

HIRING TO PREVENT WORKERS' COMPENSATION CLAIMS

With workers' compensation costs on the rise, one of the best ways to control costs is to prevent workplace injuries before they even occur. Such prevention starts at the hiring stage. Although unqualified employees or those who abuse drugs may be more prone to injury than others, employers hesitate to make certain inquiries that would help reveal these risks in fear of legal backlash. Indeed, Michigan and federal law limit the type of information employers may obtain, especially with regard to an applicant's disability. However, employers may still take several steps at the hiring stage.

Specifically, employers should prepare written job descriptions describing the essential job functions. Aside from scrutinizing gaps in employment and inconsistent responses, employers should also make inquiries that would predict whether an applicant's qualifications match those needed to perform the job. Employers must be careful when making such inquiries as they could be unlawful simply because of the manner in which they are posed. The following are some things employers should keep in mind to avoid potential lawsuits:

Employers may:

- Conduct physical agility, vision, and other job-related tests in which applicants must demonstrate the ability to perform actual or stimulated job tasks, because they are not considered medical examinations under the American's with Disability Act.
- Conduct background checks and confirm all credentials with the appropriate licensing agency/authority, provided the employer has the proper releases signed.
- Conduct tests to determine illegal use of controlled substances, as long as they are applied consistently, because they are not considered medical examinations under the American's with Disability Act.
- Ask whether an applicant has ever been convicted of a crime. However, the Elliott-Larson Civil Rights Act prohibits maintaining information regarding an arrest, detention or disposition of a violation of the law that does not result in a conviction. A rejection based on a conviction must be job related. Further, Title VII states that conviction alone cannot be the basis to hire.
- Reject applicants who have a handicap which cannot be accommodated, as long as the rejection is job related or based on health/safety risk and is not speculative.

Employers may not:

- Conduct alcohol tests to determine whether and/or how much alcohol an individual has consumed, because they are considered medical examinations, and there is no statutory exemption.
- Ask applicants about their lawful drug use if the question is likely to elicit information about a disability.
- Ask if the applicant is disabled, or if he or she is associated with a disabled person.
- Ask random or open-ended questions about an applicant's disability.
- Ask applicants about job-related injuries or workers' compensation history. These questions relate directly to the severity of an applicant's impairments, and thus are likely to elicit information about disability.

A structured hiring process helps control workers' compensation costs. Ensuring that all employees are drug free and qualified to perform the job duties is essential in preventing workplace injuries. Ultimately, the least costly claims are those that never occur.

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