Medical Inquiries, Examinations, and Privacy

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There are legal restrictions pertaining to medical inquiries, examinations, and privacy in the employment relationship. This month's article outlines what is permissible or prohibited at each stage of the employee life cycle.

Job Applicants

Medical inquiries of job applicants are prohibited until a bona fide offer of employment is made.[1] Employers can ask applicants if they are able to perform the duties of the position, with or without reasonable accommodation, but they cannot ask about the existence of or details about medical conditions, disabilities, medications, workers' compensation injuries or related matters.

Employers cannot ask candidates about the need for reasonable accommodations unless it is obvious that one is required, or a candidate discloses a disability. The Equal Employment Opportunity Commission (EEOC) offers this guidance: "An employer might know that an applicant has a disability because it is obvious or she has voluntarily revealed the existence of one. If the applicant indicates that accommodation will be necessary, then the employer may ask what accommodation is needed."[2] Any additional inquiries must wait until a conditional offer is made.

Physical agility and fitness tests are not medical examinations under the law as they measure a person's ability to perform actual or simulated job and physical tasks. These tests can be administered before a conditional offer if they do not include medical components, such as heart rate and blood pressure measurements. Employers can require candidates to submit a doctor's certification verifying that they can safely do the required tests.[3]

Inquiries Following a Bona Fide Conditional Offer

Inquiries about the candidate's medical conditions, need for reasonable accommodation, and submission to drug/alcohol screens and/or physical or psychological examinations, are allowed after a conditional offer, provided that every candidate offered a job for the particular position is treated the same.[4] If medical inquiries or an examination reveals that the candidate has a disability as defined by state or federal law that impacts his or her ability to do the job, the employer must engage in an interactive process with the candidate to determine whether a reasonable accommodation exists. A job offer can only be withdrawn if the exclusionary criteria is related to the job and a reasonable accommodation does not exist that would permit the candidate to safely and adequately perform the work.[5]

The Genetic Information Nondiscrimination Act (GINA)[6] tempers an employer's right to make medical inquiries post-offer. GINA prohibits employers from requesting or requiring genetic information about an individual or their family members. Employers should caution candidates and health care providers against providing any genetic information in their response to requests for medical data.

Medical Inquiries/Examinations of Current Employees

The law limits medical inquiries and examinations of current employees to those that are job-related and consistent with business necessity, required by law, or offered voluntarily as part of a wellness program.[7]

1. Job-related and consistent with business necessity.

   a. These types of inquiries include those needed to administer state and federal family and medical leave and workers' compensation and respond to requests for reasonable accommodations.

   b. In addition, the law permits medical examinations when employers have objective evidence that an employee is experiencing performance problems because of a medical condition, or a condition poses a

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direct threat to safety.[8] Employers should send the employee for a medical assessment and obtain a doctor's report on the employee's ability to safely do the job, with or without restrictions. If the doctor issues restrictions on the employee's ability because of a disability as defined by state or federal law, the employer must engage in an interactive process with the employee to determine whether a reasonable accommodation would allow the employee to do the job.

The EEOC provides the following example of a legitimate medical inquiry:

"A crane operator works at construction sites hoisting concrete panels weighing several tons. A rigger on the ground helps him load the panels, and several other workers help him position them. During a break, the crane operator appears to become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, the crane operator says that this has happened to him a few times during the past several months, but he does not know why.

The employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat and, therefore, may require the crane operator to have a medical examination to ascertain whether the symptoms he is experiencing make him unfit to perform his job. To ensure that it receives sufficient information to make this determination, the employer may want to provide the doctor who does the examination with a description of the employee's duties, including any physical qualification standards, and require that the employee provide documentation of his ability to work following the examination."[9]

c. Periodic medical examinations of public safety employees are permissible when narrowly tailored to identify health conditions that could affect their ability to do their jobs safely. Again, if an identified condition is a disability under state or federal law, consideration of reasonable accommodations is required.

2. Required by law.

Medical inquiries or exams mandated by law are also permissible. Examples include physical exams required to maintain a CDL license, exams associated with a claim for workers' compensation, hearing tests required by state safety regulations, and medical monitoring for employees exposed to toxic or hazardous substances.[10]

3. Wellness programs.

Workplace wellness programs often provide screenings related to blood pressure, cholesterol, glucose, and similar tests. These types of screens and related medical inquiries are lawful provided they are voluntary, meaning the employer "neither requires participation nor penalizes employees who do not participate."[11]

Privacy and Confidentiality

Employers must protect the privacy and confidentiality of employee medical information.[12] Medical records cannot be kept with employees' personnel files, but must be maintained in a separate locked cabinet, or if electronic, stored on a separate network drive. Employers should not let supervisors keep copies of any medical records. They should be kept in one location, preferably in human resources or administration.

Employers can share medical information only with staff who have a "need to know," such as supervisors and managers who need to understand any restrictions and accommodations, or first aid and safety personnel administering emergency treatment.[13] Supervisors and managers must understand and be trained in their obligation to preserve the confidentiality of employees' medical information. The law prohibits them from sharing that information with staff members or other third parties.

Conclusion

An organization's employee handbook should include a Medical Privacy policy, which outlines the circumstances under which employees may need to provide medical information, and the protections the organization has established to preserve privacy and confidentiality. Legal exposure exists for making unlawful medical inquiries or failing to protect medical information under laws such as the Family and Medical Leave Act and the Americans with Disabilities Act. Employers should be careful and intentional about ensuring compliance throughout the organization.

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1. 42 U.S.C. § 12112 (d)(2). This prohibition may not apply if a candidate requests an accommodation during the recruitment process, or if the employer seeks voluntary disclosure of disabilities pursuant to affirmative action in accordance with applicable regulations. *Job Applicants and the Americans with Disabilities Act, Q.1 (10/07/2003); EEOC Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act* (ADA), Q.23 (7/26/2000).
2. *Job Applicants and the Americans with Disabilities Act* at Q.15.
3. EEOC *Enforcement Guidance* at Q.2, 14.
4. 42 U.S.C. § 12112 (d)(3).
5. 29 C.F.R. § 1630.14 (b)(3); the definition of disability under the Wisconsin Fair Employment Act is found at Wis. Stat. § 111.32(8) and is found at 42 U.S.C. § 12102 under the Americans with Disabilities Act.
6. 42 U.S.C. Chapter 21F.
7. 42 U.S.C. §12112(d)(4).
8. EEOC *Enforcement Guidance* at Q. 5.
9. *Id.*
10. *Id.* at Q.21.
11. EEOC *Enforcement Guidance* at Q. 22. The EEOC has since issued more specific regulations on the parameters of acceptable wellness programs. *See e.g.* 29 C.F.R. § 1630.14(d).
12. 29 CFR 1630.14(b).
13. *Id.*