct. at 2126. The touchstone of the inquiry was a “reasoned review” of the employer’s justification for his use of the challenged practice. *Id.* The Supreme Court rejected the view that the challenged practice must be “indispensable” or “essential” to the employer’s business to pass muster. *Id.* It also outlined the

applied a lenient standard for the “business necessity” defense.⁴¹ Indeed, the Administration and many members of Congress desired to have the *Wards Cove* conception of “business necessity” incorporated into the ADA.⁴² In contrast, the civil rights community and some of the Senate sponsors desired to overturn

burdens of proof and persuasion in a disparate impact case. *Id.* at 659–61, 109 S. Ct. at 2126–27. The civil rights community viewed the *Wards Cove* conception of business necessity as a repudiation of the arguably more stringent conception of business necessity first announced by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849 (1971). In *Griggs*, the Court had established that disparate impact theory as a viable one under Title VII. The civil rights community also disagreed with the burdens placed on disparate impact plaintiffs by the *Wards Cove* decision. In response to the criticism of the *Wards Cove* decision, Congress passed the Civil Rights Act of 1991 (1991 Act). Pub. L. No. 102-166, 105 Stat. 1071 (1991). Section 105 of the 1991 Act amended Title VII to expressly recognize disparate impact claims, alter the burdens of proof and persuasion outlined in *Wards Cove*, and provide for a business necessity defense. *See* 42 U.S.C. § 2000e-2(k) (1995). While the 1991 Act made clear that the burden of proving business necessity is on the employer, it did not make clear whether a stringent, medium, or lenient conception of business necessity was intended for purposes of Title VII disparate impact law. Section 105(b) of the 1991 Act states that an interpretive memorandum issued by former Senator John Danforth is the only reliable legislative history concerning the meaning of the term “business necessity.” That memorandum is not of great help, however, because it merely states that Congress used the term to reflect the business necessity concepts enunciated by the Supreme Court in *Griggs* and in other Supreme Court decisions prior to *Wards Cove*. *See* 137 Cong. Rec. S15472-01, S15485 (Oct. 30, 1991) (statement by Sen. Kennedy); C. Geoffrey Weirich, *Employment Discrimination Law* § II.B, at 82 (3d ed. 2002) (noting that “there is substantial disagreement over the meaning of *Griggs* and of other pre-*Wards Cove* decisions.”). In short, it is fair to say that the 1991 Act did not resolve the debate concerning the appropriate business necessity standard applicable to Title VII disparate impact cases. *See* *EEOC v. Steamship Clerks Union, Local 1066*, 48 F.3d 594, 607 (1st Cir. 1995) (meaning and scope of business necessity defense “are blurred at the edges” and the 1991 Act “did little to sharpen the focus.”). Not surprisingly, the federal courts of appeal have varied as to whether “business necessity” should be given a strict or lenient interpretation in post-1991 Act disparate impact cases. *See, e.g.*, *Lanning v. Southeastern Pennsylvania Transp. Auth.*, 181 F.3d 478, 485–94 (3d Cir. 1999) (strict standard); *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1119 (11th Cir. 1993) (lenient standard).

41. *See, e.g.*, Feldblum, *supra* note 29, at 546.

42. *See, e.g.*, Arlene Mayerson, *Title I—Employment Provisions of the Americans with Disabilities Act*, 64 Temp. L. Rev. 499, 511 (1991).

the *Wards Cove* decision and clearly did not want the *Wards Cove* conception of business necessity to be incorporated into the ADA.⁴³

The differences between the two sides led to an impasse.⁴⁴ To bridge this chasm, both sides agreed that the ADA would use the term “job-related and consistent with business necessity” because that term had some direct precedent in case law developed under the Section 504 regulations.⁴⁵ While they also agreed that the statute itself would not explicitly define the term, nevertheless, it was decided that forthcoming committee reports could be used to define the term.⁴⁶ The committee reports therefore are relevant to the extent they provide insight into the Congressional understanding of business necessity. As explained later in this article, mandatory periodic medical examinations of remote-location employees fit within the general principles outlined in the committee reports.

B. Medical Examinations of Employees—The EEOC’s View

Absent situations in which periodic medical examinations are required of employees by state or federal law,⁴⁷ the EEOC limits

43. *Id.*

44. *See* Feldblum, *supra* note 29, at 546.

45. *Id.* at 547.

46. *Id.*

47. The legislative history of the ADA demonstrates that § 12112(d)(4) did not overturn federal, state, and local laws that require certain categories of employees to submit to mandatory periodic medical examinations. *See* House Labor Report, *supra* note 20, at 74. For example, federal regulations require certain categories of employees in the private sector to submit to mandatory periodic medical examinations as part of their fitness-for-duty certification process. These include, but are not limited to, commercial truck drivers, commercial airline pilots, marine pilots, and hoist operators in open pit mines. *See* 49 C.F.R. §§ 39.41, 39.45 (2005) (commercial motor vehicle operators must submit to mandatory physical examination every twenty-four months as part of licensing requirement); 14 C.F.R. §§ 61.121, 61.23, 67.201 (2005) (commercial pilots must undergo annual medical examination as part of licensing requirement); 46 C.F.R. § 10.709 (2005) (marine pilots who pilot vessels that weigh more than 1600 tons and over must submit to annual medical examinations); 30 C.F.R. § 56.19057 (2005) (no person shall operate a hoist in a mine unless the person has had a medical examination by a qualified, licensed physician within the preceding twelve months and is certified by the physician to perform the hoisting duty). Federal law also requires certain categories of federal employees to submit to mandatory periodic medical examinations. *See* 5

periodic medical examinations to employees in positions affecting public safety.⁴⁸ Even then, these examinations must be narrowly tailored to address specific job-related concerns.⁴⁹ The EEOC notes that police officers and firefighters are examples of jobs that fit within the public safety exception.⁵⁰

C.F.R. § 339.205 (2005) (federal agencies may establish periodic medical examination programs by written policies or directives to safeguard the health of employees whose work may subject them or others to significant health or safety risks due to occupational or environmental exposure or demands). These include, but are not limited to, nuclear materials couriers, firefighters, and air traffic controllers. *See* United States Office of Personnel Management, Qualification Standards for General Schedule Positions, *in* Operating Manual §§ IV-B-20 (Aug. 1994) (“Before entrance on duty and periodically during employment, applicants for and employees in [nuclear courier positions] must undergo a medical examination and be physically and medically capable of performing the essential duties of the position efficiently and without hazard to themselves or others.”), IV-B-14 (“Employees in positions involving firefighting or other duties involving arduous physical exertion may be subject to periodic (e.g., annual) medical examinations following appointment to determine fitness for continued performance of the duties of the position.”), IV-B-278 (air traffic controllers must requalify for their positions in an annual medical examination, usually given during the employee’s month of birth).

48. *See* EEOC, *Questions and Answers*, *supra* note 19, at Question 18.

49. *Id.*

50. The public safety exception does not require state and city police and fire departments to enact policies that mandate current police officers and fire fighters submit to periodic medical examinations. It only makes such policies permissible. Nonetheless, prudent departments should require such examinations of their employees. The National Fire Protection Association (NFPA), a leading organization aimed at protecting the safety of firefighters, recommends that all fire departments conduct mandatory medical examinations of their members in order to identify medical conditions that affect a member’s ability to safely perform essential job tasks, monitor the effects of exposure to chemicals, detect patterns of disease or injury that could indicate underlying work-related problems, and provide members with information about their current health. *See* National Fire Protection Association, NFPA 1582: Standard on Comprehensive Occupational Medical Program for Fire Departments §§ 7.1–7.3 (2003). This recommendation is partly due to the increase in occurrences of on-duty heart attacks and cardiac arrests among fire fighters. *See* National Institute for Occupational Safety and Health (NIOSH), *Firefighter Fatality Investigation Report F2003-9* (July 13, 1994), available at <http://www.cdc.gov/niosh/face200339.html> (career firefighter in Tennessee died of sudden cardiac arrest in parking lot of fire station); *NIOSH Fire Fighter Fatality Investigation Report 99F-11* (May 3, 1999), available at

In general, the EEOC's view is that, unless periodic medical examinations are required by law or fit within the narrow public safety exception, medical examinations of current employees are "job-related and consistent with business necessity" only when the employer has a reasonable belief, based on objective evidence, that: (i) an employee's ability to perform essential job functions will be impaired by a medical condition or (ii) an employee will pose a direct threat due to a medical condition.⁵¹ According to the EEOC's enforcement guidance, this standard may be met when: an employer observes symptoms indicating that an employee may have a medical condition that will impair his or her ability to perform essential job functions or will pose a direct threat; an employer knows about a particular employee's medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition; or an employer receives reliable information from a credible third party that indicates the employee has a medical condition that will impair his or her ability to perform essential job functions or pose a direct threat.⁵²

<http://www.cdc.gov/niosh/face9911.html> (career firefighter in West Virginia died of sudden cardiac arrest during a training drill). Not surprisingly, many of these incidents occurred in fire departments that do not conduct periodic medical examinations of the fire fighters. *Id.* Although not required by federal law, more and more police and fire departments are requiring periodic examinations as a condition of continued employment. See Collective Bargaining Agreement Between Polk County Board of County Commissioners and Polk County Professional Firefighters, I.A.F.F., Local 3531, Article XVI, (Oct. 1, 2003–Sept. 30, 2004), available at http://www.polk-county.net/county_offices/fire_svcs/contract.html (fire fighters in Polk County, Florida required to undergo annual medical examinations); Agreement Between Township of Hardyton, Sussex County, New Jersey and Hardyton Township PBA Local 374, Article XIX, (Jan. 1, 2004–Dec. 31, 2006) (on file with the author) (police officers in Hardyton, New Jersey must submit to annual medical examination to insure proper physical capabilities on the job).

51. See EEOC, *Questions and Answers*, *supra* note 19, at Question 5.

52. *Id.*

III. A BETTER APPROACH

A. *Legitimate Business Purpose Standard*

The EEOC's position is inconsistent with the purpose of § 12112(d)(4)(A), the ADA legislative history, and its own interpretive guidance. The term "job-related and consistent with business necessity" in (d)(4)(A) should be construed to allow employers to require periodic medical examinations of current employees when those examinations serve a legitimate business purpose. Because employers who hire workers for jobs that involve arduous, dangerous work in remote locations have a legitimate business interest in requiring such employees to submit to mandatory periodic medical examinations, such employers should be allowed to require such examinations without running afoul of the ADA.

1. Purpose of the "Business Necessity" Defense in § 12112(d)(4)(A)

As described in Part II(A)(3) of this article, Congress and the Bush Administration could not agree on how to define the business necessity standard in the ADA.⁵³ Does the business necessity language incorporate a lenient or strict interpretation of the term? The Bush Administration and Congress opted not to make this clear in the statute. There is no definition of "job-related and consistent with business necessity" in the text of the ADA.⁵⁴ As explained later, a lenient standard should apply.

Section 12112(d)(4)(A) provides that an employer can require an employee to submit to a medical examination if such

53. See, e.g., Feldblum, *supra* note 29, at 547.

54. The term "job-related and consistent with business necessity" is found in three separate provisions of the ADA. Section 12112(a)(6) prohibits an employer from using "qualification standards, employment tests or other selection criteria" that screen out disabled individuals or a class of disabled individuals unless the standard, test, or other criteria is shown to be "job-related for the positions in question and is consistent with business necessity." Section 12113(a) provides that it is a defense to a charge of discrimination under section 12112(a)(6) that the qualification standard, test, or selection criteria used by the employer "has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation." Section 12112(d)(4)(A) prohibits an employer from requiring a medical examination of a current employee unless the examination "is shown to be job-related and consistent with business necessity."

examination is job-related and consistent with business necessity. The statute does not define the "business necessity" term. Nor does it limit the situations in which an employer can attempt to prove that a required medical examination is a business necessity. Thus, when an employer institutes a mandatory periodic medical examination policy to protect its employees from health and safety risks, it should have the opportunity to demonstrate that such a policy is job-related and consistent with business necessity. Protecting employees from health and safety risks qualifies as an important business goal for ADA purposes.⁵⁵

To be sure, it is not enough for the employer to simply assert that the mandatory periodic medical examination policy is needed for safety reasons. The employer must present evidence that the policy furthers legitimate safety interests. But the employer should not be precluded from asserting this type of defense.

Unfortunately, this is exactly what the EEOC's position does. It operates as a *per se* rule to prevent employers from even attempting to prove that their mandatory periodic medical examination policy meets the business necessity standard. The EEOC's position does not comport with the plain language of the statute and should not be followed by the courts.⁵⁶

55. See *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045 (2002).

56. The EEOC's position—as evidenced in its Enforcement Guidance, litigating position, and the informal opinion letter—lacks the force of law and is not binding on the courts. See *O'Neal v. City of New Albany*, 293 F.3d, 998, 1009 (7th Cir. 2002) (ADA Enforcement Guidance constitutes a body of experience and informed judgment to which courts and litigants may properly resort to for guidance, but does not bind a court); *Gregory v. Ashcroft*, 501 U.S. 452, 485, 111 S. Ct. 2395, 2414 n.3 (1991) (EEOC's litigating position in recent lawsuits is entitled to little, if any, deference); *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S. Ct. 1655, 1662–63 (2000) (opinion letters lack the force of law and do not require *Chevron*-style deference); Theodore W. Wern, Note, *Judicial Deference to EEOC Interpretations of the Civil Rights Act, the ADA, and the ADEA: Is the EEOC a Second Class Agency?*, 60 Ohio St. L.J. 1533, 1575–76 (1999) (noting that, according to the majority of the Supreme Court, EEOC enforcement guidance only qualifies for earned deference under *Skidmore*).

2. ADA Legislative History

a. Business Necessity and Qualification Standards under the ADA

The concept of “job-related and consistent with business necessity” is explained primarily in the part of the ADA legislative history that deals with qualification standards that have a disparate impact on the disabled.⁵⁷ The concept is also discussed in the section of the ADA legislative history that addresses medical examinations and inquiries of employees.⁵⁸ I examine the concept as it relates to qualification standards at the outset so I can later demonstrate the subtle differences between qualification standards that are “job-related and consistent with business necessity” and periodic medical examinations that are “job-related and consistent with business necessity.”

The legislative history reveals that Congress desired to prevent an employer from utilizing selection criterion that did not measure the applicant or employee’s ability to perform the essential functions of the job, with or without a reasonable accommodation.⁵⁹ The Labor Reports of both the House and the Senate cite and discuss *Stutts v. Freeman*⁶⁰ as an example of a case in which an employer’s neutral selection criteria was not “job-related and consistent with business necessity.”⁶¹ Immediately after the discussion of *Stutts*, the Labor Reports state:

57. See House Labor Report, *supra* note 20, at 70–72; Senate Labor Report, *supra* note 29, at 37–39; House Judiciary Report, *supra* note 20, at 42.

58. See House Labor Report, *supra* note 20, at 74–75; Senate Labor Report, *supra* note 29, at 39–40; House Judiciary Report, *supra* note 20, at 43–44.

59. See House Labor Report, *supra* note 20, at 71; Senate Labor Report, *supra* note 29, at 37–38.

60. 694 F.2d 666 (11th Cir. 1983).

61. In *Stutts*, a dyslexic applicant was denied the job of heavy equipment operator because he could not pass a written test used by the employer for entering the training program, which was a prerequisite for the job. See House Labor Report, *supra* note 20, at 71; Senate Labor Report, *supra* note 29, at 38. It was undisputed that the applicant could safely perform the job of heavy equipment operator in spite of his dyslexia. *Id.* The dyslexia only interfered with his ability to perform on the written test and meet the outside reading requirements of the training program. *Stutts*, 694 F.2d at 669 n.3. The Eleventh Circuit held that, even if passing the written test and satisfying the reading requirements of the training program itself were necessary criteria to work as a heavy equipment operator, the employer violated Section 504 of the Rehabilitation Act because the employer had not provided the applicant with a

Hence, the requirement that job selection procedures be "job-related and consistent with business necessity" underscores the need to examine all selection criteria to assure that they not only provide an accurate measure of an applicant's actual ability to perform the essential functions of the job, but that even if they do provide such a measure, a disabled applicant is offered a "reasonable accommodation" to meet the criteria that relate to the functions of the job.⁶²

To the casual observer, the above-quoted passage from both the House and Senate Labor Reports may indicate that the *Stutts* court had interpreted the phrase "job-related and consistent with business necessity." This is not the case, however. Interestingly enough, the *Stutts* opinion never mentions the phrase "business necessity," although the opinion does raise the question of whether the written test and training program are job-related.⁶³ Therefore, while the *Stutts* case provides a flavor of Congressional intent, we are still left searching for the meaning of the term "job-related and consistent with business necessity" as it relates to qualification standards.

Is a neutral selection criterion that actually measures an applicant's ability to perform the essential functions of the job, with or without a reasonable accommodation, nonetheless prohibited by § 12112(a)(6) if such a selection criteria is not essential or indispensable to the employer's business? The House Judiciary Report is no more illuminating than the Senate Labor and House Labor Reports on this question.

The House Judiciary Report states that if an employer uses a facially neutral qualification standard that has a discriminatory effect on persons with disabilities, "this practice would be discriminatory unless the employer can demonstrate that it is job-related and consistent with business necessity."⁶⁴ The report then cites *Prewitt v. United States Postal Service*⁶⁵ for interpretive support. *Prewitt*, a notable Rehabilitation Act case, states that the

reasonable accommodation—*i.e.*, the opportunity to take an oral version of the test for admission to the training program and to engage a professional reader to assist him with the reading requirements of the training program. *Id.*

62. House Labor Report, *supra* note 20, at 72; Senate Labor Report, *supra* note 29, at 38.

63. 694 F.2d at 669 n.3.

64. House Judiciary Report, *supra* note 20, at 42.

65. 662 F.2d 292 (5th Cir. 1981).

employer bears the burden of proof when asserting a “business necessity” defense as related to a neutral qualification standard.⁶⁶ But it is ambivalent on the exact contours of the term “job-related and consistent with business necessity,” other than to indicate that the business necessity principles asserted in *Griggs v. Duke Power, Co.*⁶⁷ should apply to claims, by the disabled, that assert neutral qualification standards and have a disparate impact in violation of § 12112(a)(6).⁶⁸ Asserting that the principles of *Griggs* apply hardly answers the question posed by the Supreme Court’s fractured view of the *Griggs* conception of “business necessity” in the Court’s *Wards Cove*⁶⁹ decision and the political debate concerning the meaning of business necessity under Title VII.⁷⁰ Pointing to a case that merely cites *Griggs* is not much help.⁷¹

Turning away from the legislative history for the moment, the remaining avenue to discern Congressional intent on this question is the Rehabilitation Act,⁷² its accompanying regulations, case law interpretations of the Act, and regulations that existed prior to the passage of the ADA. The Rehabilitation Act is relevant to the ADA conception of business necessity for two reasons. First, the ADA states that Rehabilitation Act standards are applicable to the ADA.⁷³ Second, the ADA drafters used the term “business

66. *Id.* at 306; Feldblum, *supra* note 29, at 547 n.149.

67. 401 U.S. 424 (1971).

68. *Prewitt*, 662 F.2d at 306–07.

69. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 109 S. Ct. 2115 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *Cota v. Tuscon Police Dept.*, 783 F. Supp. 458 (D. Ariz. 1992).

70. *See, e.g.*, Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 Notre Dame L. Rev. 1153, 1157–64 (1993) (arguing that the *Wards Cove* conception of business necessity is still good law after the Civil Rights Act of 1991); *but see, e.g.*, Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 Harv. L. Rev. 896 (1993) (contending that the *Wards Cove* conception does not survive the Act).

71. *See* discussion *supra* note 40.

72. “The Rehabilitation Act [of 1973] was the first major federal law prohibiting employment discrimination on the basis of ‘handicap.’” *See* Richard R. Carlson, *Carlson’s Federal Employment Laws Annotated*, Employment Discrimination, Chapter 4 (2002 ed.). The Act applies to entities that accept federal funds.

73. *See* 42 U.S.C. § 12201(a) (1995) (“In General.—Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. § 790 et seq.) or the regulations issued by Federal agencies

necessity” because that term had been present in some Rehabilitation Act cases.⁷⁴ The Rehabilitation Act cases bear more fruit on the question.

A Department of Labor regulation, applicable to entities that accept funds from the department, interprets Section 504 of the Rehabilitation Act and provides that job qualifications “which would tend to exclude handicapped individuals because of their handicap . . . shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and safe performance.”⁷⁵ *Bentivegna v. United States Department of Labor*,⁷⁶ the leading case interpreting the business necessity language in the above regulation, warns courts not to confuse business necessity with mere expediency and states that job qualifications that exclude handicapped individuals must be “directly connected with, and must substantially promote” business necessity and safe performance.⁷⁷ It also plants the seed that certain medical conditions are incompatible with jobs that carry high risks of injury.⁷⁸

Another Rehabilitation Act case, *E.E. Black, Limited v. Marshall*,⁷⁹ provides additional insight into the concept of business necessity. In *Black*, the district court considered a Department of Labor regulation, applicable to federal contractors, which interprets Section 503 of the Rehabilitation Act.⁸⁰ The regulation states that whenever a federal contractor applies qualification requirements that tend to screen out qualified handicapped individuals, “the requirements shall be related to the specific job or jobs for which the individual is being considered and shall be consistent with business necessity and the safe performance of the

pursuant to such title.”); Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's “Disability Regulations” Under the ADA*, 39 Wake Forest L. Rev. 177, 183 (2004) (“The ADA explicitly states that its protections extend as far as the protections offered by Title V of the Rehabilitation Act and its accompanying regulations.”).

74. See Feldblum, *supra* note 29, at 547.

75. 29 C.F.R. § 32.14(b) (2005).

76. 694 F.2d 619 (9th Cir. 1982).

77. *Id.* at 621–22.

78. *Id.* at 623 n.3 (opining that job requirements directly tied to increased risks of injury might present a valid justification for rejecting a handicapped individual when the job carries elevated risks of injury).

79. 497 F. Supp. 1088 (D. Haw. 1980).

80. *Id.* at 1103.

job.”⁸¹ The *Black* court hypothesized a scenario in which an employer screened out a qualified handicapped individual on the basis of a possible future injury and concluded that in some cases such a qualification standard could be both consistent with business necessity and the safe performance of the job if the risk of injury was substantial and imminent.⁸² Both *Bentivegna* and *Black* elucidate a conception of business necessity that is less stringent than one that would require an employer to prove a neutral qualification standard, which has a disparate impact on the disabled, is essential or indispensable to the employer’s business.

b. Business Necessity and Periodic Medical Examinations

The legislative history concerning the conception of business necessity in § 12112(d)(4)(A) indicates that periodic medical examinations are “job-related and consistent with business necessity” so long as they serve a legitimate business purpose. For good reason, this conception of business necessity is even more lenient than under ADA qualifications standards and Title VII disparate impact law.

Qualification standards are different from medical examinations. If an applicant is not hired or an employee is fired because of a qualification standard that has a disparate impact on the disabled or a protected category under Title VII, that person suffers an economic loss.⁸³ In contrast, merely taking a medical examination does not cause the employee to suffer an economic loss. The medical examination impinges on his or her privacy interests and could perhaps stigmatize the individual, but the economic effects of an adverse employment action do not exist.

Because the interests underlying the regulation of qualification standards and medical examinations vary and the degree to which the law should protect those interests also vary, it would make

81. *Id.*

82. *Id.* at 1104 (employer can validly deny a qualified handicapped individual a particular job if it was determined that the individual would have a ninety percent chance of suffering a heart attack within one month if given the particular job because such a job requirement would be consistent both with business necessity and the safe performance of the job).

83. Not all adverse employment actions taken against employees due to their failure to meet qualification standards necessarily have economic consequences. For example, an employee’s change in job duties due to his or her failure to meet a qualification standard without a corresponding decrease in the employee’s pay would not have an adverse economic impact on the employee.

sense for Congress to treat those interests differently through different conceptions of the business necessity defense. In my view, the legislative history calls for different conceptions.⁸⁴ An important strand of the legislative history reflects the notion that medical examinations of current employees are permissible if they serve a legitimate business purpose.

The House Labor, House Judiciary, and Senate Labor Reports all speak of medical examinations meeting the "job-related and consistent with business necessity" standard if they serve "legitimate employer purposes" or an employer's "legitimate needs."⁸⁵ Similar language is not used in the part of the legislative history that discusses business necessity as it relates to qualification standards under the ADA. Instead, the qualification standards concept of business necessity focuses on reasonable accommodation and clarifies that a reasonable accommodation may entail adopting an alternative, less discriminatory criterion.⁸⁶ This suggests the medical examination conception of business necessity is something akin to the qualification standard conception outlined in *Bentivegna* and *Black*, the Rehabilitation Act cases, and considerably less strict than the business necessity interpretation that some courts have applied in Title VII disparate impact cases after the 1991 Civil Rights Act.⁸⁷

84. See, e.g., *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 213, 121 S. Ct. 1433, 1441 (2001) (the meaning of the same words can sometimes vary to suit the purposes of the law).

85. See House Labor Report, *supra* note 20, at 75 ("An inquiry or medical examination that is not job-related serves no *legitimate employer purpose*, but simply serves to stigmatize the person with a disability. An employer's *legitimate needs* will be met by allowing those medical inquiries and examinations which are job-related and consistent with business necessity." (emphasis added)); Senate Labor Report, *supra* note 29, at 39-40 ("An inquiry or medical examination that is not job-related serves no *legitimate employer purpose*, but simply serves to stigmatize the person with a disability. An employer's *legitimate needs* will be met by allowing the medical inquiries and examinations which are job-related." (emphasis added)); House Judiciary Report, *supra* note 20, at 44 ("An inquiry or medical examination that is not job-related serves no *legitimate employer purpose*, but simply serves to stigmatize the person with a disability. . . . *Legitimate needs* of the employer are met by allowing job-related medical examinations and inquiries." (emphasis added)).

86. See House Labor Report, *supra* note 20, at 71; Senate Labor Report, *supra* note 29, at 38.

87. See *Lanning v. Se. Pennsylvania Transp. Auth.*, 181 F.3d 478, 490 (3d Cir. 1999) (business necessity defense under Title VII requires more than a legitimate business reason because "a business necessity standard that wholly

Another telling portion of the legislative history demonstrates that, with respect to medical examinations of current employees, Congress was most concerned about medical examinations that single out an employee on the ground of a perceived disability because being identified as disabled often carries with it a stigma. The House Labor, House Judiciary, and Senate Labor Reports each provide the example of an employer who requires an employee to be tested for cancer after witnessing him or her start to lose a significant amount of hair.⁸⁸ The reports explain such tests should not be permitted unless they are job-related and consistent with business necessity because the individual with cancer may object to being identified as disabled, independent of the consequences, because such identification often carries a stigma.⁸⁹ The protected interest, according to Congress, is the prevention of a stigma.⁹⁰ If that is so, periodic medical examinations of current employees in a job category are less problematic than ad hoc examinations based on observation of an individual employee because periodic exams do not identify an individual as disabled. If all employees in a job

defers to an employer's judgment is completely inadequate in combating covert discrimination based upon societal prejudices"). The legal principle that different interpretations may be given to the same language—whether appearing in separate statutes or in separate provision of the same statute—upon a showing of Congressional intent finds considerable support in the law. Justice O'Connor, in her separate opinion in *Smith v. City of Jackson*, 125 S. Ct. 1536, 1549 (2005) (O'Connor, J., concurring), applied this principle, concluding that a disparate impact theory is not cognizable under the ADEA even though the ADEA contains similar language to Title VII because the perceived purposes of the statutes were different. Justice O'Connor cited a number of Supreme Court cases in which the same phrase appeared in separate provisions of the same statute, but had been interpreted to have different meanings. *Id.* at 1556–57 (O'Connor, J., dissenting) (citing *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595–97, 124 S. Ct. 1236, 1245–47 (2004) (“age” has different meaning where used in different parts of the ADEA); *United States v. Cleveland Indians Baseball Co.*, 532 U.S. 200, 121 S. Ct. 1433 (2001) (“wages paid” has different meanings in different provisions of Title 26 U.S.C.); *Robinson v. Shell Oil Co.*, 519 U.S. 337, 343–44, 117 S. Ct. 843, 847 (1997) (“employee” has different meanings in different provisions of Title VII)).

88. See House Labor Report, *supra* note 20, at 75; Senate Labor Report, *supra* note 29, at 39–40; House Judiciary Report, *supra* note 20, at 44.

89. See House Labor Report, *supra* note 20, at 75; Senate Labor Report, *supra* note 29, at 39–40; House Judiciary Report, *supra* note 20, at 44.

90. See House Labor Report, *supra* note 20, at 75; Senate Labor Report, *supra* note 29, at 39–40; House Judiciary Report, *supra* note 20, at 44.

category are required to take a periodic medical examination, no stigma should attach to the taking of the examination. For this reason, periodic medical examinations should have an easier time fitting into the "legitimate business purpose" standard—at least in certain high-risk jobs.

Although a legitimate business purpose standard is detailed in the legislative history, this standard is not directly mentioned during the discussion of periodic medical examinations. The House Labor Report upholds periodic medical examinations that are required by law and notes that periodic medical examinations could be appropriate in jobs that impact public safety.⁹¹ Nonetheless, the House Labor Report does not shut the door on expanding the allowance of periodic medical examinations to other dangerous jobs not covered by those situations when such examinations serve a legitimate business purpose. The House Labor Report provides periodic medical exams required by law and periodic exams permitted due to public safety as *examples* of situations in which periodic medical exams of employees are job-related consistent with business necessity.⁹² It does *not* state that

91. The House Labor Report states in pertinent part:

[42 U.S.C. § 12112(d)(4)(A)] prohibits medical exams of employees unless job-related and consistent with business necessity. Certain jobs require periodic physicals in order to determine fitness for duty. For example, Federal safety regulations require bus and truck drivers to have a medical exam at least biennially. In certain industries, such as air transportation, physical qualifications for some employees are critical. Those employees, for example, pilots, may have to meet medical standards established by Federal, State, or local law or regulation, or otherwise fulfill requirements for obtaining a medical certificate, as a prerequisite for employment. In other instances, because a particular job function may have a significant impact on public safety, e.g. flight attendants, an employee's state of health is important in establishing job qualifications, even though a medical certificate may not be required by law. The Committee does not intend for this Act to override any medical standards or requirements established by Federal, State or local law as a prerequisite for performing a particular job, if the medical standards are consistent with this Act (or in the case of federal standards, if they are consistent with section 504)—that is, if they are job-related and consistent with business necessity. *See, e.g., Strathie v. Dep't of Transp.*, 716 F.2d 227 (3d Cir. 1983).

See House Labor Report, *supra* note 20, at 74.

92. *Id.* at 74 ("Certain jobs require periodic physicals in order to determine fitness for duty. *For example*, Federal safety regulations require . . . *In other*

periodic medical examinations are job-related and consistent with business necessity only if those two situations apply.⁹³ Thus, an employer should have the opportunity to demonstrate that its mandatory periodic medical examinations policy meets the business necessity standard because the policy protects the health and safety of its employees.

3. Interpretive Guidance

In addition to finding support in the legislative history, a legitimate business purpose standard is also consistent with certain language in the EEOC Interpretive Guidance.⁹⁴ The Interpretive Guidance states that the purpose of a key regulation⁹⁵ governing medical examinations of current employees is “to prevent the administration to employees of medical tests . . . that do not serve a *legitimate business purpose*.”⁹⁶ The Interpretive Guidance also construes another key regulation⁹⁷ concerning medical examinations of current employees to permit employers to “require medical examinations (fitness for duty exams) when there is a *need* to determine whether an employee is still able to perform the essential functions of his or her job.”⁹⁸

Conversely, the EEOC’s litigation position, enforcement guidance, informal opinion letter, and some parts of the

instances, because a particular job function may have an impact on public safety” (emphasis added)).

93. *Id.* at 74.

94. The ADA required the EEOC to issue regulations within one year of the ADA’s enactment to carry out Title I. 42 U.S.C. § 12116 (1995). The EEOC issued its regulations on July 26, 1991. *See* 29 C.F.R. pt. 1630 (2004). At the same time, the EEOC also issued an appendix to the regulations entitled Interpretive Guidance on Title I of the Americans with Disabilities Act. *See* 29 C.F.R. pt. 1630 app. (2004). The Interpretive Guidance interprets the EEOC’s regulations and explains the major concepts of disability rights. 29 C.F.R. pt. 1630 app. (2004). The EEOC complied with the notice and comment provisions of the Administrative Procedures Act for the regulations and Interpretive Guidance. *See* Barbara Hoffman, *Reports of Its Death Were Greatly Exaggerated: The EEOC’s Regulations that Define Disability Under the ADA after Sutton v. United Air Lines*, 9 Temp. Pol. & Civ. Rts. L. Rev. 253, 258–59 (2000).

95. 29 C.F.R. § 1630.13(b).

96. *Id.* § 1630.13(b) (emphasis added).

97. *Id.* § 1630.14(c).

98. *Id.* pt. 1630 app. § 1630.14(c) (emphasis added).

Interpretive Guidance appear to prohibit all periodic medical examinations unless required by law or contained within the narrowed public safety exception.⁹⁹ The EEOC's litigation position, enforcement guidance, and opinion letter appear to be at odds with the language of the interpretive guidance, which, in my mind, is expansive enough to allow periodic medical examinations of employees in high-risk jobs. The Interpretive Guidance provides that the main purpose of the EEOC regulations is to prevent medical examination of current employees that do not serve a legitimate business purpose.¹⁰⁰ It also states that employers are permitted to require medical examinations when there is "a need to determine whether an employee is still able to perform the essential functions of his or her job,"¹⁰¹ not when there is an "essential" need or a "compelling" need. Some courts have interpreted this language to mean that "job-related and consistent with business necessity" has a more flexible connotation than it does under traditional disparate impact law.¹⁰² The inconsistency between the Interpretive Guidance and the EEOC's litigation position, enforcement guidance, and opinion letter is a persuasive reason for the courts to refuse to defer to the EEOC on such an important issue as whether periodic medical examinations of

99. See *Equal Opportunity Employment Comm'n v. Murray, Inc.*, 175 F. Supp. 2d 1053, 1061 (M.D. Tenn. 2001) (EEOC argued that company's periodic medical examination policy, which applied to all forklift operators, violated 42 U.S.C. § 12112(d)(4)(A) because medical screening was not prompted by individual employee behavior); EEOC, *Questions and Answers*, *supra* note 19, at Questions 5 and 18 (periodic medical examinations only allowed for employees who work in positions affecting public safety); Letter from Joyce Walker-Jones, *supra* note 9, at 1-2 (medical examination limited to situations in which employer has individualized suspicion of employee's inability to perform essential functions or employees work in positions affecting public safety); 29 C.F.R. pt. 1630 app. § 1630.14(c) (EEOC regulation permits periodic physicals that are required by law in that they are job-related and consistent with business necessity).

100. 29 C.F.R. pt. 1630 app. § 1630.13(b).

101. *Id.* § 1630.14(c).

102. See *Riechmann v. Cutler-Hammer, Inc.*, 183 F. Supp. 2d 1292, 1297 (D. Kan. 2001) (interpreting the EEOC's "Interpretive Guidance" to permit employers to make periodic medical inquiries of current employees if such inquiries serve the legitimate business purpose of the employer even though they do not serve a "compelling" need, an "immediate" need, or a need which is of "great importance" to the employer, because Guidance makes clear that disparate impact principles do not apply).

employees in high-risk jobs, like offshore oil workers, are job-related and consistent with business necessity.¹⁰³

4. Summary

In summary, a “legitimate business purpose” standard should apply to mandatory periodic medical examinations. The next section explains why permitting employers to require periodic medical examinations of remote-location employees fits within this standard.

B. Periodic Medical Examinations of Remote-Location Employees

Employers that conduct remote-location operations have workplace safety concerns that other employers do not. The remoteness of the location makes it difficult for employees who suffer on-the-job injuries to receive expedient medical attention. In addition, many remote-location operations involve inherently dangerous jobs. To protect the safety of these employees, the employer has a legitimate business interest in requiring mandatory periodic medical examinations of these employees.

While the dangers involved in remote-location work are substantial, federal law typically does not require employees in these jobs to maintain medical certificates as part of a licensing requirement.¹⁰⁴ Nor do these jobs fit squarely within the public safety exception set forth in the ADA legislative history and adopted by the EEOC through its enforcement guidance.¹⁰⁵ But

103. See, e.g., *Smith v. City of Jackson*, 125 S. Ct. 1536, 1560 (2005) (O'Connor, J., dissenting).

[I]t makes little sense to attribute to the agency [the EEOC] a construction of the relevant statutory text that the agency itself has not actually articulated so that we can then “defer” to that reading. Such an approach is particularly troubling where applied to a question as weighty as whether a statute [the ADEA] does or does not subject employers to liability absent discriminatory intent. This is not, in my view, what *Chevron* contemplated.

Id.

104. See Feldblum, *supra* note 29.

105. Although remote-location positions may not always fit squarely within the public safety exception, they may fit within the spirit of the exception. Take the offshore oil rig employees, for example. Offshore employees are not police officers or firefighters, but they work in an environment in which their ability to perform their jobs without posing a direct threat to others affects the safety of all those who live and work on the rig. See Request for Technical Assistance,

the rationale for permitting or requiring periodic medical examinations of commercial motor vehicle operators, commercial airline pilots, marine pilots, air-traffic controllers, mine hoisters, nuclear materials couriers, firefighters, and police officers should also permit remote-location employers to require remote-location employees that work in dangerous jobs to submit to periodic medical examinations.¹⁰⁶

For each of these positions, catastrophic injury could result to the employee and others if the employee has a health condition that renders him or her unfit for duty. The offshore oil rig example illustrates these points. The offshore employer operates Mobile Offshore Drilling Units (MODUs) in the Gulf of Mexico.¹⁰⁷ The jobs on the MODUs include, but are not limited to, rig manager, driller, assistant driller, derrickman, foreman, crane operator, roustabout, rig maintenance supervisor, ballast control operator, electrician, mechanic, motorman, welder, subsea engineer, barge engineer, materials coordinator, and training specialist.¹⁰⁸ The offshore employees who work in jobs that require them to aid in the navigation of the MODUs—the rig manager, barge engineer,

supra note 3, at 4. Stated another way, because the rig itself is a self-enclosed community, the employees on the rig are the public. *Id.* Furthermore, offshore employees actually perform traditional public-safety functions in the event of an emergency on the rig. *Id.* Offshore employers may require offshore employees to have training in emergency-life saving situations. *Id.* at n.10. In addition, Coast Guard regulations required offshore employers to designate certain offshore employees as lifeboatmen and able seamen. *Id.* To obtain their certification, lifeboatmen and able seamen must have emergency life-saving training. 46 C.F.R. §§ 12.05-03, 12.10-13 (2005).

106. *See supra* note 47.

107. *See Request for Technical Assistance, supra* note 3, at 3. The ADA applies to the employer even if the MODUs are not located in United States waters because the ADA applies extraterritorially. *See* 42 U.S.C. § 12111(4) (2005); *Id.* § 12112(c). Section 109 of the Civil Rights Act of 1991 amended the ADA to make clear that the protections of the ADA extend to American citizens working overseas for American employers, effectively overruling *Boureslan v. Arabian American Oil Co.*, 499 U.S. 244, 111 S. Ct. 1227 (1991). *See Enforcement Guidance on Application of Title VII and the Americans with Disabilities Act to Conduct Overseas and to Foreign Employers Discriminating in the United States*, EEOC Guidance No. 915.002, § I.A.2, October 20, 1993, available at <http://www.eeoc.gov/policy/docs/extraterritorial-vii-ada.html>. In *Boureslan*, the Supreme Court held that Title VII of the Civil Rights Act of 1964 did not apply extraterritorially. 499 U.S. at 248–49, 111 S. Ct. at 1230–31.

108. *Id.*

ballast control operator, and subsea engineer employees—are required by Coast Guard regulations to submit to periodic medical examinations.¹⁰⁹ For employees in the remaining positions, there is no legal requirement that they submit to periodic medical examinations. Moreover, according to the EEOC, if the employer requires those employees to submit to periodic medical examinations, it violates § 12112(d)(4)(A) of the ADA.¹¹⁰

This should not be the case. Most of the offshore jobs on the MODUs require the employee to either operate heavy machinery or work in the presence of heavy machinery.¹¹¹ The dangers inherent to the offshore oil rig—human error in the operation of heavy machinery to name one—make it imperative that all offshore employees be physically capable of performing their essential job duties.¹¹²

While other industrial employers may have similar safety concerns, the company's concerns are heightened due to the remoteness of the job site.¹¹³ If an accident occurs in the typical industrial setting, firefighters and emergency medical personnel ordinarily are able to assist the employer immediately in a rescue operation and the treatment of injuries.¹¹⁴ Likewise, if an employee has a heart attack or stroke, the employer can be reasonably assured that it will obtain immediate medical assistance for the employee.¹¹⁵

The same cannot be said for offshore oil drilling companies. It may take hours, or even days, to transport the injured employee by helicopter from the MODU to a hospital.¹¹⁶ Requiring periodic medical examinations of all offshore workers would reduce—through early detection—the risk of incapacitating medical

109. *Id.* at 4. To obtain a merchant mariner's license, these employees must undergo a physical examination. 46 C.F.R. § 10.205(d). To renew their license, they must submit a medical certification to the Coast Guard. A licensed physician or physician assistant must attest that the employee "is in good health and has no physical impairment or medical condition which would render him or her incompetent to perform the ordinary duties of that license." *Id.* § 10.209(d)(1).

110. *See* sources cited *supra* note 9.

111. *See* Request for Technical Assistance, *supra* note 3, at 3.

112. *Id.*

113. *Id.* at 3–4.

114. *Id.* at n.9

115. *Id.*

116. *Id.* at 3. *See, e.g., Gulf Rig Workers Evacuate as Storm Approaches*, Lubbock Avalanche-Journal, Sept. 14, 2004, at D6 (evacuation of gulf rig workers due to storms took several days).

emergencies while on-duty, and thereby reduce the risk of consequential catastrophic injury to co-workers.¹¹⁷ In addition, mandatory periodic medical examinations would save the lives of employees who otherwise may be unaware of a life-threatening impairment.¹¹⁸

For example, assume the driller referred to earlier in the article is required to submit to an annual medical examination by the offshore employer.¹¹⁹ The examination reveals a heart defect unknown to the driller¹²⁰ and results in emergency quadruple bypass surgery, which saves the driller's life.¹²¹ Consider what could have happened had the driller not been required to submit to the annual medical examination: the driller suffers a massive heart attack while working on the rig, several employees are killed when the driller loses control of the drawworks, and the driller dies because the employer is not able to quickly transport him to the nearest medical facility.¹²² The mandatory periodic medical examination prevented this catastrophe.¹²³ The need for offshore

117. See Request for Technical Assistance, *supra* note 3, at 4.

118. See, e.g., *id.* The recent cardiac problems experienced by former President Bill Clinton illustrates that people with cardiovascular disease often do not even realize the dire straits they are in. Although President Clinton looked to be in good health, he was within a "cat's whisker of death" prior to checking into the hospital. See, e.g., Editorial, *Heart Risks*, Lubbock Avalanche-Journal, Sept. 20, 2004, at A5.

119. See Request for Technical Assistance, *supra* note 3, at 4.

120. *Id.*

121. *Id.*

122. *Id.*

123. The devil's advocate will argue that once the driller's heart condition is identified through a periodic medical examination, the employer will immediately fire the driller. After the termination of employment, the driller will then have no health insurance and will be unable to pay for any medical treatment needed. The response to this excellent point is two-fold. First, most employers are not heartless creatures. Many employers will have leave policies which the driller could use to take time off to address the health issue. Absent a leave policy, the driller should be able to take leave under the Family Medical Leave Act (FMLA) of 1993, which allows a covered employee to take up to twelve weeks unpaid leave to address his or her own serious health condition. See 29 U.S.C. § 2601 (1999). An employer may also seek to temporarily transfer the driller to a less dangerous job, while he seeks medical assistance for his condition. Finally, if termination of employment occurs after exhaustion of all leave options, the driller could keep his health insurance for up to eighteen months through the Consolidated Omnibus Budget Reconciliation Act (COBRA). *Id.* §§ 1161–69. COBRA Continuation Coverage is expensive for the individual, but it may be the best option for certain employees who lose their

oil companies to require offshore employees to submit to periodic medical examinations for safety reasons is merely the tip of the iceberg. There are undoubtedly other jobs where the remoteness of the location and the nature of the job would sensibly lead the employer to require the employees to submit to mandatory periodic medical examinations.

A hypothetical company called BJK sets up an observatory in the mountains of one of the islands of Hawaii. The observatory houses one of the world's finest telescopes. The goal of the company is to conduct astronomical research. Assume that BJK is an "employer" under the ADA and is subject to Title I. Many different types of employees work at the observatory—engineers, computer workers, maintenance workers, guides, etc. The employees have to deal with a peculiar environmental factor—high altitude. Therefore, BJK requires all staff members to submit to, and pass, a High Altitude Physical Exam upon joining the company. It also requires each staff member to submit to, and pass, a High Altitude Physical Exam periodically during his or her employment. The frequency of the periodic exams varies depending on the age of the employee.¹²⁴ BJK requires periodic mandatory medical examinations of all its employees for a very good reason—to protect the safety of its employees. People with certain medical conditions are at increased risk if they work in high altitude conditions. Some of them may not even be aware that they have a condition which places them at risk. There is also the concern that employees who experience acute mountain sickness while on duty may not be able to receive immediate medical attention due to the remoteness of the location. For all of these reasons, it makes sense for BJK to periodically require the employees to undergo a medical examination to make sure that the company is not placing them in harm's way by continuing to allow them to work in such extreme conditions. Indeed, I would argue

job and have serious health conditions when the prospects of quickly obtaining a new job that provides health benefits are uncertain.

124. This example is modeled on a real-world scenario. There is actually an astronomy center located in Hawaii called the Joint Astronomy Centre (JAC). See Joint Astronomy Centre, <http://www.jach.hawaii.edu/>. All JAC employees who work above one of the mountains, Hale Pohaku, must undergo periodic medical examinations due to the remoteness of the location and the high altitude. See Joint Astronomy Centre, Mauna Kea Safety Policies General, Chapter 9, § G2, <http://www.jach.hawaii.edu/safety/chap9.htm#chap9b>. The frequency of the periodic medical examinations depends on the age of the employee. *Id.* § H4.

that BJG would be negligent if it did not have such a requirement. But, according to the EEOC, unless the examination is required by state, federal, or local law, such a requirement violates the ADA.

An example from the government sector also proves the point. The United States Department of State hires foreign service employees. The employees must be fit for worldwide duty. Should the government be prohibited from requiring those employees to submit to periodic medical examinations prior to assignment in remote outposts? One would think not, and that appears to be the case.¹²⁵ Why should private-sector employers be denied the flexibility some government agencies are given on this issue?¹²⁶

Periodic medical examinations reduce the risk that medically unfit workers will remain on the job in dangerous environments and cause harm to themselves and others. They reduce the employer's costs and exposure to potential liability that may arise

125. Foreign Service employees must be able to serve on a world-wide basis. 22 C.F.R. § 11.1 (e)(2) (2004). Often, such employees are required to serve in remote parts of the world which present unusual health hazards and where adequate medical care is non-existent. See *Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State*, 662 F. Supp. 50, 52 (D.D.C. 1987). Current Foreign Service employees must undergo periodic medical examinations about every two to three years, typically upon a change of tour of duty. 3 Foreign Affairs Manual § 680 (1992); *Local 1812*, 662 F. Supp. at 51. The content of the examination is changed to reflect evolving medical practice. *Local 1812*, 662 F. Supp. at 51–52. If significant health problems are detected, the employees are prevented from serving in remote locations. *Id.* at 54 (upholding Department of State policy that prohibited HIV-positive foreign service employees from serving in remote foreign posts due to inadequacy of medical treatment in remote posts).

126. The United States Office of Personnel Management has promulgated a regulation which gives each federal agency the authority to decide whether federal employees in the agency must submit to periodic medical examinations. See 5 C.F.R. § 339.205 (2005). The OPM regulations state that periodic medical examinations must comply with EEOC regulations concerning periodic medical examinations, which presumably means that periodic medical examinations are available only if they are required by federal law or the public safety exception applies. *Id.* § 339.103. But a careful look at the OPM regulation reveals that OPM understands that unique occupational or environmental demands may warrant periodic medical examinations. *Id.* § 339.205 (“Agencies may establish periodic examination or immunization programs by written policies or directives to safeguard the health of employees whose work may subject them or others to significant health or safety risks *due to occupational or environmental exposure or demands.*” (emphasis added)).

from workplace incidents caused by unfit workers.¹²⁷ Moreover, these examinations help the employer adhere to its duty to

127. It goes without saying that the employer will suffer increased costs and expenses—damage to equipment, lost work time, emergency rescue service expenses, etc.—when a catastrophic accident occurs. The employer may also face lawsuits from the injured employees. For example, in the offshore oil accident example, the injured or dead workers, depending on the location of the accident and the workers' employment status may have actions or claims under the Jones Act, 46 U.S.C.A. § 688 (1975) ("seaman" who suffers personal injury or death in the course of employment may maintain negligence cause of action against employer), Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 (2001) and 43 U.S.C. § 1333(b) (1986) ("employee" who suffers disability or death resulting from an injury that occurs as a result of oil operations conducted on the outer Continental Shelf is entitled to workers' compensation), or Death on the High Seas Act, 46 U.S.C.A. § 761 (1975) (negligence action against vessel or corporation available to personal representative of decedent when the corporation's negligence led to the employee's death on the high seas). It is questionable whether the offshore employer could use the EEOC position that mandatory periodic medical examinations of offshore employees are prohibited under the ADA to defend the workers' claims that the employer negligently failed to maintain a safe workplace because it assigned the driller to perform a job that his heart condition precluded him from safely performing. *See, e.g., Moreno v. Grand Victoria Casino*, 94 F. Supp. 2d 883, 895 (N.D. Ill. 2000) ("A Jones Act employer owes a duty to assign employees to work for which they are reasonably suited The employer is negligent if it knew or *should have known* that the employer was unfit for the job because of his or health condition." (emphasis added)). I have found no cases that address whether employers sued under the Jones Act can hide behind the EEOC's interpretation of the ADA as a shield to liability. But offshore oil employers cannot expect that the alleged prohibition of mandatory periodic medical exams under the ADA will necessarily provide a winning defense to the type of Jones Act claims referred to above. In summary, the potential tort liability and the increased costs associated with permitting medically unfit employees to work in remote-location or dangerous-job positions, in combination with other reasons, tilts the balance in favor of a finding that mandatory periodic medical examinations of remote-location employees are job-related and consistent with business necessity. *See, e.g., International Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 212–18, 111 S. Ct. 1196, 1210–13 (1991) (White, J., concurring) (bona fide occupational qualification (BFOQ) defense to employer's facially discriminatory fetal protection policy could include considerations of potential tort liability and increased costs); *id.* at 224, 111 S. Ct. at 1216–17 (Scalia, J., concurring) (suggesting that "a shipping company may refuse to hire pregnant women as crew members on long voyages because the on-board facilities for

maintain a safe workplace.¹²⁸ A periodic medical examination requirement for employees in remote-location jobs serves a legitimate business purpose and should be allowed under the ADA because it is consistent with business necessity.¹²⁹

C. *Creating the Remote-Location Exception Through Case Law*

The EEOC should make clear, through regulation or enforcement guidance, that employers who require employees to work in dangerous jobs in remote locations may subject such employees to mandatory periodic medical examinations in the interest of workplace safety. But, regardless of whether the agency opts to change its policy, the courts should apply the remote-location exception on a case-by-case basis. In doing so, the courts should consider whether the employer's periodic medical examination policy, which requires all remote-location employees to submit to periodic medical examinations, serves a legitimate business purpose of the employer, and is narrowly tailored to effectuate that purpose. If so, the courts should find that the policy does not violate the ADA.¹³⁰

foreseeable emergencies, though quite feasible, would be inordinately expensive”).

128. See, e.g., *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 85, 122 S. Ct. 2045, 2052 (2002) (OSHA's general duty clause requires employers covered by OSHA to maintain a safe workplace for all employees); *Fletcher v. Union Pac. R.R.*, 621 F.2d 902, 909 (8th Cir. 1980) (Jones Act employer has a duty to assign workers to jobs for which they are reasonably suited); *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 352–53, 63 S. Ct. 1062, 1063–64 (1943) (Jones Act employer has a duty to provide a reasonably safe place to work).

129. See, e.g., *Chevron*, 536 U.S. at 86, 122 S. Ct. at 2053 n.6 (opining that it is “a business necessity for skyscraper contractors to have steelworkers without vertigo”).

130. My intent is that practitioners, scholars, and judges will be persuaded by this article. When these remote-location or dangerous-job cases arise, I want the judiciary to rule that the employer's mandatory periodic medical examination policy is job-related and consistent with business necessity. But regardless of whether the courts adopt my view, the courts will face several related issues: (i) should a non-disabled employee have a claim against the employer for merely requiring the employee to submit to the periodic medical evaluation in violation of 42 U.S.C. § 12112(d)(4)(A)?; (ii) should a disabled employee have such a claim if the employee suffers no cognizable injury from the required examination? Consider the following example:

An employer implements a periodic medical examination policy, which requires all current remote-location employees to submit to a periodic medical examination. A remote-location employee sues the employer after he submits to the medical examination merely for requiring the medical examination in violation of 42 U.S.C. § 12112(d)(4)(A). The employee is not disabled and has experienced no adverse employment action as a result of the examination. Notwithstanding whether the examination is job-related and consistent with business necessity, can the non-disabled employee challenge the medical examination in the first place? The weight of authority says yes, but not all courts agree. *Compare* *Conroy v. New York State Dep't of Corr. Svcs.*, 333 F.3d 88, 94 (2d Cir. 2003) (“[A] plaintiff need not prove that he or she has a disability . . . in order to challenge a medical . . . examination under . . . (d)(4)(A).”); *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 969 (8th Cir. 1999) (asserting that a plaintiff need not be disabled to assert a (d)(3)-(4) claim for unauthorized disclosure of confidential medical information); *Fredenburg v. Contra Costa County Dep't of Human Svcs.*, 172 F.3d 1176, 1182 (9th Cir. 1999) (“[P]laintiffs need not prove that they are qualified individuals with a disability in order to bring claims challenging the scope of medical examinations under the ADA.”); *Roe v. Cheyenne Mountain Conference Resort, Inc.*, 124 F.3d 1221, 1229 (10th Cir. 1997) (asserting that plaintiff’s ability to prove a claim under (d)(4) did not require her to prove she was an individual with a disability); *with* *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 516–17 (3d Cir. 2001) (noting that the text of the ADA is unclear “whether non-disabled individuals are permitted to sue for violations of § 12112(d)” and declining to reach the question); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 559 (5th Cir. 1998) (declining to reach the question of whether the ADA provides a private right of action for non-disabled job applicants who are subjected to pre-employment medical examinations and inquiries in violation of § 12112(d)(2)(A), but finding that applicant’s claim failed because he did not allege any compensable injury and lacked standing to seek injunctive or declaratory relief); *O’Neal v. City of New Albany*, 293 F.3d 998, 1010 n.2 (7th Cir. 2002) (non-disabled applicant cannot recover under § 12112(d)(3)(C)). *See also* EEOC, *Questions and Answers, supra* note 19, at B (“This statutory language makes clear that the ADA’s restrictions on inquiries and examinations apply to all employees, not just those with disabilities.”). The courts that permit non-disabled applicants and employees to sue under 42 U.S.C. § 12112(d) generally do so for two reasons: (i) the statutory language in § 12112(d)(2) and (d)(4) refers to “job applicants” and “employees,” not merely qualified individuals with disabilities; and (ii) the belief that “[i]t makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether or not he has a disability.” *See Conroy*, 333 F.3d at 95; *Roe*, 124 F.3d at 1229. Some commentators have criticized this position, at least with respect to 42 U.S.C. § 12112(d)(2) claims. *See* Allyson R. Behm, *The Americans with (or without) Disabilities Act: Pre-employment*

D. Taking Adverse Employment Action

The mere act of conducting a medical examination of a remote-location employee should not violate the ADA. But how can the employer use the employee's medical examination results without running afoul of the ADA? The employer should only take adverse employment action against an employee as a last resort. If the medical examination reveals a health issue, the employer is best served by placing the employee on a leave of absence so that the employee can address the issue. If the employee receives successful treatment, the employer should return the employee to his or her original position upon presentation of a medical release. In certain cases, however, that may not be possible. If, after treatment, the employee's medical condition prevents him or her from safely performing the essential functions of their job duties, the employer may choose to take adverse employment action against the employee.¹³¹

What types of procedures or assessments should the employer make before taking adverse employment action? The employer has a few options at its disposal. In *EEOC v. Exxon Co.*,¹³² the Fifth Circuit considered Exxon's policy of permanently removing employees who had "undergone treatment for substance abuse from certain safety sensitive, little supervised positions."¹³³ Exxon enacted the across-the-board policy in response to the 1989 Exxon

Medical Inquiries and the Non-disabled, 26 Am. J.L. & Med. 439, 449-52 (2000) (arguing that the statutory language, EEOC regulations, and legislative history counsel against allowing non-disabled individuals to pursue § 12112(d)(2)(A) claims). In any event, I subscribe to the view that the mere fact that the employee had to submit to a medical examination does not give rise to a legally cognizable injury. See *Armstrong*, 141 F.3d at 559-62. Thus, irrespective of whether the employee in my example is disabled or non-disabled, he would not be entitled to legal relief. *Id.* I leave open the possibility that injunctive relief could be appropriate, assuming the court finds—against my wishes—that the medical examination is not job-related and consistent with business necessity. *Id.* at 562-64.

131. Unless the FMLA applies, the employer does not have a statutory duty to provide the employee with a leave of absence and to recertify the person for duty. But, from a pragmatic perspective, such an approach shows the good faith of the employer in case of subsequent suits. More importantly, this approach should be taken because the employer should desire to treat its employees fairly and be a good corporate citizen.

132. 203 F.3d 871 (5th Cir. 2000).

133. *Id.* at 872.

Valdez incident, in which an Exxon tanker ran aground.¹³⁴ The incident caused extensive environment damage and resulted in “billions of dollars of liability for Exxon.”¹³⁵ The investigation of the incident indicated that the tanker’s chief officer’s alcoholism, which had been treated in the past, contributed to the accident.¹³⁶ Exxon defended its policy as a safety-based qualification standard that was job-related and consistent with business necessity.¹³⁷ The EEOC argued that the direct-threat test must be used in all cases in which an employer adopts a safety-based qualification standard.¹³⁸ The Fifth Circuit rejected the EEOC’s argument, stating:

We have found nothing in the statutory language, legislative history or case law that persuades that the direct threat provision addresses safety-based qualification standards in cases where an employer has developed a standard applicable to all employees of a given class. We hold that an employer need not proceed under the direct threat provision of § 12113(b) in such cases but rather may defend the standard as a business necessity. The direct threat test applies in cases in which an employer responds to an individual employee’s supposed risk that is not addressed by an existing qualification standard.¹³⁹

The circuit based its holding on the language of § 12113(a) and § 12113(b),¹⁴⁰ the legislative history of the ADA, and the fact that

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*; see also 29 C.F.R. pt. 1630 app. § 1630.15(b) & (c) (2005):

With regard to safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, an employer must demonstrate that the requirement, as applied to the individual, satisfies the “direct threat” standard in § 1630.2(r) in order to show that the requirement is job-related and consistent with business necessity.

139. *Exxon*, 203 F.3d at 875.

140. *Id.* at 873 (Section 12113(a) suggests “a general standard applicable to all employees. In contrast, the direct threat provision of section 12113(b), phrased in the permissive, allows a requirement that the *individual* not pose a threat to health or safety. The different approaches suggest that business necessity applies to across-the-board rules, while direct threat addresses a standard imposed on a particular individual.”). 42 U.S.C. § 12113(a) states:

In General.—It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown

“the business necessity defense under Title VII and the ADEA” applies to “safety-based qualification standards which tend to screen out women or certain age groups.”¹⁴¹ In short, under *Exxon*, when an employer develops a general safety requirement for a position, safety is a qualification standard that can be defended under the ADA’s business necessity defense, just like any other qualification standard.¹⁴² The Fifth Circuit correctly recognized that across-the-board safety standards can be defended on business necessity grounds.¹⁴³ The EEOC’s position conflicts with the plain language of the statute and cannot be justified.

The United States Supreme Court has not yet ruled on whether the Fifth Circuit’s holding in *Exxon* is correct, but dicta in *Albertson’s, Inc. v. Kirkingburg* indicates that across-the-board safety-based qualification standards can be defended on business necessity grounds.¹⁴⁴ Moreover, other circuits which have addressed the issue have rejected the EEOC’s position and sided with the Fifth Circuit.¹⁴⁵

Relying on *Exxon*, the remote-location employer could take adverse action against a remote-location employee if the employee’s medical examination results demonstrate that the employee does not meet an across-the-board safety standard established by the employer, so long as the safety standard is job-related and consistent with business necessity. In evaluating whether its safety standard constitutes a business necessity, the

to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

42 U.S.C. § 12113(b) provides: “Qualification Standards.—The term ‘qualification standards’ may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.”

141. *Exxon*, 203 F.3d at 873–75.

142. *Id.* at 874.

143. *Id.* at 875.

144. See *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 569–70, 119 S. Ct. 2162, 2170–71 n.15 (1999) (questioning the soundness of the EEOC’s position requiring a showing of “direct threat” to justify a safety-based qualification standard).

145. See *Verzeni v. Potter*, 109 Fed. Appx. 485, 490–91 (3d Cir. 2004) (unpublished opinion) (holding that a defendant need not satisfy the direct threat defense every time that a safety-based qualification standard has an adverse impact on a disabled employee); *Morton v. United Parcel Service, Inc.*, 272 F.3d 1249, 1258 n.10 (9th Cir. 2001) (rejecting the EEOC’s interpretation of the statutory direct threat defense).

employer should consider the nature of the risk and the connection between its qualification standard and alleviation of the risk. In this regard, the employer should assess the magnitude of possible harm as well as the probability of the occurrence. The employer should also think long and hard about why across-the-board, rather than individualized, determinations are needed. The employer should realize that these are the types of factors the courts will consider should a disabled employee who suffers an adverse employment action challenge the across-the-board safety standard.¹⁴⁶ Finally, the employer should argue for a lenient interpretation of the business necessity defense.¹⁴⁷

A prudent remote-location employer should take adverse employment action against the employee only after conducting an individual assessment of whether the employee's medical condition prevents him from safely serving in the remote-location workplace. The individualized assessment should take into account the examining physician's evaluation of the employee's health condition, but the employer should realize it will not be able to hide behind the medical judgments of the examining physician if the physician's conclusions are not objectively reasonable.¹⁴⁸ The individualized assessment should also involve a direct threat analysis, which is similar to the business necessity analysis the

146. See *Morton*, 272 F.3d at 1263 (“[I]n assessing the validity of safety standards under the ADA business necessity defense . . . the nature of the risk, the adequacy of the connection . . . between the employer’s qualification standard and alleviation of the risk, and the showing of the necessity of across-the-board rather than individualized determinations” are all relevant); *Exxon*, 203 F.3d at 875 (“In evaluating whether the risks addressed by a safety-based qualification standard constitute a business necessity, [a] court should take into account the magnitude of possible harm as well as the probability of occurrence.”).

147. See discussion *supra* Part III.A.

148. See, e.g., *Verzeni*, 109 Fed. Appx. at 491–92 (business necessity defense must be based on objective, up-to-date medical knowledge, not unfounded fears; an employer’s good faith actions will not save it if it is misinformed about the realities of the individual’s medical condition; in considering a business necessity defense, “the jury should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgments”). The employer should provide the examining physician with information concerning the essential job functions and the conditions under which the employee performs the job. In this way, the physician can better assess the employee’s fitness-for-duty based on his or her evaluation of the employee’s health condition. See *Request for Technical Assistance*, *supra* note 3, at 5.

employer should undertake.¹⁴⁹ If the employer determines that the employee's health condition poses a direct threat to himself or others in the workplace, the employer may take adverse employment action without violating the ADA.

IV. PATERNALISM AND ECONOMIC EFFICIENCY

I advocate allowing employers to require periodic mandatory medical examinations of remote-location employees on both moral and economic efficiency grounds. The remainder of the article elaborates on my position.

A. Reasoned Paternalism in the Name of Safety is Not a Vice

The approach I have outlined recognizes that the ADA should be interpreted to allow employers to require periodic medical examinations of employees in certain dangerous jobs and to take adverse employment action against employees when the examinations reveal medical conditions that place those employees and others at risk. I disagree with those commentators who would decry that my approach violates the ADA because it is paternalistic. Reasoned paternalism in the name of workplace safety is not a vice.

I begin with the general notion that in many cases a periodic medical examination of a remote-location or dangerous-job employee—to the extent that an examination can diagnose an employee's problematic medical condition—will reveal a medical condition that places both the worker and others at substantial risk. Return to my example of the driller who works on the offshore oil rig. The periodic medical examination reveals that the driller has a

149. “‘Direct threat’ means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. § 1630.2(r) (2005); *see also* 42 U.S.C. § 12111(3) (1995); *Chevron U.S.A., Inc., v. Echazabal*, 536 U.S. 73, 78, 122 S. Ct. 2045, 2049 (2002). The determination that an individual poses a “direct threat” shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. “This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.” 29 C.F.R. § 1630.2(r). “In determining whether an individual would pose a direct threat, the factors to be considered include: (1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood the potential harm will occur; and (4) [t]he imminence of the potential harm.” *Id.*

cardiac condition that requires immediate surgery. The offshore employer prohibits the driller from returning to his job in the Gulf of Mexico until the condition is corrected. If the condition cannot be entirely cured, the employer prohibits the driller from working at his job in the Gulf. The effect of the offshore employer's mandatory periodic medical examination policy and its employment decision is to prevent the scenario that I revealed in the introduction from taking place. The lives of both the worker and his co-workers are saved. The periodic medical examination and the employment decision are not paternalistic because they protect the co-workers as well as the worker.

But one can imagine situations in which a periodic medical examination is required of a remote-location or dangerous-job employee and the examination reveals the employee has a medical condition that places only that employee at risk, but the employer nonetheless makes the decision to prohibit the employee from working at that job. Consider a guide worker in the context of my earlier example of a remote observatory in Hawaii. The periodic medical examination reveals a respiratory condition that places the worker at increased risk if she continues to work at such high altitudes. The possibility exists that, while working at high altitudes, she may have a respiratory attack and die before medical attention can be provided. The Supreme Court's decision in *Chevron U.S.A., Inc. v. Echazabal* makes clear that the employer may refuse to allow the guide worker to continue in her position, despite any concerns that such an act is paternalistic.¹⁵⁰

By now, the *Echazabal* decision is well-known. In *Echazabal*, the Supreme Court considered whether Chevron could refuse to hire an applicant for a position in Chevron's oil refinery on the sole ground that a post-offer medical examination revealed that the applicant had a liver condition that would be aggravated by continued exposure to toxins at Chevron's refinery.¹⁵¹ Chevron argued that it could deny the applicant employment, based on the EEOC regulation that recognizes a threat-to-self defense.¹⁵² The applicant, Mr. Echazabal, argued that the EEOC regulation exceeded the scope of permissible rule-making under the ADA because the ADA statute makes clear that a threat to the individual himself is not a permissible reason for precluding employment under the ADA.¹⁵³ The Supreme Court concluded that, because Congress had not directly spoken on threats to a worker's own

150. 536 U.S. 73, 122 S. Ct. 2045 (2002).

151. *Id.* at 76, 122 S. Ct. at 2047.

152. *Id.* at 79, 122 S. Ct. at 2049. See 29 C.F.R. § 1630.15(b)(2) (2005).

153. *Echazabal*, 536 U.S. at 79–80, 122 S. Ct. at 2049.

health, the EEOC's regulation was permissible as it was a reasonable one.¹⁵⁴ The Court pointed out that an employer who hired an applicant knowing full well that the applicant's medical condition placed him in danger would be asking for trouble from the Occupational Safety and Health Administration (OSHA).¹⁵⁵ OSHA requires an employer to provide a safe workplace for each and every employee.¹⁵⁶

The *Echazabal* decision is unique in that it bucks the trend of disability cases in which the Supreme Court refused to defer to the EEOC's interpretation of the ADA.¹⁵⁷ But the departure should not necessarily be read to mean the Court will be more inclined to accept the EEOC's interpretation of ambiguous ADA terms—like business necessity—in future cases. The decision is best understood as consistent with the view that courts should adopt constructions of ambiguous ADA terms that reflect good old-fashioned common sense¹⁵⁸ and provide some degree of discretion to the employer.¹⁵⁹

However, the *Echazabal* decision has not been popular with some in the academic community. It has been criticized on statutory interpretation grounds.¹⁶⁰ Further criticism has come

154. *Id.* at 84, 122 S. Ct. at 2052.

155. *Id.* at 84–85, 122 S. Ct. at 2052.

156. *Id.* See 29 U.S.C. § 654(a)(1).

157. See *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184, 194, 122 S. Ct. 681, 689 (2002); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479–80, 119 S. Ct. 2139, 2145 (1999); Eichhorn, *supra* note 73, at 202 (arguing that while the Court has not yet decided the amount of deference due EEOC regulations, the *Sutton* and *Toyota* decisions indicate a refusal on the Court's part to defer to the EEOC position).

158. See Charles Lane, *Supreme Court Limits Disabilities Act on Safety Issue*, Wash. Post, June 11, 2002, at A07 (Ann Elizabeth Reesman, general counsel of the Equal Employment Advisory Council, hails the decision as a "victory for common sense"); David Yee, *Current Event: Chevron U.S.A., Inc. v. Echazabal*, 11 Am. U. J. Gender Soc. Pol'y & L. 213, 221 (2002).

159. See Harry F. Tepker, Jr., *Writing the Law of Work on Nero's Pillars: The 1998–99 Term of the U.S. Supreme Court*, 15 Lab. Law. 181, 197, 203 (1999) (*Sutton*, *Murphy*, and *Albertson's* decisions (ADA Supreme Court decisions) are better explained by the default interpretive rule that when Congress passes ambiguous texts courts are "bound to adopt the construction least intrusive and least restrictive of the employer's discretion," as opposed to the Court's claims of interpreting plain text).

160. See Tricia M. Patterson, *Paternalistic Discrimination: The Chevron Deference Misplaced in Chevron U.S.A., Inc. v. Echazabal*, 23 J. Nat'l Ass'n Admin. L. Judges 147, 166 (2003) (arguing that application of the Chevron two-

from those who view the decision as improperly paternalistic.¹⁶¹ D. Aaron Lacy chides the Supreme Court for failing to acknowledge the anti-paternalistic purpose of the ADA.¹⁶² Mr. Lacy draws upon works by classic liberalist scholars such as John Stewart Mill and modern liberalist scholars such as Professors Margaret Radin, Joel Feinberg, and Ronald Dworkin to argue that the prevention of physical harm to an employee himself is not an appropriate reason for invading the liberty of the employee by restricting his right to alienate his labor.¹⁶³ The idea is that such a restriction impermissibly invades the employee's personal autonomy to have absolute power over the decision whether to risk his or her health.¹⁶⁴ He argues that the employee knows better than the employer whether the risks of the job are acceptable for him or her and the employee has the sole right to make that choice, regardless of whether that choice is viewed, from an objective standard, as unwise.¹⁶⁵

The paternalism criticisms evoked by the *Echazabal* commentators are unwarranted for several reasons. First, as the Court notes, the sort of paternalism outlawed by the ADA is the type based on myth and stereotype.¹⁶⁶ Reasoned paternalism based on objective medical evidence and real risks is not prohibited by

step was misplaced because the statute did not show a lack of clear Congressional intent or silence on the issue); Tara Jones, *The Threat-to-Self Defense and The Americans with Disabilities Act*, 27 S. Ill. U. L.J. 539, 561 (2003) (contending that the expression-exclusion canon was misused by the Court).

161. See D. Aaron Lacy, *Am I My Brother's Keeper: Disabilities, Paternalism, and Threats to Self*, 44 Santa Clara L. Rev. 55, 90 (2003) (arguing that the Supreme Court's decision in *Echazabal* failed "to acknowledge the anti-paternalistic purposes of the ADA"); Alexandra G. White, Note, *Paralyzing Discord: Workplace Safety, Paternalism, and the Accommodation of Biological Variance in the Americans with Disabilities Act*, 63 La. L. Rev. 509, 572-73 (2003) (equating sex-based paternalism with disability-based paternalism and concluding that disability-based paternalism should receive the same scrutiny as sex-based paternalism).

162. See Lacy, *supra* note 161, at 90.

163. *Id.* at 91-98.

164. *Id.* at 97.

165. *Id.* at 98.

166. *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 85-86, 122 S. Ct. 2045, 2052-53 & n.5 (2002).

the ADA.¹⁶⁷ An employer does not have to shut its eyes to the realities of the employee's condition and the demands of the job in question.¹⁶⁸ As Judge Trott exclaimed in his Ninth Circuit dissent, it would belie credulity to conclude that Congress intended a manufacturer to be legally obligated to allow an employee with narcolepsy to operate a power saw or a construction company to be legally required to allow a steelworker who develops vertigo to keep his job constructing high-rise buildings.¹⁶⁹

Second, there is no indication that Congress intended to apply a liberalist conception of plenary personal autonomy to the employee who faces objective medical risks. While certain scholars may view such a theory as preferred, examples abound in which the law imposes restrictions on an individual's personal autonomy, despite the fact that the individual's choice would harm no one but himself or herself. Laws that prohibit drug use, require drivers to wear seat belts, and make suicide a crime are but a few of the many examples.¹⁷⁰ Reasoned paternalism has its support in the law.

Third, in contravention of the espoused liberalist conception of the employee's complete personal autonomy to put him or herself in harm's way, it should be understood that the employer has a moral stake in the decision as well. While I am not so naive to

167. See House Labor Report, *supra* note 20, at 73–74 (stating that with regard to a post-offer medical examination, “if the examining physician found that there was a high probability of substantial harm if the candidate performed the particular functions of the job in question, the employer could reject the candidate . . .”). See, e.g., Jessica L. Johnson, Comment, *The Americans with Disabilities Act of 1990: The Incredible Shrinking Legislation? A Closer Look at Chevron v. Echazabal and the Expansion of the Direct Threat Defense*, 32 Cap. U. L. Rev. 761, 801 (2004) (arguing that well-reasoned decisions based on current medical knowledge “do not violate the ADA” and that “concerns about paternalism are unfounded”); Nathan J. Barber, Note, “Upside Down and Backwards”: *The ADA’s Direct Threat Defense and the Meaning of a Qualified Individual After Echazabal v. Chevron*, 23 Berkeley J. Emp. & Lab. L. 149, 176 (2002) (asserting that legislative history “requires paternalistic action in favor of workplace safety”).

168. See Brief for Pacific Legal Foundation and California Manufacturers and Technology Association as Amici Curiae Supporting the Petition for Writ of Certiorari, *Chevron U.S.A., Inc. v. Echazabal*, 536 U.S. 73, 122 S. Ct. 2045 (2002) (No. 00-1406) (citing real-world examples to point out the absurdity of precluding employers from ignoring the well-being of disabled individuals when making employment decisions).

169. *Echazabal v. Chevron U.S.A., Inc.*, 226 F.3d 1063, 1074 (9th Cir. 2000) (Trott, J., dissenting), *rev’d sub nom.*, 536 U.S. 73, 122 S. Ct. 2045 (2002).

170. See Lacy, *supra* note 161, at text accompanying notes 278–80.

believe that all employers will make decisions based on altruistic concern for the employee's health and safety, there are undoubtedly employers who will object to putting the employee in harm's way on legitimate moral grounds. An employer's moral objections are valid and must be taken into consideration. Many employers may rightly believe that leading the calf to the slaughterhouse is no different than personally driving the knife into the calf.¹⁷¹

When the risks to the employee are real and not based on myth or stereotype, the ADA does not prohibit the employer from taking the decision out of the employee's hands. There is no way to get around the fact that certain jobs—remote-location jobs in particular—are inherently dangerous. Remote-location employers must be allowed the flexibility to ensure that they provide a safe workplace for all employees. Periodic medical examinations of remote-location employees are necessary tools in that endeavor. The medical examinations themselves, as well as adverse employment actions against employees who have medical conditions that place the employee and others in the workplace at a substantial risk of injury, reflect reasoned paternalism and do not violate the ADA.

B. The Efficiency of Periodic Medical Examinations

Moral concerns notwithstanding, a rule of law that permits remote-location employers to require periodic medical examinations also makes sense from an economic perspective. In a recent, groundbreaking article, Professor J.H. Verkerke develops an economic efficiency argument to justify the ADA's duty of reasonable accommodation.¹⁷² Many of the cogent arguments and insights provided by Professor Verkerke are beyond the scope of my article. Nonetheless, the article provides analyses and insights that support my argument. Professor Verkerke opines that dignity and personal-fulfillment goals, as a general matter, mobilized societal concern for the disabled and inform our understanding of

171. See Scott Quillin, Comment, *Chevron U.S.A., Inc. v. Echazabal: The Supreme Court's Common Sense Interpretation of the Americans with Disabilities Act's Direct Threat Defense*, 29 Okla. City U. L. Rev. 641, 658–59 (2004) (arguing that requiring an employer to “knowingly put an employee in harm's way, even with the employee's consent” puts employers “in the position of assisting” suicide and is “morally irresponsible”).

172. See J.H. Verkerke, *Is the ADA Efficient?*, 50 U.C.L.A. L. Rev. 903, 907 (2003).

the ADA's purpose.¹⁷³ But he points out that dignity and personal-fulfillment concerns are an "incomplete defense of laws barring disability discrimination."¹⁷⁴ Taken to the extreme, concern for "human dignity and self-fulfillment provides no stopping point, no indication of when it might be permissible to deny an employment opportunity to someone with a disability, perhaps even because of that person's disability."¹⁷⁵ Verkerke thus looks for an economic approach that would separate morally and politically legitimate disability discrimination from morally and politically illegitimate discrimination.¹⁷⁶

As part of the development of his economic approach, Professor Verkerke rejects a "wooden" interpretation of the ADA that would "require employers to accommodate employees wherever they might choose to work."¹⁷⁷ He explains that allowing workers with disabilities to be unconstrained in their choice of occupation ignores the beneficial effects of matching.¹⁷⁸ Labor market efficiency is critically dependent on matching both disabled and non-disabled workers for jobs to which they are well-suited.¹⁷⁹ "Mismatching" can occur whenever employers have inadequate information about the characteristics of current employees."¹⁸⁰ In the real world, of course, no legal or economic system could obtain perfect matching. But a legal system should strive to promote matching.¹⁸¹ Medical examinations of applicants and employees provide a means of accomplishing that objective. However, medical examinations also pose the risk of providing employers with information by which they can make prejudicial or stereotypical decisions.¹⁸² The ADA seeks to balance the concern about "scarring"¹⁸³ with the truth that health information can sometimes be relevant to an applicant or employee's job qualification through the regulation of examinations at the pre-

173. *Id.* at 904-05.

174. *Id.* at 904.

175. *Id.* at 905.

176. *Id.*

177. *Id.* at 936.

178. *Id.* at 937.

179. *Id.* at 910.

180. *Id.*

181. *Id.* at 913.

182. *Id.* at 925.

183. Professor Verkerke uses the term "scarring" to refer to instances in which employer uses unproductive labor market signals (an unfounded stereotype about a disability) to deny a job to someone who could be productively employed. *Id.* at 910-11, 921-23.

offer, post-offer, and post-employment stages.¹⁸⁴ My article is concerned with whether it is legal under the ADA for certain employers to require current employees to submit to mandatory periodic medical examinations and, if so, the extent to which information from that examination can be used by the employer to make an employment decision.

In permitting medical examinations of current employees that are “job-related and consistent with business necessity,” Congress recognized that situations exist where an employer must have the flexibility to require such examinations. The problem is that Congress did not expand enough on when that standard will be satisfied. An economic perspective can help fill in the gaps left by Congress and should guide the courts in drawing those lines. As Professor Verkerke explains, the social costs of mismatching vary widely from the “trivial to [the] extremely severe.”¹⁸⁵ Based on that insight, he distinguishes between high-risk and normal-risk occupations.¹⁸⁶ A mismatched employee can cause grave social harm in high-risk jobs, whereas the mismatched employee cannot do much social damage in a normal-risk job.¹⁸⁷ He argues that courts should be permissive about employer inquiries, such as medical examinations, in high-risk occupations, and less so in normal-risk jobs.¹⁸⁸ This excerpt summarizes his point:

My earlier analysis suggested that courts should—and almost certainly do—give employers greater freedom to make disability-related inquiries for high-risk occupations. At the opposite end of the spectrum, efficiency may also demand that courts apply informational restrictions more strictly for comparatively low-risk occupations. In fact, we might even want to prevent employers from learning about hidden disabilities that affect a worker’s productivity. Unless the information will produce better matching, there exists a significant risk of scarring. Individuals with disabilities will end up unemployed or underemployed. However, this argument for concealment applies only to jobs that pose little risk of severe mismatching and in which the consequences of diminished productivity are comparatively slight. A normative prescription follows from this analysis. Courts and regulators should apply

184. *Id.* at 926.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 929.

informational restrictions more strenuously for comparatively low-risk occupations. Coupled with our earlier analysis of high-risk jobs, the frame-work thus supports comparatively restrictive rules for low-risk jobs and relatively permissive standards for high-risk occupations.¹⁸⁹

The law concerning periodic medical examinations of current employees, to a certain degree, reflects Professor Verkerke's insight. On the high-risk side, FAA regulations require airline pilots to submit to mandatory periodic medical examinations.¹⁹⁰ Similarly, EEOC enforcement guidance allows employers to require employees who work in public safety jobs to submit to mandatory periodic medical examinations.¹⁹¹ On the low-risk side, the ADA clearly prohibits an Albertson's grocery store from requiring employees who work as store checkers to submit to mandatory periodic medical examinations. The uncertainty in the law is that various categories of high-risk jobs exist in which employees are neither required by law to submit to mandatory periodic medical examinations, nor, according to the EEOC, does the law allow employers to mandate that those employees submit to such examinations. This gap prevents certain employers from taking prudent steps to maximize workplace safety for employees in high-risk jobs, which, in turn, increases the likelihood of catastrophic injury. From an economic efficiency perspective, the social costs that are paid, when, for example, a driller has a massive heart attack while operating a drawworks deep in the waters of the Gulf of Mexico, outweighs the risk that a disabled individual may be terminated from his or her job due to a periodic medical examination and subsequent adverse employment action. I urge the courts and the EEOC to interpret the ADA to allow employers to require remote-location employees to submit to mandatory periodic medical examinations.¹⁹²

189. *Id.* at 928–29.

190. *See* discussion *supra* note 47.

191. *See supra* note 50.

192. My pragmatic argument that the stringency of the ADA's business necessity defense as related to medical examinations of employees should decrease for employers who employ workers in dangerous jobs, as opposed to employers who employ workers in normal jobs, aligns with the approach to similar issues under Title VII advocated by Professor Spiropoulos. *See* Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. Rev. 1479 (1996). Professor Spiropoulos argues that, under Title VII, a flexible standard of

V. CONCLUSION

EEOC guidance prohibits employers from requiring an employee to submit to a medical examination unless such examination is required by law, objective evidence indicates the individual employee cannot perform his or her job duties or poses a direct threat, or the public safety exception applies. The EEOC's restrictive interpretation of the ADA fails to acknowledge that employers who employ people to work in dangerous jobs, such as remote-location positions, have unique safety-related concerns.

For these employers, a substantial risk exists that some of their employees may develop medical conditions that preclude them from performing their jobs in a safe manner. Of these employees, some know about their medical conditions but choose not to inform their employers of the problem. Others do not know that they have a medical condition that places them and their co-workers at risk. In either case, the employer is unlikely to know that the employees have medical conditions that place the safety of the employers' workplace in jeopardy because the employees do not exhibit any outward signs of a problematic condition. To protect the workplace safety of all their employees, these employers need the flexibility to require mandatory periodic medical examinations. The EEOC should change its policy to comport with the legitimate safety concerns of these employers. Courts should rule that remote-location employers who require current employees to submit to mandatory periodic medical examinations do not run afoul of the ADA because the examinations are "job-related and consistent with business-necessity."

business necessity should be applied to jobs that "at their core require the possession of intangible qualities or the performance of complex tasks" or jobs in which employees "are responsible for the health and safety of others," but that most other jobs should require a strict standard. *Id.* at 1539-40.

