



Use of Workers' Compensation Records: Extreme Caution Advised

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At the same time, the Federal Americans with Disabilities Act (ADA), as well as numerous state laws, seek to protect job seekers from discrimination in hiring as a result of filing valid claims. The ADA also seeks to prevent the discrimination against workers who, although suffering from a disability, are nevertheless able to perform essential job functions as long as there are reasonable accommodations.

The bottom line is that an employer cannot request workers' compensation records in order to have a policy of not hiring anyone who has made a claim. It is discriminatory to penalize a person who has exercised a lawful right in a lawful way and filed a valid claim.

Employers are well-advised to contact a labor lawyer before seeking to obtain workers' compensation records. A labor law expert can assist an employer in preparing company policies, job descriptions, and forms and procedures necessary to comply with the ADA, such as a conditional job offer and medical review form.

The following brief summary describes the major points involved in obtaining and using workers' compensation records.

1. There are wide variations between the states in the availability of these records. In a few states, the records are not available to the public, period. In other states, it can take two to three weeks to obtain a record. In some states, there are special requirements before obtaining the records, such as a notarized release. Because they are familiar with state regulations, background screening firms can assist employers in obtaining these records.

2. Under the ADA, an employer may not inquire about an applicant's medical condition or past workers' compensation claims until a conditional job offer has been extended. A conditional job offer means that a person had been made an offer of employment, subject to certain conditions such as a job-related medical review.

3. Any questioning in a job interview should be restricted to whether the person can perform the essential job functions with, or without, reasonable accommodation. That is another good reason to have well-written job descriptions so it is clear in an interview exactly what the job entails.

4. If a candidate discloses a disability, then there should not be any follow-up. Questioning should be limited to whether that applicant can perform the job.

5. If a history of filing workers' compensation claims is found, then the offer may only be rescinded under very limited circumstances, such as:

- The applicant has lied about a workers' compensation history or medical condition, usually during a medical examination;
- The applicant has a history of filing false claims;
- The past claims demonstrate the applicant is a safety or health threat to himself or others in the opinion of a medical expert;
- The past claims demonstrate the applicant is unable to perform the essential functions of the job even with a reasonable accommodation.

6. If the applicant has lied on a medical questionnaire, or to a doctor performing a pre-employment physical, then the employer may be justified in rescinding the job offer based upon dishonesty. If an applicant has a history of multiple claims that have been denied, then an employer may be justified in rescinding the offer based upon a history of dishonest conduct. The reason is based upon an inference of fraud, not disability. Some firms contend that a workers' compensation record may also be used to determine the truthfulness of information on a job application on the theory that an applicant may try to hide a past employer where a claim was filed. However, even with this justification, if used, the best practice may be to review the records post-hire only.

What does all this mean? Before attempting to utilize a search for workers' compensation claims as part of a screening program, an employer is well-advised to consult with their attorney.