

## YOU MAKE THE CALL



*Presented below is a hypothetical fact pattern based on a compilation of questions related to hiring issues received by Associated Industries' In-house Counsel. The information below is not a substitution for competent legal advice, nor does it create an attorney-client relationship between Associated Industries' In-house Counsel and any readers or recipients of this information. Additionally, this material reflects the current state of the law at the time of development. Where specific legal issues arise, recipients or readers should seek private legal counsel.*

### THE DILEMMA

An employer fabricating company has recently entered into a contract to produce sign posts for new road construction funded by federal stimulus programs. In order to receive these contracted funds, however, the employer must begin production by February 1st. This requires the employer to hire production employees right away. The work is strenuous and involves a significant amount of lifting and the operation of forklifts and heavy machinery. John Doe has interviewed for the position.

Because of the physical nature of the position and number of previous workers' compensation claims, the HR manager has inquired whether John has any prior L & I claims.

She thinks John will be a good fit and has offered him the position, provided he undergoes and passes the company mandated pre-employment medical exam and drug test.

### THE ISSUES

Under state and federal law, an employer is permitted to inquire whether an applicant is able to perform the essential functions of the job for which the applicant is applying.

However, an employer is not permitted to inquire about the nature, severity or extent of a disability or whether the applicant requires reasonable accommodation prior to a conditional job offer.

Furthermore, employers are prohibited by state and federal regulations from inquiring about an applicant's prior workers' compensation claims, including whether an applicant has applied for and/or received L & I benefits.

Once an employment offer is extended to the applicant and before the applicant begins work, the employer may require a medical examination and make the offer of employment conditional on the results of the exam, so long as all employees are subject to such an inquiry prior to their employment and the information obtained is maintained in a separate, confidential file.

With the passage of the Genetic Information Nondiscrimination Act (GINA) in 2009, the employer must now ensure that any questions regarding the applicant's medical history and/or applicant's family medical history are removed from the medical examination forms.

The medical exam and inquiry must focus solely on the applicant's currently ability to perform the essential functions of the job.

Generally, pre-employment testing to detect substance abuse is within the employer's discretion (although there are some situations in which the federal law requires such testing, not applicable here). The Americans with Disabilities Act (ADA) does not permit a "medical examination" until an employer has extended a job offer.

Therefore, *alcohol* testing should never be performed until an offer of employment had been made. *Drug* testing, however, can be undertaken at any time during the application process, so long as it is uniformly applied and required of all applicants at the same stage in the process.

For practical reasons, many employers choose to delay drug testing until a conditional offer of employment is made to minimize testing costs and ensure accurate testing procedures apply.

## THE DILEMMA – PART II

John has successfully completed his pre-employment medical exam. Because the facility that the employer uses to process its drug tests is operating weeks behind schedule, the employer has decided to bring John to work in the interim until the results of his drug test are available.

On his second day on the job, John sustains a back injury while moving some boxes in the warehouse, and has now opened an L & I claim.

A week later, John's drug test comes back "positive" for prohibited substances.

What can and should the employer do?

**Stay tuned for further discussion next month.....**

*– Ann Allen, Associated Industries Chief In-house Counsel  
and Angela Hayes, Associated Industries In-house Counsel*