Workers' Compensation & Pre-Employment Checks



Prior to an offer of employment, federal law prohibits an employer from asking ANY disability related questions or require ANY medical examinations, even if they are related to the job sought. In this regard, the employer cannot take into consideration (and therefore should not ask questions about) a candidate's prior medical history, such as on a pre-employment questionnaire or during an interview, or workers' compensation claims (state laws prohibit retaliation in connection with exercising rights under workers' compensation statutes), or any other medical issues. Candidates cannot be required to submit to a pre-employment physical at this stage in the process, either. We thus discourage the employer from making any inquiries of interviewees, directly or indirectly, that are designed to elicit information from them in regards to any pre-existing or prior medical conditions including occupational injuries or illnesses as they may have.

At the pre-offer stage, however, the employer can provide a copy or statement of the job description or duties and CAN lawfully ask whether a candidate can perform the essential functions of the position sought. This question must be in a yes/no format, though, and further must be asked of ALL candidates (or at least all candidates for the same position) and not just some of them – certainly the employer cannot seek to single out those who are or appear disabled, etc. for this inquiry. Of course, if an applicant voluntarily discloses a medical condition AND ASKS for an accommodation in connection with being able to participate in the hiring/recruitment process, the employer can and indeed must seek to provide one that is reasonable at that point.

After an applicant is given a conditional job offer but before he or she starts work, the enforcement policy changes. Indeed, at this point the employer can lawfully ask disability-related questions and can even conduct medical examinations (including pre-employment physicals), even if they are not related to the job, but only as long as it does so for all entering conditional employees, or again, all those in the same job category. This is true whether or not a conditional employee has disclosed a medical condition. If an employer does not ordinarily make post-offer medical inquiries or require post-offer physicals of all conditional employees, though, we do not recommend that the employer seek to do so only for one or a few candidates, and certainly not for only those who have informed the employer of a prior or pre-existing medical

condition or appear older, infirm, etc.

After employment actually begins, the analysis shifts against. Indeed, once employed and work has begun, an employer may make disability-related inquiries and require medical examinations of employees ONLY if they are job-related and consistent with business necessity.

Even if an employer lawfully asks questions or requires physical exams at the appropriate point in the hiring process, if it seeks to rescind a job offer or terminate employment based upon the results,

i.e., if a medical condition is revealed and the employer fears it will impair an individual's ability to do the job, then such a decision, without more, would violate the ADA. Obviously, if an employer does not know the details about a conditional employee's medical or workers' compensation claim history and, if the employer opts to decline further with the hiring of such employee then its risk for a disability discrimination or retaliation claim may be reduced since the employer can't be said to have made a decision based on information that it was not aware of in the first place.

While employers can lawfully disqualify a disabled individual who poses a "direct threat," such exception only exists when there is a significant risk of substantial harm to the health or safety of the individual or others, where such risk cannot be eliminated or reduced below the level of a direct threat by reasonable accommodation. In short, even where permitted, employers must be careful about what they do with the information disclosed through lawful medical inquiries or a physical exam.

This information is provided from a general employment law perspective. There may be regulatory requirements that impose a duty on the employer to confirm fitness for duty based on a particular industry. However, an employer never has to compromise safety as a reasonable accommodation, but should not speculate or assume that a particular candidate will be unable to do the job, or will sustain a subsequent injury and file a workers' compensation claim, without specific (and lawfully obtained) information that this is the case.