ALFA INTERNATIONAL
2015 WORKERS’ COMPENSATION
PRACTICE GROUP SEMINAR

WORKERS’ COMPENSATION TOOLS: PRE-EMPLOYMENT
INVESTIGATION, FITNESS FOR DUTY AND RETURN TO WORK TESTING

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Use and Abuse of Pre-employment, Fitness for Duty and Return to Work Testing in Workers’ Compensation

There are many testing tools available to employers and in the workers’ compensation practitioners’ tool kit, including pre-employment, fitness for duty and return to work testing. These instruments are becoming increasingly expensive and sophisticated, and we will look at what they are, how they can be used in the workplace, and how to minimize the risks that come with their use.

Why are we discussing employment testing in a workers’ compensation seminar? The first question an employer will ask when a claim arises from an unwitnessed event is whether the claimed injury is pre-existing. The answer to the question may be found in a comprehensive pre-employment physical examination that documents orthopedic, pulmonary or cardiovascular impairments. But, is such a test legally permissible? Further, may the employer perform psychological evaluations to identify those prone to illness or likely to suffer prolonged periods of temporary disability following minor injury?

The Internet is replete with advertisements for the benefits of testing. One site promises that “Pre-employment testing reduces turnover, increases productivity, and lowers hiring and training costs. It provides objective data on candidates and allows you to make more informed hiring decisions.” Another asserts “skills testing is the most accurate and reliable method to measure the candidate’s skill, knowledge and training enabling your organization to find the perfect fit every time.” One even “provides quantitative data to make your interview and hiring decisions more legally defensible.”

Many Human Resources and Workers’ Compensation managers would like to take advantage of all these benefits. The promise of finding the right physical specimen for the job is attractive for the line manager, the HR generalist and the risk manager. Every workers’ compensation practitioner wishes for a pre-employment x-ray, MRI or range of motion test that provides a pre-existing explanation for a claimed industrial injury. Yet, today’s legal milieu makes these goals illegal in some contexts and extremely risky in others.

The Equal Employment Opportunity Commission introduces its Fact Sheet on Employment Tests with the following statement: “The use of tests and other selection procedures can be a very effective means of determining which applicants or employees are most qualified for a particular job. However, use of these tools can violate the federal anti-discrimination laws if an employer intentionally uses them to discriminate based on race, color, sex, national origin, religion, disability, or age (40 or older). Use of tests and other selection procedures can also violate the federal anti-discrimination laws if they disproportionately exclude people in a particular group by race, sex, or another covered basis, unless the employer can justify the test or procedure under the law.”

This broad statement may actually understate the risk to employers who seek to perform pre-employment testing. Among the federal laws that affect an employer’s use of testing are Title VII of the Civil Rights Act of 1964, The Americans’ With Disabilities Act (ADA), and The Age Discrimination in Employment Act (ADEA). Added to these must be the myriad of state laws.
that expand on the federal regulations or focus on industries particular to that state. Among these are California’s Fair Employment and Housing Act, Tennessee’s Disability Act, or the Colorado Antidiscrimination Act.

The real world experience of employers with testing includes some experiences that might cool the ardor of the most ardent testing advocate. For instance, the EEOC took action against Dial Corporation, asserting that “women were disproportionately rejected for entry-level production jobs because of a strength test. The test had a significant adverse impact on women – prior to the use of the test, 46% of hires were women; after use of the test, only 15% of hires were women.” Dial defended the test by noting that use of the test had resulted in fewer injuries to hired workers. The court upheld the EEOC finding that the test was more difficult than the job required and there were other non-test explanations for the improved injury experience.

In another effort gone awry Daimler Chrysler found itself in opposition to the EEOC from the company’s use of a pre-employment test given hourly unskilled workers. The test required the examinee to read, and the EEOC held that it was potentially discriminatory to those with a learning disability. According to the EEOC, who reached an agreement to resolve the dispute, “The settlement agreement also required that the employer provide a reasonable accommodation on this particular test to each applicant who requested a reader and provided documentation establishing an ADA disability. The accommodation consisted of either a reader for all instructions and all written parts of the test, or an audiotape providing the same information.”

Our panel will explore the questions and ideas of the panel members in dealing with the yin and yang of employment testing. We hope to explain and augment the Best Practices guidelines offered by the EEOC:

1. Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
2. Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used.
3. The test or selection procedure must be job-related and its results appropriate for the employer’s purpose. While a test vendor’s documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under UGESP.
4. If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.
5. To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.
6. Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the
organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.

Testing is used in many other employment settings. Each is accompanied by risks that must be appreciated to be avoided. We will look at the difference between pre-employment testing and post-hire pre-placement testing. We will discuss what is permissible in drug testing with and without an industrial injury. The panel will raise issues with return-to-work testing and the desire for a 100% recovered returnee. Additionally, we will invite the audience to share their success stories and warnings from the use and abuse of testing in the workplace. In the end we hope that our audience will have enough information to able to grade testing in their workplace with a pass or fail.