Wade McGuffey with Goodman, McGuffey, Lindsey, and Johnson assisted with the section on the post-offer health questionnaire. We discussed job descriptions earlier in the chapter. The recommended best practice is to have a written job description (including the PDA) at the pre-employment stage of hiring. If the job is offered, the appropriate screening should take place and the employee should be given a post-offer health questionnaire.

I understand that there is a huge explosion of litigation related to employment practices. But I strongly recommend using the Post-Offer Health Questionnaire. I have been using the same post-offer health questionnaire for about eighteen years and it is actively in use by thousands of employers. I do not have any knowledge that the form has ever resulted in an EEOC action. Your broker will more than likely have a form that they can provide for you. Please remember you should consult your legal counsel *before* you implement or utilize any form, policy, or procedure.

Below is some guidance from Wade on how to properly use the form.

Utilizing a Health History Questionnaire

(You need to check state-specific guidelines to see if you can utilize the form in states other than Georgia.)

The use of health history questionnaires and medical examinations in the workplace may be appropriate; however, an employer needs to be careful when asking prospective employees and current employees about their medical history. Medical information regarding a prospective employee or current employee's medical history must be obtained in compliance with the standards outlined by the EEOC and the Americans with Disabilities Act.

The EEOC does not provide general guidance on all workers' compensation matters. The workers' compensation laws in each state are different and may have different applications and interactions with federal law. The ADA is federal law and would govern in the case of a conflict. In many states, there is not a conflict between the Workers' Compensation Act and the ADA. It is clear that an employer can make a job offer to a prospective employee contingent upon completion of a health history questionnaire, and the employer's motives for doing so cannot be questioned so long as the employer requires every new employee in the same job category to complete the health history questionnaire.

Directing current employees to complete a medical health history questionnaire is more problematic. The EEOC does not give any specific guidance on requiring current employees to complete a medical health history questionnaire. Requiring current employees to complete a health history questionnaire should be done only when the inquiry is job-related and necessary for the business. Of course, any health or medical information obtained from an employee or prospective employee must be maintained on separate forms, in a separate medical file, and must be treated as a confidential medical record. With the above in mind, below are some guidelines for using health history questionnaires and medical examinations for each type of employee.

New Employees

The law is clear and undisputed that a health history questionnaire can be required of all new employees once a job offer has been made. "A covered entity may require medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his/her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees of the same job category are subjected to such an examination (and/or inquiry) regardless of disability."[1] "Medical examinations conducted in accordance with this section do not have to be job-related and consistent with business necessity."[2]

Under federal law, therefore, while a medical history questionnaire may not be required to be completed pre-employment, any offer of employment may be conditioned upon the completion of such a questionnaire. The EEOC has made it clear that the ADA does not require an employer to justify its requirement that each new employee complete a health history questionnaire. The ADA does require, however, that any information obtained from the post-offer health history questionnaire be used only in compliance with the ADA. An employer may not refuse to hire or revoke the offer of employment based upon information obtained from a post-offer medical examination or inquiry unless the reason for not hiring the individual is job related and necessary for the business. In order to show that the reason for not hiring the individual is job-related and necessary for the business, the employer must show that no reasonable accommodation was available to enable the individual to perform the essential functions of the job or that any accommodation would impose an undue hardship on the employer.[3]

The ADA also requires that any information regarding a medical condition or history that is collected be maintained on separate forms, in a separate medical file, and be treated as a confidential medical record.[4] Someone with hiring authority, of course, must review the medical information, but solely for the purpose of determining whether further inquiries should be made, and to determine whether reasonable accommodation should be considered.

For example in Georgia, because it is undisputed that a health history questionnaire can be required of any new employee post-offer, every job offer in Georgia should be contingent upon the completion of a health history questionnaire.

Current Employees

After a person starts work, a medical examination or inquiry must be job-related and necessary for the business.[5] It is clear that disability related questions, medical examinations, or health

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[1] 29 CFR §1630.14(b)

[2] 29 CFR §1630.14(b)(3)

[3] A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act, §6.1 (1992).

[4] 29 CFR §1630.14(b)(1)

[5] 29 CFR §1630.14(c)

history questionnaires are appropriate when an employee seeks to return to work following an injury.[6]

The ADA allows medical monitoring to meet standards established by federal, state, or local laws.[7] The ADA does not overrule state or local laws, except when there is a conflict. "This provision also permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring is required by medical standards or requirements established by federal, state or local laws that are consistent with the ADA."[8]

If an employer has questions about a current employee's ability to return to work following a work injury, a fit for duty exam can be scheduled, but must comply with the ADA. Using it solely to obtain knowledge about the employee's ability to return to work at a suitable job in compliance with the Workers' Compensation Act certainly can be both job-related and serves a legitimate business purpose. As with new employees, any health or medical information from a current employee must also be maintained on separate forms, in a separate medical file, and must be treated as confidential medical records.

Testing Applicants

The ADA does not restrict an employer's right to establish job qualifications. An employer may establish physical or mental qualifications necessary to perform the job. Standards that are intended to exclude an entire class of individuals with disabilities, however, are prohibited. Standards that measure a physical or mental ability needed to perform a job are allowed. A physical agility test to determine physical qualifications necessary for certain jobs prior to making a job offer are allowable if they are in fact simply an agility test and not a medical examination. An agility test, however, may not involve a medical examination or diagnosis by a physician and may not require the revealing of any medical or health history other than to ask whether the person can safely perform the test.[9]

An employer may not, however, use qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disability. Any such standard, test, or criteria must be shown to be job related and consistent with business necessity.[10]

Risk Management Considerations

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[6] EEOC Enforcement Guidance: Workers' Compensation and the ADA (1996)

[7] 29 CFR §1630, *Appendix-Interpretative Guidance on Title I on the Americans with Disabilities Act*

[8] 29 CRF, *Appendix to Part 1630 - Interpretative Guidance on Title I of the Americans with Disabilities Act*, §1630.14(c)

[9] EEOC Technical Assistance Manual, Section 4.4

[10] 29 CFR §1630.10

It is important to have the form in English and Spanish. Also, if the employee cannot read**,** someone needs to verbally explain the form, sign that they attest that the form was explained, and the employee understood the purpose of the form. We will talk about claims action plans later in the book. The Post-Offer Health Questionnaire should be reviewed on every claim. If the employee falsified the questionnaire and that becomes relevant to the work comp claim, your Insurance Carrier or TPA may be able to deny benefits. Please remember to send a copy to your adjuster. Adjusters typically have a narrow time frame (many states is twenty-one days) to accept or deny a claim. So getting them a copy of the questionnaire timely is crucial. We will talk more about this in P4 Post claims management. As with any health information, the Post-Offer Health Questionnaire needs to be kept in a separate file from the employee application.