MEMORANDUM

State of Alaska
Department of Law

TO: The Honorable Tom Cashen
Commissioner
Department of Labor

DATE: September 17, 1996

FILE NO.: 661-95-0748

TELEPHONE NO.: 269-5190

SUBJECT: Are AS 23.30.022 and AS 23.30.205(c) Preempted by the Americans with Disabilities Act?

FROM: Kristin S. Knudsen
Assistant Attorney General

You have asked for advice concerning the relationship between the Americans with Disabilities Act of 1990, Pub. L. No. 101-336 (codified at 42 U.S.C. §§ 12101-12213), known as the ADA, and certain sections of the Alaska Workers' Compensation Act relating to the Second Injury Fund ("Fund") and the false statement exclusion. Specifically, you ask if AS 23.30.022 and AS 23.30.205(c) are preempted in whole or in part by the ADA. You also ask whether an insert titled "Notice" provided with the brochure distributed by the Division of Workers' Compensation to injured workers is sufficient to address any problems that may exist. The short answer to your question is that there is a conflict between the ADA and certain portions of AS 23.30.022 and AS 23.30.205(c)[1]; these provisions may be preempted by the ADA. The insert does not adequately inform employers or employees of the possible effect of preemption.

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[1] In AS 23.30.022, "employment application or preemployment questionnaire" and "in hiring" conflict with ADA provisions barring inquiries as to the existence of a disability in preemployment questionnaires and job applications, and barring discrimination in hiring on the basis of disability. In AS 23.30.205(c), the phrase "hired" [after the employer acquired that knowledge] of a qualifying condition presents similar conflicts.

DISCUSSION

1. Second Injury Fund

Alaska is one of twenty states which provide a broad-based second injury fund in their workers' compensation system.[2] The purpose of a second injury fund is to encourage employers to hire persons with certain permanent pre-existing physical impairments by ameliorating the employer's cost of potential work-related injury. *See, Sea-Land Services v. Second Injury Fund*, 737 P.2d 793, 795 (Alaska 1987); *Employers Commercial Union Ins. Group v. Christ*, 513 P.2d 1090, 1093 (Alaska 1973). While this is the primary purpose of second injury funds, they are designed to achieve this purpose without reducing the benefits available to the employee whose disability is greater because of pre-existing impairment.[3] The Fund reimburses employers for compensation payments exceeding 104 weeks if, because of the pre-existing condition, the employee's disability is substantially greater than would result from the injury alone (AS 23.30.205(a)) or, if the employee dies, the employee would not have died except for the pre-existing impairment (AS 23.30.205(b)).

In order to be eligible for Fund reimbursement, the employer must:

> establish by written records that the employer had knowledge of the permanent physical impairment before the subsequent injury and that the employee was hired or retained in employment after the employer acquired that knowledge.

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[2] Alaska's Second Injury Fund is broad-based because it defines permanent physical impairment as one of 25 listed conditions, from ankylosis of joints to varicose veins, plus any condition supporting a rating of disability of 200 weeks or more. AS 23.30. 205(d). "Second Injury" is something of a misnomer, as many of the listed conditions, e.g., epilepsy, varicose veins, are unrelated to industrial injuries. An employee need not have a prior work-related injury for an employer to be entitled to use the fund. The class intended to be benefitted is broader than workers who have suffered industrial injuries.

[3] Professor Larson argues that if the sole purpose of second injury fund statutes was to encourage employers to hire those with preexisting impairments by limiting exposure to liability, pure apportionment statutes achieve this with greater fairness to employers, albeit greater hardship to employees. If the purpose was only to ameliorate the impact of an employee's prior impairments upon his employer, there would be no need for prior knowledge, since the cost of prior impairment, not having arisen from the employment, should not be borne by the employer. 2 A. Larson, *Workmen's Compensation Law*, § 59.33(e), at 10-518 (1992).

AS 23.30.205(c). The written record requirement:

> helps ensure that Fund reimbursement furthers the statutory purpose by providing evidence that the employer actually knew of the employee's pre-existing impairment; it protects the Fund against spurious or collusive claims.

Sea-Land Services, 737 P.2d at 795, citing *U.S. Pipe & Foundry Co. v. Caraway*, 546 S.W.2d 215, 219 (Tenn. 1977). The written record requirement also serves to reduce litigation on the question of whether the employer had knowledge of the pre-existing impairment. *Sea-Land Services, supra*; *Ketchikan Gateway Borough v. Saling*, 604 P.2d 590 (Alaska 1979); A. Larson, *Workmen's Compensation Law*, Sec. 59.33(f), Vol.2, p. 10-523 (1992).

2. False Statement Exclusion

As part of a general reconstruction of the workers' compensation laws in 1988, AS 23.30.022 was adopted. § 5 ch 79 SLA 1988. It provides:

> An employee who knowingly makes a false statement as to the employee's physical condition on an employment application or preemployment questionnaire may not receive benefits under this chapter if
> (1) the employer relied upon the false representation and this reliance was a substantial factor in the hiring; and
> (2) there was a causal connection between the false representation and the injury to the employee.

This provision protects the employer from compensation liability where the employee misrepresents his physical condition, the employer relies on the false representation to the extent that it was a substantial factor in hiring, and the employee incurs an injury which is causally connected to the false representation. Unlike AS 23.30.250, which imposes a criminal penalty for willful misrepresentation in the workers' compensation process, this provision addresses knowing misrepresentation prior to the injury and protects the employer as well as excludes the employee. It complements the Second Injury Fund mechanism. If the employee divulged the information, the employer had a "written record" and could file a claim for Fund protection if an injury resulted in significant disability. On the other hand, if the employee knowingly concealed

the information, the employer would not have access to Fund reimbursement in the event of injury, but in certain cases[4] the employer would be able to avoid liability altogether.

3. The Americans with Disabilities Act (ADA)

The ADA is designed to:

> provide a clear and comprehensive national mandate to end discrimination against individuals with disabilities and to bring persons with disabilities into the economic and social mainstream of American life; to provide enforcement standards addressing discrimination against individuals with disabilities, and to ensure that the federal government plays a central role in enforcing these standards on behalf of individuals with disabilities.

Senate Rep. No. 116, 101st Cong., 1st Sess. 9 (1989). In order to accomplish these purposes, the ADA prohibits discrimination against a qualified individual with a disability in job application procedures, hiring, compensation, and other terms and conditions of employment. ADA 42 U.S.C. §12112(a). This prohibition applies to all employers of 15 or more employees, except Indian tribes, certain religious organizations and the federal government. 29 CFR § 1630.2(e). Through regulations enforcing 42 U.S.C. § 12132, these provisions also apply to state and local governments. 28 CFR 35.140.

In particular, the ADA explicitly prohibits pre-employment medical examinations or inquiries of job applicants as to the existence of a disability or the severity or nature of the disability. 42 U.S.C. § 12112(c)(2). On the other hand, the ADA permits employers to require medical examinations *after an offer of employment* and prior to the commencement of job duties. The information obtained regarding the medical condition or history of the applicant must be collected and maintained on separate forms, placed in separate medical files, and treated as a confidential medical record. 42 U.S.C. § 12112(c)(3)(B). For current employees, no examination may be required or inquiries made as to disability "unless such examination or inquiry is shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(c)(4)(A).

The reasoning behind these restrictions was set forth at length in the House Education and Labor Committee:

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[4] The misrepresentation exclusion applies only where the employee's misrepresentation is causally related to the injury; e.g., in those cases where the employer could have provided injury-preventing accommodation for an impairment, had it been known, or the employee was not qualified to perform the work without significant risk of substantial harm to himself. In many cases there is no causal relationship between the injury and the impairment, although the two may combine to result in greater disability.

> Historically, employment application forms and employment interviews requested information concerning an applicant's physical or mental condition. This information was often used to exclude applicants with disabilities -- particularly those with so-called hidden disabilities such as epilepsy, diabetes, emotional illness, heart disease and cancer -- before their ability to perform the job was even evaluated.
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> In order to assure that misconceptions do not bias the employment selection process, the legislation sets forth a process which begins with a prohibition on pre-offer medical examinations or inquiries. . . . This prohibition against inquiries regarding disability is critical to assure that bias does not enter the selection process.

H.R. Rep. No. 485, 101 Cong., 2d Sess., pt. 2, at 72-73 (1990).

The ADA provides that state and local governments may not exclude a qualified person with a disability from participation in government services, benefits or programs, nor deny benefits of government services, benefits or programs by reason of such disability. 42 U.S.C. § 12132. Such programs include services of the workers' compensation division and eligibility for workers' compensation benefits.

While concern was expressed in Congress regarding ADA conflicts with OSHA workplace safety standards or other state health regulations, no explicit discussion of conflicts with second injury funds or workers' compensation laws is contained in committee reports.[5] Regarding potential conflict with workplace safety laws, the United States Attorney General was directed to "exercise coordinating authority to avoid and eliminate such conflicts." H.R. Rep. No. 485, 101st Cong. 2d Sess., pt.2, at 136 (1990).

4. Federal Preemption

Article VI of the Constitution of the United States provides that the laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." Art. VI, cl.2. Thus, since *M'Culloch v. Maryland*, 17 U.S. 3136, 427, (1819), state law that conflicts with federal law is without effect.

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[5] There was testimony relating "myths about job performance, safety, insurance costs" as a barrier to employment. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt 2 at 33 (1990).

In general, the courts are reluctant to infer preemption of state law. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516, 112 S.Ct. 2608, 2617, 120 L.Ed.2d 407 (1992); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947). "Consideration under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law." *Building Trades Council v. Associated Builders*, 507 U.S. 218, 113 S.Ct. 1190, 1194 122 L.Ed 2d 565 (1993) quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S.Ct. 2114, 2129 (1981). Workers' compensation is traditionally reserved to the states, and is presumed not superseded unless Congress expresses a clear and manifest intent to preempt state law. *Pacific Merchant Shipping Ass'n v. Aubry*, 918 F.2d 1409, 1416 (9th Cir. 1990), *cert. denied*, 502 U.S. 1002, 112 S.Ct. 2956 (1992).

Federal preemption may be either express or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309 (1977); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 95, 103 S.Ct. 2890, 2899 (1983); *Fidelity Savings & Loan Ass'n v. De la Cuesta*, 458 U.S. 141, 152-153, 102 S.Ct. 3014, 3022 (1982). Where there is no explicit preemptive language in the statute, the U.S. Supreme Court has recognized at least two forms of implied pre-emption: field preemption and conflict preemption. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 98; 112 S.Ct. 2374, 2383 (1992).

Field preemption occurs when Congress intends that federal law occupy a given field, *California v. ARC Am. Corp.*, 490 U.S. 93, 100 (1989), as demonstrated by a scheme of federal regulation "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947).

Conflict preemption is found where (1) compliance with both federal and state law is a physical impossibility, *Federal Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-3 (1963), or (2) where the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Felder v. Casey*, 487 U.S. 131, 138, 108 S.Ct. 2302, 2306 (1988).

While courts are not to seek out conflicts between state and federal regulation where none clearly exist, *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 446 (1960), "under the Supremacy Clause, from which our pre-emption doctrine is derived, any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. at 108, 112 S.Ct. 2388; quoting in part *Felder v. Casey*, 487 U.S. at 138; 108 S.Ct., at 2307.

Congress did not express a clear and manifest intent to preempt state workers' compensation laws in enacting the ADA. The ADA is designed to prevent discrimination on the basis of disability, not to compensate those who suffer disability as a result of work-related injury. Congress disclaimed any intent to occupy the field of disability law, stating that the ADA is not to be construed to "invalidate or limit the remedies, rights, and procedures of any Federal law or law of any State . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this Act." Sec. 501(b). Moreover, the EEOC's interpretive guidance to the federal regulations enforcing the ADA's restrictions on employer medical inquiries provides that state workers' compensation laws are not preempted by the ADA. 29 CFR 1630, App. 1630.14(b). However, the EEOC also states that "ADA requirements supersede any conflicting state workers' compensation laws." EEOC Technical Assistance Manual, Sec. 9.6(b), Part IX, p.6 (1992). In this instance, federal preemption by the ADA of the state's workers' compensation laws must rest on the existence of a conflict between the ADA and the state law.

5. Preemption of Second Injury Fund Written Record Requirement

AS 23.30.205(c) requires an employer to have written knowledge of a permanent physical impairment before the injury and that "the employee was hired or retained in employment after the employer acquired that knowledge". The ADA, on the other hand, strictly prohibits any pre-employment inquiries into the existence of a "disability or the nature or severity of a disability." 42 U.S.C. § 12112(c)(2)(A). The ADA definition of disability is sufficiently broad[6] to encompass many of the Second Injury Fund's listed impairments. An ADA-covered employer may not ask an employee if he has such a condition before hire[7] and still comply with the ADA.

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[6] The ADA defines "disability" as

> (a) a physical or mental impairment that substantially limits one or more of the major life functions of such individual;
> (b) a record of such impairment; or
> (c) being regarded as having such an impairment.

42 U.S.C. 12102(2). Not all of the listed conditions would necessarily substantially limit one or more major life functions in a particular worker. However, including the worker's condition in a list defined as permanent physical impairments "of such seriousness as to constitute a hindrance or obstacle to obtaining employment," AS 23.30.205(d), for Fund purposes probably at a minimum means the worker is "regarded as having such an impairment" under the ADA.

[7] The ADA creates a two-step process of hire: a first stage leading to an offer of employment, and, in some circumstances, a post-offer stage, during which the employment offer may be conditioned upon results of medical examination. In some situations, before hire arguably could be interpreted to mean "before

(continued...)

If an employee discloses the existence of a disability, the employer may not make further inquiry about it prior to employment. 29 CFR 1630.13, App.1630.13.

The ADA does permit pre-employment inquiry into the ability to perform essential functions of a position. However, the Alaska Supreme Court interpreted AS 23.30.205(c) to require the employer to have a written record, from which "its prior knowledge of the employee's *qualifying disability* can be fairly and reasonably inferred," *Sea-Land Services*, 737 P.2d at 795 (emphasis added). In other words, the record must disclose knowledge of the listed condition, not simply notation of inability to perform certain job functions.

To the extent then, that AS 23.30.205(c) requires an employer to have a written record showing that an employee "was *hired* . . . after the employer acquired" knowledge of a listed impairment, it is preempted by the ADA.

However, the ADA does not bar post-offer employment entrance examinations or inquiries, provided that the information is used in a permitted manner not inconsistent with the ADA. 42 U.S.C. § 12112(c)(3). Results must be kept confidential, ADA U.S.C. § 12112(c)(3)(B), but this requirement has been interpreted to allow an employer to "submit information to state workers' compensation offices or second injury funds" without violating the confidentiality provisions. 29 CFR 1630, App. 1630.14(b). All entering employees in a job class must be given the same examination and/or inquiry, 42 U.S.C. § 12112(c)(3)(A); 29 CFR 1630.14(b), and inquiries to current employees are limited to those "job-related and consistent with business necessity." 42 U.S.C. § 12112(c)(4)(A).[8] With regard to entrance examinations, the EEOC cautions that, although inquiries that are not job-related are permitted:

> employers may, as a practical matter, find it desirable to avoid requiring such examination/inquiries. This is so because an employer's obtaining information unrelated to the job can be probative of an employer's knowledge of an individual's disability if discrimination is alleged at a later time.

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[7] (...continued)
completion of a post-offer medical examination." However, AS 23.30.205(c) states that the employee must be "hired . . . after the employer acquired [the] knowledge." In this context, "before hire" means "before an offer of employment."

[8] It could be argued that it is consistent with business necessity for an employer to make sufficient record to claim Fund protection in the event of a future serious work-related injury, particularly as the existence of the record is necessary for Fund reimbursement.

EEOC Guidance on Pre-Employment Disability-Related Inquiries and Medical Examinations under the ADA (No. 915.002, May 19, 1994) at n.59. Thus, while an ADA-covered employer has a window of opportunity to make broad inquiry into the existence of listed conditions, and the EEOC acknowledges the role of second injury funds in limiting the cost of injury to an employer, the EEOC cautions that the employer may find it more advantageous not to make such inquiries.

> It is the position of the EEOC that:
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> > the ADA does not prohibit employers from obtaining information about pre-existing *injuries* and providing needed information to second injury funds. . . . [A]n employer may make such medical inquires and require a medical examination after a conditional offer of employment and before a person starts work, so long as the examination or inquiry is made of all applicants in the same job category.

EEOC Technical Assistance Manual, Sec. 9.5, Part IX, p.6 (1992). The manual makes no statement about information acquired after hire. After the employment entrance inquiries, inquiries must be "job related and consistent with business necessity." It could be argued that broad inquiries after the employment entrance window are "consistent with business necessity," but it is more difficult to tie such inquiries to the specific employee's job, even solely for Second Injury Fund purposes.

The ADA restricts an employer's opportunity to acquire knowledge of listed impairments. If an employer acquires written knowledge of a listed impairment in a lawful post-offer entrance examination, or in the course of an examination which is job-related and consistent with business necessity, and the employer retains an employee in employment after acquisition of the knowledge, the employer may obtain Fund reimbursement in the event of a later qualifying injury to the employee. Therefore it is not impossible to comply with the ADA and AS 23.30.205(c) to the extent the employee is "retained . . . after the employer acquires knowledge" of the listed impairment.

The employer, whose compliance with the ADA results in an absence of prior knowledge of a listed impairment and denial of Second Injury Fund reimbursement may argue that the employer who has knowledge gained prior to the ADA, or in violation of the ADA, or to whom the ADA does not apply, has unfair advantage in obtaining Second Injury Fund reimbursement. The perceived inequity[9] of application, and the financial incentives of Second

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[9] The Fund is designed to benefit employers who knowingly choose to employ a worker with a listed (continued...)

Injury Fund reimbursement in a permanent total disability or death case, may be at cross-purposes with the ADA's purpose in limiting employer opportunity to obtain knowledge of pre-existing disabilities. Insurers of employers to whom the ADA applies may argue that the written record requirement encourages (other) employers to acquire knowledge which the ADA prohibits or limits.

Even where compliance is not impossible, a state law may be subject to conflict preemption if it is "an obstacle to the accomplishment and execution of the purposes and objectives of Congress," *Felder v. Casey*, 487 U.S. at 138, in enacting the ADA. In order to rise to the level of preemption, a state law must have a "direct and substantial effect" on the federal statutory scheme. *Gade v. National Solid Wastes Management Ass'n,* 505 U.S. at 107, 112 S.Ct. at 2387; quoting *English v. General Electric Co.*, 496 U.S. 72, 85, 110 S.Ct. 2270, 2278 (1990). *See also, State, Dept. of Public Safety v. Brown*, 794 P.2d 108, 110-11 (Alaska 1990) (state workers' compensation exclusive remedy rule cannot be applied to conflict with maritime policy and undermine uniformity of substantive maritime law).

The federal agency charged with enforcement of the ADA has approved transmission of information properly obtained to second injury funds. 28 CFR 1630, App. 1630.14(b). Since the employer must obtain the knowledge and record it to send to a second injury fund, the EEOC evidently does not view a requirement that an employer establish by written record that the employee was retained in employment after the employer had knowledge of the listed impairment as having direct and substantial effect on implementation of the ADA. Such a written record requirement may or may not induce some employers to evade the ADA. However, speculation that an employer may be tempted to violate the ADA to obtain a state benefit does not render the state statute invalid. An otherwise valid state statute will not be struck down "merely because the public reacts to it in a manner inconsistent with federal law." *Kosikowski v. Bourne* 659 F.2d 100, 105 (9th Cir. 1981) (dismissing argument that local ordinance was preempted because it induced unsafe practices and caused pilots to attempt to violate federal regulations). *Compare, Tellis v. United States Fidelity and Guar. Co.*, 625 F. Supp. 92, 95 (N.D.Ill. 1985) (in claim against employer based on scheme to defraud worker of benefits by false statement that he would be returned to work, RICO does not preempt state workers' compensation exclusive remedy rule), *aff'd*, 805 F.2d 741 (7th Cir. 1986), *cert. granted and vacated on other grounds*, 483 U.S. 1015, 107 S.Ct. 3255 (1987), *aff'd on other grounds*, 826 F.2d 477 (7th Cir. 1986).

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[9] (...continued)
impairment, and not to benefit those who employ a worker without knowing about a listed impairment. The latter result is encouraged, when not mandated, by the ADA. In view of the shift in public policy represented by the ADA, Professor Larson advocates elimination of the knowledge requirement. 2 A. Larson, *Workmen's Compensation Law*, § 59.33(g), at 10-528 (1992).

6. False Statement Exclusion

AS 23.30.022 provides that an employee who "knowingly makes a false statement as to the employee's physical condition on an employment application or preemployment questionnaire" may not receive workers' compensation benefits if the employer substantially relies on the false statement "in hiring" and the employee's injury is causally related to the false statement.

The ADA prohibits preemployment inquiries as to physical condition prior to a job offer. Therefore, an employer with more than 15 employees cannot comply with the ADA and obtain relief from liability under this statute. Since the statute does not exclude employees from coverage based on post-offer misrepresentations, as in an entrance examination or a legitimate job-related inquiry, the employer cannot obtain relief under this statute in other circumstances when the information is obtained in compliance with the ADA.[10] The statute also requires the employer to demonstrate that the employee's statement was a "substantial factor in hiring." While reliance on a statement of physical ability to perform job duties may be acceptable under the ADA, an employer who substantially relied on a statement that certain conditions (having no bearing on ability to perform the work) are absent in deciding to offer a job would not be in compliance with the ADA. It is precisely the "screening out" of persons with disabilities unrelated to qualification to perform the employment duties that the ADA is intended to prohibit. Finally, if an employee exercises his right not to answer improper preemployment inquiries, the employer may contest a later claim of injury.

These results are prohibited under the ADA, 42 U.S.C. § 12132, as they condition participation in a state program (workers' compensation) upon violation of the right of persons with disabilities not to be subjected to preemployment medical examinations or inquiries, 42 U.S.C. § 12112(d)(2)(A). *See*, *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 239, 88 S.Ct. 362, 366 (1967) (invalidating Florida ban on payment of state unemployment benefits to person filing unfair labor practice charge under NRLA). The ADA itself provides that a person may not discriminate against an individual because he or she "opposed any act or practice made unlawful" by the ADA, 42 U.S.C. § 122203. AS 23.30.022 also acts as an "eligibility criteri[on] that screen[s] out or tend[s] to screen out an individual with a disability . . . from fully and equally enjoying" the services of workers' compensation. 28 CFR 35.130(b)(8). Therefore, to the extent that AS 22.30.022 refers to "employment application or preemployment" questionnaires and

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[10] If the "pre-employment questionnaire" in AS 23.30.022 is defined as a "post-offer entrance questionnaire" which complies with the ADA, an employer could avoid conflict. However, a preemployment questionnaire is not generally meant as being completed after an offer of employment. Also, taken in conjunction with the requirement that the information be relied on *in hiring*, the text of AS 23.30.022 does not support this interpretation.

requires that "this reliance was a substantial factor in the hiring" it would be preempted by the ADA.

However, the ADA does not conflict with the principle underlying statutes like AS 23.30.022. The EEOC advises that an employer may refuse benefits to a person who knowingly makes false answers to a lawful inquiry and is later injured because of it.

> The ADA does not prevent use of this defense to a workers' compensation claim. The ADA requires only that information requests about health or workers' compensation history are made as *part of a post-offer examination or inquiry*.

EEOC Technical Assistance Manual Sec. 9.8, Part IX, p.7 (1992) (Emphasis added). As one noted commentator stated, "Fraud is not a disability." Christopher G. Bell, "Integrating the Americans with Disabilities Act into the Workers' Compensation System," *Disability Law Reporter*, Vol.2, No.6, p.3, 13 (June 1993). The EEOC takes the position that under the ADA an employer may withdraw an offer to, or fire, a person who knowingly provides a false answer to a lawful inquiry about their physical condition or workers' compensation history. EEOC Technical Assistance Manual, *supra*.

7. Effect of Federal Preemption

A state statute that actually conflicts with federal law is void to the extent that the conflict exists. *Edgar v. MITE Corp.,* 457 U.S. 624, 102 S.Ct. 2629 (1982). In those cases where Congress did not intend to occupy the whole field, the state statute is invalid or void only to the extent of the actual conflict; *Planned Parenthood of Billings v. State of Montana*, 648 F. Supp. 47 (D.C. Mont. 1986); *Consolidated Rail Corp. v. City of Bayonne*, 724 F. Supp. 320 (D.C. N.J. 1989); and inconsistent provisions only of state law may be preempted. *Matter of Baby K.*, 16 F.3d 590 (4th Cir. 1994). The extent of the preemption depends on the extent of the conflict. *Boyle v. United Tech Corp*., 487 U.S. 500, 512, 108 S.Ct. 2510, 2518 (1988).

Federal preemption may invalidate otherwise valid state law "as it is applied," *Hankin v. Finnel*, 964 F.2d 853 (8th Cir. 1992) (invalidating application of state's incarceration reimbursement lien against judgment paid by state in inmate's 1983 action against state prison guard); *Texas Employers' Ins. Ass'n v. U.S.*, 569 F.2d 874, 875 (5th Cir. 1978) (application of state workmen's compensation anti-assignment statute against V.A. hospital invalid); or specific provisions of state law, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 101 S.Ct. 1895 (1981) (invalidating state law prohibiting pension benefit offsets of workmen's compensation benefits); or specific operation of state law. *Employee Benefits Committee, Etc. v. Pascoe*, 679 F.2d 1319, 1322-23, (9th Cir. 1982) (invalidating operation of Hawaii workers' compensation law barring any rule to relieve the employer from liability). Thus while specific operation or

provision of state law may be invalid, the remaining applications or provisions are not preempted. *District of Columbia v. Greater Wash. Bd. of Trade*, 506 U.S. 125, 113 S.Ct. 580 121 L.Ed.2d 513 (1992).

A finding of federal preemption in this instance would invalidate only those specific offending parts of the state workers' compensation law, since neither the operation of second injury funds in general nor false statement exclusions are barred by the ADA. Specifically, in AS 23.30.205(c), the words "hired or" and, in AS 23.30.022, the words "on an employment application or preemployment questionnaire" and "this reliance was a substantial factor in the hiring" are the portions of the statutes that present conflicts with the ADA.

42 U.S.C. § 12132, which prohibits exclusion from the workers' compensation program "by reason of . . . disability," places an obligation upon states to ensure that the workers' compensation laws do not violate the ADA and imposes penalties when they do. 42 U.S.C. § 12202. While it is the opinion of this office that the specific portions of AS 23.30.022 and AS 23.30.205(c) above conflict with federal law, and that state agencies have an obligation to comply with the ADA, there have been no court decisions dealing with a similar statute or "specifically declaring the [Alaska] statute unconstitutional." *O'Callaghan v. Coghill*, 888 P.2d 1302, 1304 (Alaska 1995). Should the Alaska Supreme Court determine conflict preemption is not sufficiently clear, it may determine that the executive branch should have continued to enforce the above portions of AS 23.30.022 and AS 23.30.205(c) until the courts determined otherwise.

8. Notice to the Public

The informational brochure supplied to injured employees by the Workers' Compensation Division sets out the employee's rights and obligations under the Alaska Workers' Compensation Act. The supplemental insert (attached Ex. A) refers to AS 23.30.022 only. It cautions the employee that "a federal law . . . may limit your employer's right to ask you about your physical condition (health)" and gives reference to the ADA and the EEOC's telephone number and address. While this is helpful, it does not place the employee on notice of the possible effects of preemption nor does it assist the employer who may believe that AS 23.30.022 grants it authority to do what the ADA prohibits. The supplemental insert also does not address the issue of the Second Injury Fund's written record requirements. For these reasons, the insert is insufficient to put employers and employees on notice of possible effects of preemption by the ADA relating to employer acquisition of knowledge of an employee disability.

CONCLUSION

The ADA bars inquiry into the existence of an employment candidate's disability in preemployment questionnaires, job applications, or interviews. The ADA also bars discrimination in hiring on the basis of disability. It is not possible for an employer to comply with the ADA and meet, through employer pre-hire inquiry, the Second Injury Fund requirement of AS 23.30.205(c) for a written record showing the employee was hired after the employer acquired knowledge of a listed impairment. It is possible for an employer to acquire subsequent knowledge of such impairment in accord with the ADA and the employer who retains an employee in employment thereafter may qualify for reimbursement by the Fund. Since the ADA bars inquiry into physical conditions in employment applications or pre-employment questionnaires, an employer may not require an employee to divulge such conditions at the risk of losing future workers' compensation under AS 23.30.022.

Because it is impossible to comply with conflicting provisions of the ADA (federal law) and the specific offending provisions of AS 23.30.205(c) and AS 23.30.022, identified more specifically above, the federal law (the ADA) would preempt the state law provisions regarding the Second Injury Fund (reimbursement based on hire after acquiring written knowledge of impairment) and the false statement exclusion (concealment of conditions on employment applications or pre-employment questionnaires). These provisions could be deemed void.[11] The insert provided does not give notice of the effect of preemption by the ADA.

We hope this memorandum answers your questions.

KSK:lea

Enclosure

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[11] There has been no published ruling from any court on this precise issue to date.