

HIRING AND PERSONNEL PRACTICES INTRODUCTION

Hiring competent employees helps prevent accidents. It is recommended that careful consideration be given to the process of evaluating job applicants.

The employment provisions of the Americans with Disabilities Act (the "ADA") became effective on July 26th, 1992. The ADA prohibits discrimination against a qualified individual with a disability who can perform the essential functions of a job with or without reasonable accommodation. This includes job applicants. As of July 26, 1994, the ADA became applicable to all employers who have 15 or more employees. The New Mexico Human Rights Act has certain provisions which are similar to the employment provisions of the ADA, and also prohibits discrimination against any person otherwise qualified because of physical or mental handicap or serious medical condition. The New Mexico Human Right Act is applicable to employers who employ 4 or more employees. It is suggested that all employers familiarize themselves with, and comply with, the ADA and the New Mexico Human Rights Act.

The following recommendations are offered to assist in the evaluation of job applicants and the hiring of employees. However, the following recommendations, and the suggested forms provided, do NOT constitute legal advice, and it is suggested that you consult with your attorney in order to assure compliance with the ADA, the New Mexico Human Rights Act and any and all other state and federal laws governing or affecting employment practices and to determine the procedures that best fit your needs.

SOME ADA REQUIREMENTS

In order to help prevent discrimination against disabled job applicants who are able to perform a job, the ADA splits the hiring process into two phases: 1) Pre-employment, Pre-offer; and 2) Pre-employment, Post-offer. During the first phase, before an offer is made, an employer may require a job applicant to fill out a pre-employment application and to answer pre-employment questions, as long as these questions are not likely to elicit information about a disability. For example, the employer may ask about previous employment, education, certifications, licensures, etc. At the end of this phase, the employer may decide to make what is called a conditional job offer. Once a conditional job offer has been made, an employer can make inquiries regarding the applicant's medical history, prior workers' compensation claims and can require a medical examination (as long as it is required of all applicants for that job category) before the employer determines that the job applicant is qualified to receive a firm job offer and begin working.

Prior to making a conditional offer, an Employer may do the following:

1. An employer may ask the applicant questions which relate to the applicant's ability to perform job-related functions with or without a reasonable accommodation, so long as these questions are not likely to elicit information about a disability;
2. An employer may ask about the job applicant's ability to perform both essential and marginal job functions.

3. An employer may describe or demonstrate the job functions and ask whether or not the job applicant can perform those functions with or without reasonable accommodation;
4. An employer may ask the job applicant to describe or demonstrate how, with or without reasonable accommodation, he or she will be able to perform job-related functions, as long as all applicants in that job category are requested to do this;
5. If a job applicant has a known or obvious disability which may interfere with or prevent the performance of a job-related function, an employer can ask the applicant to describe or demonstrate how, with or without reasonable accommodation, he or she will be able to perform the job-related functions. This may be done with a job applicant who has a known or obvious disability which may interfere with or prevent the performance of an essential function, even if the employer does not routinely make such a request of all applicants in the job category. However, if an applicant has a known disability that would not interfere with or prevent performance of a job-related function, the employer can only ask the applicant to demonstrate how he or she would perform the function if all applicants in the job category are required to do so, regardless of disability.
6. An employer may ask whether the applicant can meet the employer's attendance requirements.

Prior to making a conditional offer, an employer may *not* do the following:

1. An employer may not ask the job applicant whether or not the applicant has any disabilities, or ask any questions that are likely to elicit information about a disability;
2. An employer may not ask questions about a known or obvious disability, or history of physical or mental impairment;
3. An employer may not ask whether the job applicant's family members or acquaintances have disabilities;
4. An employer may not ask questions about any prior worker's compensation claim(s);
5. An employer may not ask questions about the applicant's health or medical history or require a medical examination;
6. The employer may not ask the applicant if he or she will need a reasonable accommodation in order to perform the job, as such questions are likely to elicit information about a disability (with limited exceptions where there is a known or obvious disability).

After making a conditional job offer, an employer may do the following:

1. An employer may require a job applicant to answer questions about his/her medical history or conditions, including prior workers' compensation claims, and may require the job applicant to take a medical examination (as long as all applicants in the same job category are required to take such a medical examination). A medical examination cannot be solely in response to the applicant's answers on the medical questionnaire.
2. If an individual is not hired because a post-offer medical examination or inquiry reveals a disability, the reason(s) for not hiring must be job-related and necessary for the business. The employer also must show

that no reasonable accommodation was available that would enable this individual to perform the essential job functions, or that this person would pose a significant health or safety risk to themselves or others.

3. The results of a medical examination and all other medical information, including information about prior workers' compensation claims, must be collected, and maintained on separate forms and in separate medical files which must be kept strictly confidential, except for certain limited exceptions provided in the ADA and the regulations enacted there under. Medical records may not be kept in a personnel file.

SUGGESTED HIRING PRACTICES

The following hiring practices are recommended, in addition to compliance with all ADA and New Mexico Human Rights Act requirements:

1. Always have job applicants completely fill out an appropriate Employment Application. Information on the Employment Application may help to determine the quality and suitability of the job applicant. Be sure that the job applicant answers all of the questions on the Employment Application completely and signs the Employment Application to affirm that he or she is telling the truth and has answered completely, noting that failure to do so may be grounds for rejection of the application, or discipline up to and including dismissal if hired.
2. Once the Employment Application has been completed and any appropriate pre-employment questions have been answered (i.e., checking references, etc.), you may choose to make a conditional job offer to the job applicant. Once a conditional job offer has been made to the job applicant, you are then permitted to ask about the job applicant's prior medical history, including prior workers' compensation claims (see sample form of medical questionnaire attached), and to require a medical examination (if all applicants in that job category are required to take such an examination but a medical examination cannot be based solely in response to the applicants answers to the medical questionnaire). Also include in any medical questionnaire the language of NMSA 1991, § 52-1-28.3 conspicuously warning the applicant/worker that they shall be entitled to no further workers compensation benefits if they are knowing and willfully conceal or make a false representation about the information requested. It is very important to determine, from a workers' compensation standpoint, whether the job applicant has any previous injuries or workers' compensation claims. How much information you may want to obtain, may depend on the job category or industry in question. From the ADA standpoint, you may wish to consult your attorney to help you determine how much information you wish to know and who in your organization should have access to this information. The regulations provide some guidance as to who has a right to see such records, but you might consider who the best custodian of the confidential records would be (i.e., a company nurse, an in-house medical review officer, a Human Resources professional, etc.).
3. An employer may rescind a conditional job offer if the applicant has knowingly provided a false answer to a permitted inquiry about the applicant's medical condition or history, including prior workers' compensation claims; if the applicant is a "direct threat" to himself, herself or others, based on the opinion of a medical professional, which cannot be reduced to an acceptable level or eliminated with a reasonable accommodation; or if the individual is unable to perform the essential functions of the job with



reasonable accommodation. Note, a post-offer medical examination may not disqualify an individual with a disability who is currently able to perform essential job functions because of speculation that the disability may cause a risk of future injury or increased workers' compensation claims.

The above recommendations and the attached form are provided as suggestions only. You are reminded that the ADA and the New Mexico Human Rights Act include many other provisions which may be applicable to your business. It is recommended that you contact your attorney to determine what is right for your business.



MEDICAL QUESTIONNAIRE

(EMPLOYER'S NAME)

This questionnaire may be used to identify a worker's physical ability to perform the job he/she has been conditionally hired for and/or analyze or evaluate workers' compensation claims submitted in the future.

MEDICAL QUESTIONNAIRE (Please print)

Name _____

Address _____

Date of Birth _____

Social Security Number _____

Have you ever suffered a work-related injury? Yes No

Have you ever filed for and/or received Workers' Compensation benefits? Yes No

If yes, list dates and describe when such claims were filed, and/or benefits received.

Have you ever suffered an illness or injury other than at work where you were off work, and/or had to limit your activities for more than one week?

Yes No

If yes, list dates and describe all such injuries, and/or illnesses suffered.

Have you ever been in an automobile accident? Yes No

If yes, list dates of all such accidents, all injuries suffered including any physical restrictions imposed.

List your family physician:

Please check any of the following activities for which you have, or have had, a restriction:

- Lifting Standing Squatting
Carrying Walking Crawling
Sitting Bending Climbing

Give a brief description of any restrictions checked above.

NOTICE: Under Section 52-1-28.3, NMSA 1978, of the New Mexico Workers' Compensation Act provides that the worker shall be entitled to NO future workers' compensation benefits if he or she knowingly and willfully conceals or makes a false representation about the information requested.

I hereby certify that the information listed above is true, correct, and complete, to the best of my knowledge and that I understand all of the questions listed in this questionnaire. I further certify that I have read and understand the above Notice provision indicating that I will be entitled to NO future workers' compensation benefits if I knowingly and willfully conceal or make a false representation about the information requested. (Please make sure the questionnaire is filled out completely before signing)

Employee Signature _____ Date _____

Employer Signature _____ Date _____

EJEMPLAR - CUESTIONARIO MÉDICO

(NOMBRE DEL EMPLEADOR)

Este cuestionario puede ser usado para identificar la capacidad y el estado físico del trabajador para desempeñar el trabajo que a el/ella se le haya asignado o para evaluar o analizar reclamos de cuando se lastiman en el trabajo, sometidos en el futuro.

CUESTIONARIO MÉDICO (Escriba)

Nombre _____

Dirección _____

Fecha de Nacimiento _____

Número de Seguro Social _____

¿Ha tenido algún daño/lastimadura anteriormente en el trabajo? Sí No

¿Ha recibido o reclamado beneficios de Compensación para los trabajadores? Sí No

Cuando; anote fechas y detalles:

¿Ha sufrido algún daño/lastimadura/enfermedad que no haya sido en el trabajo y que haya tenido que limitar sus actividades por más de una semana?

Sí No

Cuando; anote fechas y detalles:

¿Ha tenido algún accidente automovilístico? Sí No

Cuando; anote fechas y detalles:

¿Quién es su médico/doctor de familia?

Marque las siguientes actividades por las que haya tenido o tenga restricciones:

Levantar

Estar de pie

Ponerse en cuclillas

Cargar

Camina

A gatas

Sentar

Doblar/encorvar

Escalar

Si algo está marcado arriba, dé una descripción/ explicación en detalle:

Sección 52-1-28.3, NMSA 1978, del Acto De Compensación de Trabajadores provee consecuencias para declaraciones o representaciones falsas escritas en este cuestionario, que pueden causar que el trabajador pierda sus beneficios de compensación de los trabajadores.

La información enumerada arriba es verdadera y correcta por mi mejor conocimiento y entendí todas las preguntas listadas arriba. Yo certifico que he leído y entendido la provisión notificada que indica que yo no voy a recibir beneficios de compensación de los trabajadores, si yo hábilmente y con conocimientos oculté y di falsa información o representación de mi condición médica. (Por favor este seguro(a) que el formulario esté completamente lleno antes de firmarlo)

Firma del empleado _____

Firma del empleador _____

Fecha _____

Fecha _____