

The Intersection of Work Comp, ADA, and FMLA

with Don Phin

Meet the Expert – Don Phin, Esq.

- Attorney since 1983
- Developed HR That Works, sold to ThinkHR in 2014
- Editor EPLiC Journal
- Author, presenter and coach
- Works with many work comp brokers



LESSON OVERVIEW

01

Don't Hire a WC Claim

Work comp premiums are expensive. Many times employers hire a work comp claim because they don't do pre-hire physicals.

04

Follow the Process

Pre-hire physicals can only be done after a conditional job offer.

02

Pre-Hire Physicals Involve the Law

It is not a game for amateurs! This involves work comp law, the ADA, FMLA and more.

05

Are they Fit for Duty?

Do they have a substantial limitation on performing an essential job function?

03

Work with Medical Experts

Occupational medicine physicians are key partners in the pre-hire fit for duty exam process.

06

Is an Accommodation Available?

If there is a limitation then you must undergo an ADA accommodation analysis and dialogue.

Don't Hire a WC Claim

It's expensive to hire a work comp claim!

- . Work comp modifier (MOD) is affected by claims. It is the most expensive money you can borrow.
- . Incidental impact is at least 1:1
- . Impacts on productivity.
- . You have a legal obligation to create a safe work environment. No right to a job if it will cause risk to employee or others.
- . A quick story...



Pre-Hire Physicals Involve the Law

Numerous laws are implicated

- . Known as the "Bermuda Triangle"
- . Work comp retaliation and discrimination
- . Americans with Disabilities Act
- . Family and Medical Leave Acts
- . HIPAA and other privacy laws



Work with Medical Experts

This is a specialty practice

- . There are specialists who do pre-hire fit for duty exams.
- . They are often certified as Occupational Medicine Physicians by the American College of Occupational and Environmental Medicine.
- . Their offices are equipped to do the exams
- . They have a familiarity with the law.



Follow the Process

Take a checklist approach to getting it right

- Let them know there will be a FFD exam, including a drug test. You can do a drug test at any time.
- Make sure you place the physical requirements for essential job functions in the job description
- You can only do FFD after making a conditional job offer.
- Now you can ask questions...but it's much better to send them to the Occ Med right away.
- As part of taking a history: have you ever been injured on the job and have you ever filed a WC claim?
- Dr. to report on limitations and prognosis.



Are They Fit for Duty?

Is there a limitation?

- Currently have one, record of one, regarded as having one. Mental or physical.
- Substantial limitation (difficult in CA) on essential work activity:
- Can't lift more than 15 lbs.
- Can't type for more than 4 hours
- Can't sit or stand for more than 2 hours
- Can't breathe "dirty air"
- Can't work at heights
- Limited vision
- Mental disabilities that limit concentration, productivity or emotional responses.
- Alcoholics are protected unless use adversely affects performance or other workplace rules.
- Drug addicts are protected only if rehabilitated or getting treatment and not currently using.

Is an Accommodation Available?

An accommodation dialogue is a must

- Interactive dialogue
- Review the essential job functions
- What does the job description say
- Reasonableness vs. undue hardship
- Equipment, scheduling, restructure
- Get professional help!
- Job Accommodation Network



Accommodation Examples

Explore the possibilities

- . Lifting mechanism
- . Limited hours
- . Telecommuting
- . Relocation within building
- . Work modification
- . Change lighting, ventilation, perfumes
- . More on Job Accommodation Network



FMLA (Family and Medical Leave Act)

- . 50 Employees in 75 mi.
- . 1250 Hours
- . 12 weeks job protected leave
- . Form driven process
- . Must use vacation, sick
- . Non-paid
- . ADA applies afterwards?



Questions?

I would love to hear from you! Please send your questions or comments to:

Email: don@donphin.com
Phone: 619-852-4580
Website: www.donphin.com
LinkedIn: <https://www.linkedin.com/in/donphin>
Twitter: <https://twitter.com/donphin12>

Additional resources:
www.acoem.org
www.ghrr.com
<https://askjan.org/>

CONDITIONAL OFFER OF EMPLOYMENT

Applicant: _____

Position: _____ Wage/Salary: _____

Tentative Start Date: _____ Employer Representative: _____

Congratulations on being offered the above position with our company conditioned on being "fit for duty." The next step in the hiring process is for you to successfully complete the required drug test, medical questionnaire, and physical examination scheduled on your behalf at the following Occupational Health Clinic: [Lakeside Occupational Medical Center, P.A.]

Clinic: _____ Location: _____

Date: _____ Time: _____

Phone: _____

At the Occupational Health Clinic, you will complete an extensive medical questionnaire, undergo a drug test, and physical examination. The clinic will have a copy of your job description, which we shared with you during the interview process. This medical exam is to determine whether you can safely and efficiently perform the job duties required without limitations. If you have a disability, as defined by the Americans with Disabilities Act, we will then see if we can reasonably accommodate you to do the job safely and efficiently. We will reasonably accommodate any physical or mental disability you have unless it should create an undue hardship for the company. This Conditional Offer of Employment may be withdrawn prior to the effective date of your employment if, based on the outcome of your physical exam and/or drug test and/or medical information, as well as any discussion surrounding any job accommodations, if it is indicated you are unable to safely or efficiently perform the job duties for which you are being considered.

1. Do you know of any physical or mental limitations you have that could affect or interfere with your ability to safely or effectively perform your job duties? Yes No

If yes, please describe: _____

2. Have you ever been injured on the job or filed a workers' compensation claim? Yes No

If yes, please describe: _____

By signing below, I acknowledge that I have read, understand, and agree to the above. I understand that any misrepresentation in the hiring process, including related to my medical condition, will result in not being hired, or terminated post-hire. I declare that the information I have provided above is true and correct pursuant to the penalty of perjuries of the laws of this state.

In order to comply with the Genetic Information Nondiscrimination Act of 2008 (GINA) we are asking that you not provide any genetic information when responding to this request for medical information, including an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus or embryo unless the written request specifically requests the information and specifically mentions GINA.

Applicant Signature

Date