

An Employee Medical Inquiry May Be A Landmine



There are many chronic diseases which may affect a person's health, such as asthma, diabetes or hypertension. However, an employer must be very careful and mindful of the law when asking about their workers' health.

An employer's right to require medical exams or to ask current employees about disabilities is limited by disability discrimination laws. Inappropriate medical inquiries may create legal exposure, in the event of disciplinary action taken against a job applicant or employee sometime in the future. In situations where medical exams or inquiries of current employees are permitted, they must be completely and solely focused on the employee's ability to perform the essential job functions.

Be Careful

There are three occasions when an employer might ask about disabilities or require medical examinations: pre-offer, post-offer and during employment. However, each of these stages in the employment cycle brings distinct conditions.

Pre-Offer

Before offering a job of, the federal Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act typically forbid all disability-related inquiries and medical examinations, even if they are job-related.

Prior to the offer stage, an employer cannot:

- *Order any medical or psychological examination of an applicant*
- *Present any medical or psychological inquiry to an applicant*
- *Ask if an applicant has a mental disability, physical disability or medical condition*
- *Ask about the description or degree of a physical disability, mental disability or medical condition*

Offer stage

In the offer stage an employer is allowed to do the following:

- *Ask an applicant about their ability to perform essential functions of the job*
- *Reply to an applicant's desire for reasonable accommodation*
- *If an applicant asks for reasonable accommodation, or if an applicant has a discernable disability and the employer has a justifiable belief that they may require accommodation, the employer can make limited inquiries about the reasonable accommodation*
- *Medical examinations for current illegal drug use are not prohibited.*

However, an employer cannot ask about an applicant's workers' compensation insurance history. A qualified disabled person cannot be denied a job based on an anticipated rise in worker's compensation insurance premiums or medical benefit costs.

Existing Employees

For existing employees, medical exams and inquiries are prohibited unless you can show that the medical exam or inquiry is "job related and consistent with business necessity." The following prohibitions by the federal Americans with Disabilities Act (ADA) and the California Fair Employment and Housing Act include:

- *Demanding any medical examination of an employee*
- *Asking if employee has a mental or physical disability*
- *Asking about the description or severity of a mental or physical disability.*

A medical exam or inquiry may be job related and consistent with business necessity if it is designed solely to assess the employee's ability to perform the essential job functions or to decide if the employee's health condition represents a danger to himself/herself or others. There may be other exceptions for allowing an exam.

The employer's decision that the inquiry is justified must be based on real evidence, not hearsay or opinion and must be reasonable in nature.

Tips For Lawful Medical Inquiries/Exams

- *Prepare thorough, well thought out job descriptions that legal counsel have approved.*
- *Before demanding a fitness for duty exam or make other medical inquiries **verify** your order is truly job related and consistent with business necessity. Proceed with caution. California laws consider a business necessity as "vital" to the business. If there is a doubt, refer to legal counsel.*
- *Require medical exams or inquiries based only on evidence that they are necessary to the employee's performance of job duties and their safety and that of others. Do not rely on hearsay or assumptions.*
- *Carefully design any medical exam or inquiry to the performance of essential job functions and safety concerns.*

- *Use compliant procedures when requiring authentication in response to a reasonable accommodation request.*
- *Implement internal procedures to maintain the confidentiality of employee medical records. These files should be kept separate from personnel files.*
- *Consider consulting with legal counsel prior to disciplining an employee with a known disability, especially if the disability is considered a factor in the employee's job performance in any way.*

CLIA lodging members can call the FREE CLIA Helpline at 916 925-2915 with questions about this topic as well as other labor, legal and operational questions.