

Employee Testing: What to Avoid

by Susan Boyd, J.D.

Recent studies show that 50 to 70% of all civil cases filed in federal court today involve employment law! This article is designed to help keep you and your business from joining those statistics. This article is not intended to replace the legal advice you might seek from your attorney, but to "red flag" the issues you might want to address with him or her.

Drug Testing: If you intend to perform drug testing, include in your job application a statement in which the prospective employee agrees to be tested. Generally, you have the right to test applicants and employees for illegal drugs if:

- you give the applicant notice that drug testing is a condition of employment (put this in writing on your job application),
- you have already offered the applicant the job (in other words, you may not drug test ALL applicants; once you have decided to offer a particular applicant a job, you may make him a job offer **CONDITIONAL** upon his taking and passing a drug test).

Why can't you drug test all applicants, and use the results to help determine to whom to make an offer of employment? The practical reason is that it would cost too much; the legal reason is that prior to a drug test, the person is asked what prescription drugs he's taking in order to rule out false positives. Because certain prescriptions are taken by people with certain disabilities, if you ask about prescription drugs as part of a drug test **BEFORE** you make an offer of employment, you look like you're screening for disabilities, which is discriminatory!

- you similarly test everyone to whom you offer the same job (You'll be guilty of discrimination if you only drug test the white applicants and not the Hispanics who are hired for the same position.), and you use state-certified labs to conduct the testing.

You might be surprised to know that former drug addicts are protected from discriminatory employment treatment by the Americans With Disabilities Act (ADA). Past drug addiction is considered a disability. IF the applicant or current employee no longer uses drugs AND is currently receiving treatment for addiction OR has been success fully rehabilitated, you may not use the fact of his former addiction in any employment decision, **UNLESS** you can demonstrate that the applicant/employee is a threat to workplace health or safety. To do this, you would have to show that it is very likely that the individual will resume illegal drug use AND that it is very likely that he/she will substantially harm himself/herself or others, the risk of which you cannot prevent through reasonable accommodation.

Medical Exams: You may require that a job applicant take a medical exam IF the exam tests for health issues that are **JOB-RELATED** and the task for which you are having him physically tested is justified by business necessity (essential to the job for which the applicant is being tested). Like drug testing, you cannot require the medical exam **UNTIL** you make the job offer. In other words, you don't put your whole pool of applicants through a medical exam; you interview and decide whom you want to hire, and then make the offer of employment **CONTINGENT** upon the

applicant passing a medical exam. If you require a medical exam prior to the job offer, you're violating the ADA.

IF you conduct a medical exam (most employers don't require one), the ADA requires you to keep the applicant/ employee's medical file SEPARATE from his personnel file. Many of your employees have access to personnel records and files, while only the following should be given access to medical files: Government officials who are verifying that you are in compliance with the ADA, emergency medical personnel called to treat the employee, and the employee's supervisor, IF the employee's medical condition requires special accommodation in order to perform his job.

The doctor who conducts the medical exam for you is free to ask anything about the employee's health. The employee can speak with complete confidentiality because the doctor cannot relay to you what he/she learns during the exam, except to say that an employee: is able to work, is able to work with restrictions/accommodations, or is not able to work.

You may be wondering if you can require that an existing employee take a medical exam. You can't, UNLESS you can demonstrate that the employee poses a significant threat to the health and/or safety of your workplace. Add to that, some courts have held that if you think that the employee is suicidal or homicidal; you have the duty to REQUIRE a psychological exam and to warn your other employees of potential danger.

AIDS/HIV Testing: Like drug testing and medical exams, the ADA prevents you from testing applicants for AIDS or HIV-positive results BEFORE making a job offer.

You can make an offer conditional upon this test, but if you do so, you will have to test everyone you hire for that particular job. (In other words, you can't single out an individual or a specific group for testing.) Further, you will have to justify requiring the test by demonstrating that it determines whether the applicant can perform the job. Since there are only a few jobs in which an HIV-positive applicant would pose a significant risk of transmission, it's difficult for employers to justify requiring an AIDS test.

Polygraph Testing: The Federal Employee Polygraph Protection Act of 1988 prohibits the use of a polygraph test during hiring, and permits its use in very few other employment situations. You may test existing employees only under the following conditions:

there has been a workplace theft or other specific incident (In other words, you can't just decide one day to test everyone and ask if they've stolen anything from you; you can only test if, indeed, a theft has occurred and you are investigating it.); you can only test employees who had reasonable access to the stolen property; you can only test employees of whom you are reasonably suspicious; you must give the employees who are to be tested written notice regarding the reason for the investigation and why they are suspects.

Employers have tried to get around the polygraph act by having prospective employees sign a statement on the employment application waiving their rights under the law or by offering financial rewards if their employees will take a

polygraph test under conditions other than those outlined above. This is illegal; employees may not waive their rights, so don't ask them to do so.

Personality Tests: Since employers lost the polygraph test for use in hiring decisions, many started relying on so-called personality tests. These tests are believed, by those who use them, to demonstrate honesty and other personal attributes of the applicant.

In recent years, a number of lawsuits by applicants have pointed to abuses in which the test questions were not sufficiently job-related, and therefore discriminatory. One of those cases, *Soroka v. Dayton Hudson*, ended in a \$2 million settlement and five-year ban on testing after a class action suit was brought by individuals who had applied for work as security guards. The plaintiff applicants had been given a test involving over 700 true/false statements, some of which referred to sex and religion, as follows:

- I am very strongly attracted by members of my own sex.
- I have no patience with people who believe there is only one true religion.
- A minister can cure disease by praying and putting his hand on your head.
- I have never indulged in unusual sex practices.
- I believe my sins are unpardonable.
- I wish I were not bothered by thoughts about sex.
- I believe in the second coming of Christ.
- I have had no difficulty starting or holding my urine.
- I feel sure there is only one true religion.
- Many of my dreams are about sex matters.
- My soul sometimes leaves my body.
- I go to church almost every week.
- My sex life is satisfactory.
- I have often wished I were a girl (for men).
- I like to talk about sex.
- I believe that there is a Devil and a Hell in afterlife.

Some states have adopted laws against psychological testing, except under specific circumstances. The bottom line is: know what your state laws are, and make sure that, if you use a psychological test, the test questions are job-related and non-discriminatory.

This article originally appeared in the Fall 2003 (Vol. 7, Issue 3) Family-Owned Business Institute newsletter, Heritage. Susan Boyd is an Applied Assistant Professor of Business Law at the University of Tulsa and the Director of the Genave King Rogers Business Law Center. Email her at: susan-boyd@utulsa.edu