

## Hiring right, hiring smart

Are you hiring a high-risk employee? Take precautions but know your legal limits.

Hiring can be risky.

Employers inviting new people into their organizations sometimes wonder whether they're also inviting unforeseen workers' compensation problems.

Some employers look for ways to minimize their risk. Typically, they ask questions like: Can I require a pre-employment physical? How do I go about testing for drugs and alcohol? Can I screen this applicant for prior injuries? How can I uncover the red flags that'll identify a work comp abuser?

What employers find are a lot of legal limits to what are nonetheless prudent precautions to take in some situations. Here is some background on these questions. It is not intended as legal advice. For that, talk with your employment law attorney. This is intended to give you a basic grasp of the issues along with practical steps you can take to reduce claims by sharpening your employment process.

### Pre-employment physicals

The backdrop for your ability to conduct pre-employment physicals is state and federal law which says this: Employers cannot discriminate based on physical disability.

That's the public policy legislated in the Minnesota Human Rights Act and the Americans with Disabilities Act.

You can, however, make sure your job candidate is physically capable of doing the job's required functions. A pre-employment physical might be the best way to find that out.

Here's how to get started with a process that benefits your organization and complies with MHRA and ADA:

#### 1. Create a pre-employment physical exam policy.

That means creating a written document approved by your organization's management. Some specifics to

incorporate into it:

- An offer of employment should be made before a physical exam is required, conditioned only on the results of the exam.
- The exam should test for essential job capabilities only.
- The exam should be required for everyone conditionally offered employment for that position. If, say, you have several truckers, your policy would need to require exams for everyone being offered trucker positions. And it would need to require exams on into the future as employees turn over.

#### 2. Work with the doctor.

Tell the doctor about the physical requirements of the job. Be sure you focus on the job's specific physical requirements, not on the job duties. That will enable the physician to determine the applicant's ability to do the work.

Better yet, give the examining physician a copy of the job description. But be sure it's a complete job description that defines (1) the essential and marginal functions of the job and (2) the physical demands of the job.

Then, depending on the nature of the job, invite the physician to visit the work site. Physicians are willing and interested in doing this. The more the physician knows about the work site, the better the evaluation of the applicant will be.

#### 3. Use the results carefully.

Suppose that, based on the results of the exam, you tell the applicant you are withdrawing the employment offer. You then have 10 days to notify the applicant of the medical basis for your decision.

However, be aware that failing a pre-employment physical does not automatically disqualify the applicant.

If the physician finds the applicant is not able to perform the essential functions of the job unless "reasonable accommodation" is provided, then the employer has a duty to provide the accommodation unless it causes the employer "undue hardship."

Reasonable accommodation might include altering the workstation or the job itself, shifting functions or

providing assistance in doing them. Most reasonable accommodations can be accomplished at no cost or low cost.

Under MHRA and ADA, an employer cannot exclude a disabled applicant because of his or her inability to perform a marginal or non-essential function of the job.

Any information about the examination should be kept in a separate medical file and treated as a confidential medical record.

A key ally in planning a physical examination program is your employment law attorney.

*Another helpful resource is SFM's "Americans with Disabilities Act" legal advisory on SFM's website, [www.sfmic.com](http://www.sfmic.com). Order or download it from the "Resource Catalog" or call (952) 838-4325.*

## Drug and alcohol testing

Pre-employment testing is one way to avoid bringing substance abusers into your organization.

Testing job applicants works much the same as testing existing employees. Truck drivers have their own set of regulations, but the legal constraints for most other employees are set forth in the Minnesota Drug Testing Law. Be sure to talk with your employment law attorney before proceeding.

Here are some considerations to keep in mind:

### 1. Create a written drug and alcohol testing policy.

At a minimum, the policy must describe:

- Which job applicants and employees are subject to testing.
- The circumstances under which they will be tested.
- A job applicant's or employee's right to refuse testing, and the consequences of refusal, which could include withdrawal of the job offer.
- What disciplinary or other actions can be taken as a result of a verified positive test.
- A job applicant's or employee's right to explain a positive test result.
- Any appeal procedures.

### 2. Notify applicants and workers.

Before any testing, give a copy of the notice about the drug testing policy to the job applicant to whom you have made a conditional job offer. Also give copies of the notice to all affected employees and post it in your workplace.

### 3. Know when you can test.

An employer has a fair amount of room under the law to require job applicants and employees to take drug and alcohol tests. But there are limits and conditions to what you can require, too.

Here are the circumstances under which you can require testing for job candidates as well as existing employees:

#### Job applicant testing

An applicant who has been offered a job can be required to take a test, but you also must have a policy requiring or requesting the test of all applicants for that position.

#### Routine physical exam testing

For job applicants, you can include drug and alcohol testing as part of a pre-employment physical exam. Be sure you've complied with all the test and physical exam rules explained earlier.

For existing employees, you can require a drug and alcohol test as part of routine physical exams so long as it occurs no more than once annually and employees are given two weeks' prior notice. This is the only way an employer can require drug testing of all employees.

#### Random testing

An employer can require random testing only of employees in safety-sensitive positions. Those are positions, including management positions, where an impairment would threaten the health or safety of others.

#### Reasonable suspicion testing

Testing can be required of an employee if the employer suspects the employee:

- Is under the influence of drugs or alcohol.
- Violated written work rules—which must include the testing policy—regarding the use, possession, sale or transfer of drugs or alcohol while working on the premises or operating employer equipment.
- Suffered an injury or caused another employee to sustain an injury—which, incidentally, is not covered by workers' compensation laws if intoxication is the "proximate cause."
- Caused a work-related accident or was operating machinery involved in a work-related accident.

Some employees are referred by their employers for chemical dependency treatment or evaluation, or they participate in a program through an employee benefit plan. An employer can require these employees to take a drug or alcohol test, and does not need to give prior notice of a test during the first two years after the employee has completed the program.

If the job applicant refuses to take a drug or alcohol test,

you can choose to withdraw the job offer. An employee who refuses a test can be terminated.

#### 4. Use a licensed lab.

You must use a licensed or certified testing laboratory, and your organization must pay for the cost of the test.

But you can require a job applicant or employee to pay the cost of a re-test if it confirms the result of the first test.

#### 5. If the test is positive.

You cannot withdraw a job offer based solely on a first test that comes back positive. Have the applicant take a re-test. If the re-test confirms the first test, then you can withdraw the offer.

Similar rules apply to the test results for existing employees. A positive result from a first test that hasn't been confirmed by a re-test allows you only to temporarily suspend or transfer the employee.

You can terminate the employee only after:

- You've given the employee the opportunity to participate in a drug or alcohol counseling program, and the employee refuses or fails the program.
- The employee was re-tested, and that second test showed a positive result, too.

Drug testing can be complex. But a successful program may be worth the effort if it prevents substance abusers from entering your workplace, removes confirmed abusers, and deters others from starting.

For assistance in setting up a drug and alcohol testing program, contact your employment law attorney.

Visit SFM's website for additional resources, including the "Alcohol and drug testing of employees and job applicants" legal advisory and the "Alcohol and drug policies" CompTalk. Go to the "Policyholders" tab on SFM's website at [www.sfmic.com](http://www.sfmic.com) and click on the "Resource Catalog" link to download a copy. Or call (952) 838-4325.

## Screening for prior injuries

Employers often ask how they can screen job candidates for prior injuries.

The answer: They can't.

MHRA and ADA prohibit asking applicants about prior injuries or medical conditions. You can't ask about them on the employment application. You can't ask about them verbally. And you can't try to find out through an outside source.

What you *can* do is ensure the applicant has the physical

ability to do the essential functions of the job—which brings you back to the earlier pointers regarding pre-employment physicals.

But if you're not planning on requiring a physical, you can use the essential functions of the job discussed during the interview to find out more about the applicant's capabilities.

#### 1. Use the job description.

Walk the applicant through the job functions, explaining functions that are essential and those that are marginal.

#### 2. Ask, but know your limits.

You can ask during the interview whether the applicant can perform the essential functions of the position with or without reasonable accommodation.

Important: If you're going to ask the question above, then you have to ask the whole thing. It's all or nothing. If you ask whether the applicant "can perform the essential functions of the position," or something similar, then you are also required by law to add the phrase, "with or without reasonable accommodation."

And you have to say "with or without." You cannot say just "with," and you cannot just say "without."

Also be aware that you cannot at any time ask about a disability or necessary accommodations, even if a disability is obvious.

Once a conditional job offer is made, a pre-employment physical can verify the job candidate's physical capabilities.

If a policyholder's employee has a claim, SFM will look into prior injuries as a routine part of its claim investigation process. If a prior injury contributed to a newly claimed injury, SFM ensures that you pay only for the claim or parts of a claim attributable to your business.

## Hire smart

Pre-employment physicals and drug testing are sensible precautions in some hiring situations. But there's no substitute for a sharp interviewer and smart hiring practices.

The following questions are basic, but worth rethinking. They are your best front-line defense against inviting unnecessary workers' compensation problems into your workplace:

#### 1. Are job descriptions up to snuff?

A good job description that is clear and complete gives the applicant a proper understanding of the job and enables him or her to see whether the job fit is right.

For assistance in developing new or upgrading current job descriptions, contact your employment law attorney.

## 2. Can you spot the right people?

It's essential, of course, that your interviewer be capable of perceptive judgment about the best match between the applicants and the job.

It's also important that your interviewer be able to identify people who will be committed to your organization, regardless of any disability. Commitment counts for a lot.

## 3. Do you know the law?

Your interviewer should be well-trained in the

Minnesota Human Rights Act and the Americans with Disabilities Act.

## 4. How can you improve new-employee training?

This is sometimes overlooked as a proven way of avoiding injuries later on. Training and orientation should provide the new employee with a primer on proper work methods and set the stage for the employee's continued awareness of the injury-prevention techniques that you carry consistently through your organization on an on-going basis.

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