

## **Pre-Employment Screening for Physical Abilities under the Americans with Disabilities Act**

Many jobs within the trucking industry, especially driving jobs, are physically demanding jobs that require heavy lifting, hauling, or other physical strengths. Trucking companies may want to screen potential employees before hiring to find candidates that are capable of performing the physical requirements of the job. Pre-employment testing of job applicants for physical abilities may help to screen out any candidates that do not meet the physical requirements of the job. It may also help to prevent future work injuries and avoid potential workers' compensation claims that occurred because the employee could not perform the essential physical tasks of the job. Is pre-employment testing for physical abilities permitted under the Americans with Disabilities Act (ADA)?

The ADA gives protection to disabled workers so that they are not excluded from employment due to their disability. Title I of the ADA applies to employers with over 15 employees. 42 U.S.C. § 12111(5). It mandates that an employer not discriminate against a qualified individual with a disability. 42 U.S.C. § 12111; § 12112. A "qualified individual" is one who, with or without a reasonable accommodation, can perform the essential functions of the job." 42 U.S.C. § 12111(8). The same standard applies under the Pennsylvania Human Resources Act (PHRA) as well.

Pre-employment screening takes place in the job interview or application process before an offer of employment is made. Under the ADA, an employer cannot require a job applicant to take a medical examination until after it makes an offer to the applicant. 42 U.S.C. § 12112(d)(2). During the pre-employment stage, the employer also cannot ask the applicant questions regarding whether he has a disability, but may ask him whether he can perform all of the requirements of the job. *Id.*; 29 CFR 1630.14(a).

The ADA only prohibits employment tests that screen out potential candidates on the basis of a disability. 42 U.S.C. § 12112(b)(6). The test can screen out persons with disabilities as long as it tests the essential functions of the job. *Id.* "Essential functions" are the "fundamental duties to be performed in the position in question, but not functions that are merely 'marginal.'" 29 CFR 1630.2(n)(1). The tests are allowed only if they are job related and consistent with business necessity. 42 U.S.C. § 12112(b)(6).

An employer can, however, ask the candidate about his ability to perform specific job functions. 29 CFR 1630.14(a). An employer may describe the physical requirements of the job and ask the applicant whether he can satisfy those requirements. *Id.* For example, if the job requires that the employee be able to lift 50 pounds, the employer may ask the applicant if he can satisfy that requirement.

An employer may also ask a job applicant to describe or demonstrate how he would perform certain job tasks, as long as this is asked of all applicants for the job. *Id.*; 42 U.S.C. § 12112(b). However, if the employer believes that the applicant cannot perform a job function because of a known disability, the employer may ask that particular applicant to describe or demonstrate how he would perform that job task. EEOC Notice No. 915.002. at 4. There is a known disability when it is obvious or the applicant has voluntarily disclosed his disability. *Id.* Once a job offer is made to the prospective employee then the employer can conduct a medical examination and can ask disability-related questions, as long as it does so for all candidates entering the same job category. 42 U.S.C. § 12112(d)(3).

During the hiring process, an employer can require that applicants take physical agility or physical fitness tests. EEOC Notice No. 915.002. at 10. These tests, where “an applicant demonstrates his ability to perform actual or simulated job tasks,” are not considered medical examinations under the ADA. Id. For example, an employer may ask an applicant to perform a lifting test, which measures the applicant’s performance in lifting an amount of weight.

However, the employer cannot measure the applicant’s biological or physiological responses to the physical fitness or physical agility test. Id. at 11. This means that the employer cannot take the applicant’s blood pressure or pulse after he completes the physical test. Also, the test cannot be conducted by a medical professional. Id. at 9.

Any physical fitness or physical agility test that is given to applicants must test the essential functions of the job. 42 U.S.C. § 12112(b)(6). A job test that relates to an essential function cannot be used to exclude a person with a disability if he can pass the test with a reasonable accommodation. 42 U.S.C. § 12111(8). An employee must request a reasonable accommodation before the employer is obligated to provide one. Livingston, 388 Fed. Appx. at 741. Physical tests are allowed as long as they are not discriminatory.

As long as the tests are based on requirements that test the essential functions of the job, then the employer can refuse employment to anyone that is not physically capable of performing the job. 42 U.S.C. § 12112(b). The employer does not have to hire any potential applicants that are not physically capable of performing the essential functions of the job. 42 U.S.C. § 12111(8). For example, if an employee is required to lift at least 50 pounds as part of the job description and daily duties and the job applicant fails the lifting test, then the employer does not have to hire him.

The employer may still have to hire the applicant if he can perform the essential functions of the job with a reasonable accommodation. 42 U.S.C. § 12111(8). An employer must give an employee a reasonable accommodation that will allow him to perform the essential functions of the job unless that would result in an undue hardship on the operation of the business. 29 CFR 1630.9(a). “Undue hardship” is a significant difficulty or expense. 42 U.S.C. § 12111(10).

An employer also does not have to hire an individual if there is a direct threat to the safety of others. 42 U.S.C. §12113(b). A direct threat exists if there is a “significant risk of substantial harm to . . . others that cannot be eliminated or reduced by a reasonable accommodation. 29 CFR 1630.2(r). These factors should be looked at in the determination: “(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.” Id.

Here are some tips for implementing a pre-employment screening test for physical abilities within the parameters of the ADA:

- There should be no questions about disabilities asked as part of the pre-employment screening. These questions can be asked once an offer is made.
- The test should be for physical abilities only. A doctor should not administer the test and there should be no testing for physiological responses.
- Give the same test to all applicants for the same position. This eliminates any potential discrimination allegations.
- Any physical fitness or physical agility test only tests for items that are part of the essential functions of the job.
- Include the essential job functions in the job description so that the applicants are aware of them beforehand and know the requirements of the job before applying.

- Even though the ADA does not require job descriptions, they are evidence of the essential functions of the job. Keep job descriptions up-to-date and differentiate between essential and marginal job duties.