SFM The Work Comp Experts® Legal Advisory

Minnesota

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Pre-employment physical examinations

Many Minnesota employers have implemented pre-employment physical examination programs to determine whether prospective employees are physically capable of performing the jobs they seek. An appropriate program can be extremely cost-effective and can work well for both employers and employees.

An employer's right to require a pre-employment physical examination is limited by both the Minnesota Human Rights Act (MHRA) and the Americans with Disabilities Act (ADA). The MHRA is a state law that applies to employers with one or more employees. The ADA is a federal law which applies to employers of 15 or more full-time employees. To a large extent, the requirements for pre-employment physical examinations under the ADA are similar to those under the MHRA. It is important for any Minnesota employer who is either engaged in or contemplating a pre-employment physical examination program to be aware of and follow the requirements of both laws.

The law is still developing in this area. There are many ambiguities, and interpretations of these laws may vary, even among experts. Consequently, you are well advised to consult with your own regular business legal counsel about such a program for your company. The purpose of this advisory is to give some general information about the law regarding pre-employment physical examinations.

The MHRA was amended to more closely reflect the ADA's requirement with respect to pre-employment physical examinations. In order to comply with both statutes, the following requirements should be met:

1. An offer of employment should have been made, conditioned only on the results of the subsequent physical examination.
2. The examination should test for essential job-related abilities only.
3. The examination should be required of all persons conditionally offered employment for the particular position; and
4. The information is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record.

If based upon the results of the pre-employment exam the employer decides to withdraw the employment offer, it must notify the employee of the medical basis for its decision within ten (10) days of the withdrawal.

Employers are well advised to provide the examining physician with a written description of the **physical** requirements imposed by the job. This will help the physician make an accurate determination as to the employee's ability to perform that work. The written description will also help an employer prove that the examination was limited to essential functions, if that becomes an issue. The focus of the written description should not be the job function so much as the physical requirements of the job.

It is probably prudent for an employer to avoid all questions, written or oral, relating to an applicant's medical history or condition unless these questions are asked as part of a pre-employment physical exam and are relevant to essential job functions.

An employer may not exclude a disabled applicant because of the applicant's inability to perform a **non**-essential function of the job. And even if the applicant does not "pass" a physical exam, the employer still has a duty to make "reasonable accommodation" for the

disabled applicant, unless this would cause the employer "undue hardship." Minnesota Statute 363A.08 subd 6 suggests that reasonable accommodation for a disability may include, but does not necessarily require:

1. Making facilities readily accessible to and usable by disabled persons; and
2. Job restructuring, modified work schedules, reassignment to a vacant position, aquisition or modification of equipment or devices, and the provision of aides on a temporary or periodic basis.

A determination of undue hardship is based upon several factors, including such things as the size of the business, the cost of the accommodation, and the financial strength of the company. Beyond that, in order to show undue hardship an employer must have **documented** evidence of its good-faith effort to provide reasonable accommodation. In other words, there should be a written record of which options were explored, what the cost of each option is, and why each option was rejected. Among other things, this should always include a written summary of those suggestions for reasonable accommodation made by the disabled individual involved. Furthermore, effective documentation will reflect the employer's willingness to be creative and to seek expert advice before concluding that reasonable accommodation without undue hardship is impossible. Applicant records, including medical examination results must be retained by employers for at least one year after the record is made.

As helpful as a pre-employment physical examination procedure may be to an employer, it will not and cannot solve all hiring problems and risks. Furthermore, it is not a program which should be implemented until the employer is well informed of the various legal requirements involved. But a good program can work well for both employers and employees.

If you have any questions about the issues addressed in this *Legal Advisory*, please call Lynn, Scharfenberg & Hollick at (952) 838-4450.

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