Dynamic Chiropractic

YOUR PRACTICE / BUSINESS

Pre-Placement Physicals

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I'm going to talk about employee selection using a pre-placement physical exam. If you're wondering why I'm discussing this topic, it's because a friend of mine has just gone through an experience that I find incredible in today's employment market. Since 1991, with the passage of the Americans with Disabilities Act, the ability of employers to use any medical examination as a condition of hiring new employees has been clearly outlined, yet employers take liberties and ignore the law, seemingly on a regular basis.

The Americans with Disabilities Act (ADA) was enacted to prevent discrimination against individuals with disabilities. Title I of the ADA prohibits discrimination in the workplace and specifically defines what can be done during the process of hiring new employees. Prior to the ADA, employers had a great deal more freedom to refuse work to those individuals they considered "unfit" for the job. In the mid 1970's, when I first went into practice, my father-in-law (a DC) performed a number of "pre-employment physicals" for a local railroad company. At that time, the company wanted a brief examination of the low back, followed by AP and lateral lumbar x-rays. If any anomalies or degenerative changes were spotted on the films, the applicant was immediately rejected.

The company's concern was that the presence of anomalies in the spine would likely lead to an increased rate of low back injuries on the job. Obviously, for a number of reasons, the situation has changed dramatically since that time.

While there is certainly good rationale for not placing individuals in jobs in which they might be injured, the ADA states that employers can't refuse work to disabled individuals based simply on their disability. Rather, the ADA states that an employer may only refuse to hire a prospective employee if the employer can clearly demonstrate that the individual "cannot perform the essential functions of the job with or without reasonable accommodation." And while the ADA is only concerned with those individuals who have a qualified disability, their position has had a significant impact on the concept of pre-employment physical examinations.

The process of hiring is divided into two distinct phases by the ADA: 1) the pre-offer phase and 2) the post-offer phase. To illustrate the point, let's use an example in which a large company advertises that it has work available, and let's assume that 100 people apply for a job with the company. Unfortunately, there are only 20 positions available, so it's obvious that the company must screen the prospective employees and will only be able to offer a job to a limited number of the applicants.

The initial part of the screening process, prior to any offer of employment being made, is referred to as the "pre-offer phase." Once a job offer has been made to the 20 successful applicants, the process moves into the "post-offer phase." The rules determining acceptable conduct on behalf of the employer are significantly different during each of these phases.

Pre-Offer Phase

During the pre-offer phase, the intention is to separate the review of the worker's qualifications for a position from the issue of disability. Thus, the employer is prohibited from engaging in any discovery that would reveal a disability:

• The employer may not ask whether the pre-offer applicant has a disability.

• The employer may not subject the applicant to a medical examination.

• The use of application forms featuring a checklist of potentially disabling medical conditions is prohibited.

• With an obvious disability, the employer may not inquire as to how the person became disabled or as to the prognosis.

• The employer may not inquire as to how frequently the applicant will require leave for treatment or incapacitation related to the disability.

•The employer may not inquire as to the applicant's workers' compensation history.

Exceptions

During the pre-offer phase, the employer may do the following:

• Applicants requiring reasonable accommodation to participate in testing may be asked to inform the employer.

• The employer may request documentation of the need for accommodation.

• The employer may ask applicants with a known disability to describe or demonstrate how, with or without accommodation, the applicant will perform the job-related functions.

During the pre-offer phase, the company in question stayed within the boundaries specified by the ADA. It's when we got to the post-offer phase that the process started to unravel.

Post-Offer Phase

This phase encompasses the interval between the extension of a job offer and the start of work duties. It is in this case that the ADA permits the employer to require an entrance medical examination of the applicant. The job offer may be made contingent upon the result of the examination.

At this point, there are no restrictions on the scope of the medical data collected. It may include a complete medical history that contains an accounting of potentially disabling conditions from which the applicant may suffer and the history of any prior occupational illnesses or injuries. In addition, the entrance examination need not be job-related nor consistent with business necessity. The post-offer medical examination also allows the employer to evaluate physical and psychological criteria that may be relevant, if not critical, to the performance of the work activity.

While the ADA allows a great deal of latitude in the scope of the medical examination, it does limit the employer's discretion to rescind an offer of employment based on the results. Exclusionary criteria must be job-related and consistent with business necessity. In other words, to rescind an offer based

on the medical examination, the employer must show that there is no reasonable accommodation that will enable the person with a disability to perform the essential functions of the job.

The employer's right to pursue an entrance medical examination is contingent upon:

• All successful applicants in the same job category must be subjected to the same examination regardless of the disability.

• Information regarding the medical condition or history of an applicant must be collected and maintained in a separate file as a confidential medical record. Any information gained may only be used in compliance with Title I of the ADA.

That's what the law says. So here's what happened to my friend. She was offered a position doing exactly the same job that she had done at another company for the past five years. She was given a confirmed start date by her new employer and told that the job offer was contingent upon the results of a medical examination.

She was told to report for a drug screening at a specified date, and assumed everything was okay. At the time of the drug screening, she was interviewed by an occupational nurse who asked a series of questions, including the question of if she had ever missed work due to a medical disability.

As it happens, my friend had missed five days of work several months earlier due to a minor shoulder injury. (You'll remember Sally from my June 14 column.) Several days later, she was contacted by the nurse and told that she would not be able to report for work until she had a release from any restrictions (not legal). On the next visit to the doctor who had originally seen her for the shoulder problem, Sally was released from any restrictions. She duly informed the nurse and provided a copy of the "release."

Once again, a couple of days later Sally was contacted by the nurse and was told they needed more information. The nurse requested a letter from the doctor stating that Sally had no work limitations (again not legal). She promptly got such a letter from the doctor and provided it to the medical staff of her new employer.

The nurse stated that still wasn't enough and they needed all the records. Once again, Sally complied promptly per the request (which by the way, was not legal). Two days prior to the date Sally had been given to start work, she was informed that she would need a medical examination by the company doctor. This could not be performed until after her start date, so she would not be able to begin work on time.

By the way, the ADA only allows medical examinations of job applicants if all individuals applying for the same job category are given the same medical examination. In Sally's case, examinations were not required of other applicants. The offer to begin work that was originally made had been withdrawn.

At Sally's request, I contacted the human resources department of the company. I was informed that the offer of employment was contingent on the medical examination and that the conditions had not been met. The HR director stated that Sally would not be starting work at the time originally provided. The HR director was careful to state that Sally hasn't been disqualified state that Sally hasn't been disqualified and that she was at the top of the list for future openings.

I asked if the original offer to begin work on the specified date was still in effect, or if it had been rescinded. After repeating the question several times, the HR director eventually said, "Yes, it has." I then asked if the reason for this was due to Sally not passing the medical examination. Once again, I had to repeat the question several times before I got an answer. Finally, the HR director stated that the offer to begin employment on the date originally stated had indeed been rescinded because Sally had not passed the medical examination. In other words, she was not getting the job because the company was unable to determine that she was medically able to do the job that she had been performing for the past five years.

If I stand back and look at this series of events from an objective point of view, I see that the potential employee has a couple of choices. Choice #1: put up a fuss and insist that the company make good on their original offer. A couple of conversations with attorney friends tend to indicate this wouldn't be difficult to do, but the idea of starting a new job under such circumstances isn't very appealing. Choice #2: hire an attorney and sue. While that may be awfully tempting, it's not what Sally wants to do. She just wants to work. Choice #3: move on.

As I write this, I am absolutely amazed that this large company (approximately 90,000 employees) either doesn't know what the law states, or simply doesn't care.
It has been my experience during the past several years as a consultant to different industries that this kind of illegal activity takes place all the time. The reason I am writing this column is to caution those of you who are interested in performing pre-placement physical examinations for companies in your area. You need to know what the rules and regulations are. Don't assume that the company you are working with is up to date in this area.

I always like to look on the positive side. Since I like to teach, and I especially like to teach in the industrial arena, this episode has reinforced my idea that there is ample room for me to continue consulting with industries on the topic of work-related medical issues. It would appear that they need all the help they can get!

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