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Medical Exams and Drug Testing: Two Areas that can Land You in Hot Water

by Rebecca Boartfield

All too often we find employers who are quick to want to obtain medical information on employees for a variety of reasons or drug test employees because of performance issues they believe are related to drug or alcohol use. Unfortunately, many don't realize both of these are regulated by law and may, if not done correctly, result in liability.

Medical Exams

It all begins innocently enough. For example, it might go something like this:

Doctor: "Given how sick you've been, I think you should go see a medical doctor about your illness before you return to work."

Employee: "It's no big deal, I'm fine, really, and I've only missed two days of work this month."

Doctor: "In fact, I want a note from the medical doctor about your condition before you return."

On the surface, this seems like a very caring request. You think you are coming across as one who cares about the employee's welfare. Of course, it could also be you are tired of this particular employee's absenteeism and believe requesting a note will somehow make this employee understand s/he's on thin ice. However, this simple request could constitute a request for a medical exam. Can you

request that right now?
Let's look at the law.

Any request for medical information in order for an employee to begin work or resume work is considered a medical exam. Requests for this kind of information are restricted under the Americans with Disabilities Act (ADA), which protects people from illegal discrimination based on disabilities or perceived



disabilities. Gaining access to this information can result in the employer knowing about a disability and possibly using this as a basis for employment decisions, which can be illegal.

The ADA breaks down the rights of employers to request this information in two distinct ways: 1) pre-hire and 2) post-hire.

At the pre-hire stage, requests for medical exams and/or medical information are strictly forbidden unless three conditions are met:

- 1) a conditional offer of employment has been made to the applicant before testing occurs,
- 2) all applicants selected for hire are subjected to the medical exam, and
- 3) all information obtained by the medical exam and/or medical request is treated confidentially.

Once the employee has been hired, medical exams or requests for medical information can only be done when such request is job-related and consistent with business necessity. You may also make such requests under the ADA's "direct threat" provision (i.e. the employee's health status poses a "direct threat" to the safety of other employees or him/herself).



Situations that might legitimately warrant a medical exam should be evaluated on a case-by-case basis; there is no “one size fits all” to medical exams and/or information requests. While this is not a complete list, possible valid reasons for requesting medical exams or information may include:

- An employee whose job involves heavy lifting complains of having a hernia and is not getting medical treatment. Reason? Employee poses a direct threat to him/herself.
- An employee has been on leave for two months for a non-work-related injury and is ready to return to work. This type of medical request is usually called “fitness for duty.” Reason? Employer must be sure employee can now, post-injury, fulfill his/her essential duties.

When requesting information about someone’s medical history, you must base such inquiries on a person’s ability to perform “essential job functions.” Very broad questions into someone’s medical history can lead to legal trouble because other laws prevent such inquiries. Courts have said inquiries would have to be “no broader or more intrusive than necessary” to ensure the employee can safely do his/her job.

A good business practice is to send the medical professional a copy of the employee’s up-to-date job description, which should include the essential functions of the job clearly and objectively. This will help the medical doctor make sound decisions about the employee’s work capacity.

If you are requesting, and essentially requiring, an employee see a medical professional and/or get a medical exam, you are obligated to pay for the employee’s time spent fulfilling that request. That means travel to and from, waiting time, and time spent actually receiving the examination or treatment. In addition, you may also have to foot the bill for the employee’s “out of pocket” expenses, including the cost of the exam.

Drug and Alcohol Testing

Your employee is distracted and inattentive and comes to work looking unkempt, tired, and unprofessional. Attendance has really taken a nose dive. Sometimes, you smell an odor you think could be drugs or alcohol. You immediately think of requiring a drug or alcohol test. As far as you’re concerned, if the employee fails, s/he is fired.

When faced with an issue like this, is the solution as simple as asking the employee to submit to a test and firing if s/he fails? Unfortunately, it is never that black and white.

Here’s a little known fact: the ADA considers some drug and alcohol-related situations to be a disability and therefore protects these people from illegal discrimination. In order to be protected under the law, and as long as the person is not a “current” illegal drug user, the applicant or employee must be addicted to drugs, have a history of addiction, be regarded as being addicted, or be currently in, or have completed, a drug rehabilitation program.

Unlike drug use, alcoholism is always considered a disability; thus, people with past and current alcohol problems (alcoholics) who are able to perform the functions of their job are protected at all times.

Illegal drug use is not considered a disability. Therefore, questions (with the exception of questions related to rehabilitation, addiction, or lawful prescription drug use) and tests for illegal drugs are permissible. “Pre-employment tests” for illegal drugs are often accompanied by a “Conditional Offer of Employment” letter.

Conducting alcohol tests at the pre-hire stage is not allowable. An employer should tread lightly with questions regarding alcohol use since it could result in learning the person has a disability, which is illegal at the pre-offer stage.

Here are the most common scenarios for drug and/or alcohol testing once an employee is hired:

- **Reasonable Suspicion:** This can occur when the employer has specific objective facts and rational inferences about an employee who is suspected of abusing drugs and/or alcohol.
- **Post-Accident:** When an employee is involved in an accident at work, the employer may test for illegal drugs or alcohol if there is reasonable suspicion that drugs or alcohol played a role in the accident.
- **Random:** In this scenario, employees are put on notice they may be subject to a drug test at any time if they are “randomly” selected. There is no particular reason to subject an employee to this type of test except the employee’s name has been pulled out of a hat.

NOTE: Not all states allow the above-referenced drug and alcohol testing.

The first step to implementing a drug testing program is to have a clear policy stating you don’t tolerate illegal drug use and explaining the rules and consequences for violators. If you don’t have a policy, you should not carry out any testing of employees as it can intrude on an employee’s reasonable expectation of privacy and result in liability. Include this policy in employee manuals and handbooks, post it conspicuously, and communicate it clearly with all employees. Also, include a statement on your job applications that applicants may be required to submit to drug and alcohol testing. Apply your policy consistently and keep good documentation.

It is possible the employer will find an individual has a drug or alcohol problem after s/he has been hired, which results in the person having a disability. In that case, the employer has an obligation to “reasonably accommodate” the individual if s/he requires it. “Reasonable accommodation” is anything that will allow the employee to continue performing his/her job and manage the disability appropriately without causing undue hardship on the practice.



Conclusion

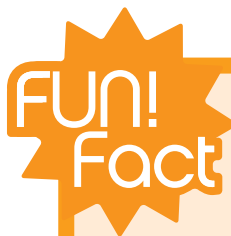
Be sure your requests for medical information, or exams, follow the guidelines listed to adequately support their being legitimate and non-discriminatory. For good measure, document the reasons for the request just in case your intentions are questioned at a later date.

More and more protections are being afforded to employees relative to drug and alcohol testing, including protection under the American's with Disabilities Act. As a result, drug and alcohol testing is a legal minefield waiting to explode on unsuspecting employers. Caution is an absolute must, as is seeking counsel from a professional before initiating testing and/or taking any adverse action against an employee.



Rebecca Boartfield is an HR Compliance Consultant for Bent Ericksen & Associates. For more than thirty years, the company has been a leading authority in human resources and personnel issues, helping dentists successfully deal with the ever-changing and complex labor laws.

FMI: For a copy of our Conditional Offer of Employment Letter-Form #107A, a sample drug policy statement, a complimentary copy of the company's quarterly newsletter and/or to learn more, call 800-679-2760 or www.bentericksen.com.



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Quote-Worthy

“ The secret of getting ahead is getting started. ”

— Mark Twain