

Handle with care: Pre-employment screening

Many employers are finding that the increasingly common practice of screening job applicants can be a double-edged sword, writes Richard Thompson

Screening usually provides information that allows the employer to make a 'good hire' while discharging its duty of care to current and future employees and the public at large. However, a downside often arises – in the form of discrimination claims – when an employer decides not to offer someone employment on the basis of their pre-employment screening results.

For employers, the danger in pre-employment screening lies in how the screening is conducted and what they do with the information collected. It is therefore essential that testing procedures be fair, consistent, non-discriminatory and strictly related to the job.

The most common types of pre-employment screening, and the inherent legal risks they create, are outlined below.

Medical checks

An employer cannot refuse to employ a person whose medical examination discloses a disability/impairment that has no bearing on their ability to do the job. In specifying the reasonable requirements of a particular job, employers should consider the inherent requirements of the task, namely those that are essential to the position rather than merely ones it may wish to impose.

There are a number of features of a non-discriminatory pre-employment medical test:

- It relates specifically to the reasonable requirements of the job.
- The specific physical capacities required for the job are accurately identified and are reasonable in all the circumstances.
- Reasonable ways of accommodating people with disabilities or impairments have been considered.
- Any facilities or services reasonably required by applicants with disabilities/impairments are provided.
- Any assessment of the person's ability to perform the inherent requirements of the job is made in conjunction with these facilities or services.
- The test only assesses current health status and does not attempt to predict any future deterioration unless the employer can demonstrate that it is reasonable to do so.

Discrimination is not unlawful under state legislation where it is reasonably necessary to protect the health, safety or property of any person including the person discriminated against. Federal anti-discrimination legislation contains a similar provision but only with respect to infectious diseases. However, it may be that an "inherent requirement" of the job is that the employee not pose a significant risk to the health and safety of other people. "Reasonably necessary" is a strict test which implies that all other practical measures to protect health, safety and property have been considered as an alternative

to the discrimination. Occupational health and safety arguments should not be used as an excuse to screen out workers when, in reality, there is no objective risk to health and safety.

Reducing pre-employment screening exposure

Further steps employers can take to reduce the possibility they are discriminating with their pre-employment medical tests, include removing any blanket employment policy concerning disabilities unless they can be justified as reasonable in all the circumstances, and choosing an **appropriately experienced doctor wherever possible (not all medical practitioners are experienced in conducting non-discriminatory pre-employment medical tests)**.

Additionally, **ensure that the doctor conducting the pre-employment medical understands the genuine and reasonable job requirements and the capacities required to perform them.**

Employers should understand that they may be liable for medical tests that are conducted in a discriminatory manner and for subsequent misuse of any discriminatory information that is obtained from such tests.

Ensure that applicants with disabilities/impairments are tested using any service or facility which they would normally use to perform the essentials of the job. For example, if an applicant uses a hearing aid or takes medication, be sure the applicant uses the aid or takes their medication during the assessment.

Remember that only abilities relating to the key duties of the job should form part of the assessment, and ensure that medical tests are not used to screen out applicants with certain past injuries or disabilities or those who have a family history of certain illness or disabilities.

Other steps employer can take include:

- ensuring that medical tests are not used to screen out applicants with previous or current workers' compensation claims.
- remembering that they may be obliged to modify the job, where reasonable, to accommodate people with a disability.
- keeping all medical records confidential.

Genetic screening

This involves the genetic testing of job applicants to exclude "high risk" individuals from the workforce. The testing may take the form of susceptibility screening to identify whether an individual who is currently asymptomatic has a gene or genes that increase the likelihood that he or she will develop a disorder as a result of the workplace environment. Alternatively, it may involve screening for genes or disorders that are unrelated to the workplace but which nevertheless render the individual undesirable to the employer.

There is currently little or no law regulating the ability of employers to request genetic information from employees, or even to require employees to undergo genetic testing. However, the Australian Law

Reform Commission recently tabled a report (DP 66) recommending that employers should only be able to collect and use genetic information on job applicants or employees where it is reasonably necessary and relevant within the terms of anti-discrimination and occupational health and safety legislation.

The report raised several concerns about the existing legal framework. It outlined that it is inappropriate to use predictive genetic information to assess a person's current or future ability to perform the requirements, or to deny a person employment on that basis. To permit such practices to go unrestrained carries the danger of creating a "genetic underclass" of people who are currently fit but are seen as a possible risk of developing genetic conditions in the future. It should be remembered that a genetic predisposition is not the same thing as a genetic disorder. Most people with susceptibilities never develop the disorder. A further concern raised by the report is the need for independent oversight to ensure that employers interpret and apply genetic test results and information accurately.

The report also recommends that employers be prohibited from requesting genetic information from employees except where they can demonstrate that the information is reasonably necessary for a purpose that does not involve unlawful discrimination. (For more information on genetic testing in the workplace, see issue 48 of *Human Resources* magazine.)

Reasons for leaving previous employment

Employers should ask each prospective worker why he or she left their previous job and should document the response. This will minimise the likelihood of facts being disputed if the applicant subsequently mounts a discrimination claim.

In a recent Australian decision (*Nazir Ahmed v Department of Immigration and Multicultural Affairs*), the Full Bench of the Industrial Relations Commission made it clear that workers (and, by implication, job applicants) are obliged to tell their employers about previous misconduct.

Criminal record checks

Using the information gained from criminal record checks can be a minefield for employers. This is particularly so given the disparity between the law across various Australian jurisdictions. It is generally prudent for employers not to ask prospective employees about any "irrelevant" criminal record they may have.

It is clear from the above that although pre-employment screening has a worthwhile role to play, it also exposes employers to potential risks. These risks need to be understood and managed if an employer is to minimise the likelihood of a discrimination claim.

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