# UTILIZING RISK MANAGEMENT TOOLS IN YOUR HIRING PRACTICE

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## INTRODUCTION

In the marine industry, it has long been thought that lawsuits filed by vessel crew members are a cost of doing business. However, in the past 10 to 15 years, sophisticated marine operators have substantially improved their loss record associated with employer injury claims. They have done this through improved safety programs and through far more sophisticated hiring practices. This article will address incorporating risk management tools in the application and hiring process as well as the many employment laws which restrict what an employer can do during this process.

## I. Pre-Employment Offer Phase

### A. The Employment Application: What to ask and what not to ask.

The employment application is the starting point for any successful employee/employer relationship. While understandably an employer wants to obtain as much information as possible during the application process, it must be cautious to ensure that the job application complies with ever-changing applicable laws. What information can lawfully be requested on an employment application will vary by where your business is located. While federal laws will always apply, states and municipalities are consistently adding and amending laws which pertain to the application process. For example, although Missouri does not have a law forbidding pay inquiries on employment applications, Kansas City recently passed an ordinance[2] extinguishing a Kansas City employer's right to make such an inquiry. As a good rule of thumb, employers should have their employment applications reviewed by counsel at least annually to ensure they are in compliance with ever changing laws.

Generally speaking, an employment application should not include questions which may elicit a response which would indicate an applicant's protected class, such as race, age, national origin or disability. Although federal and state laws do not directly prohibit an employer from including such questions on an application, the concern is that these inquiries may be used later as evidence of employer's intent to discriminate. Something as innocuous as date of birth may later be used as evidence of age discrimination in a failure to hire case. Common inquiries which could possibly be used later as evidence of intent to discriminate include, but are not limited to:

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[1] This article was prepared by Ron Fox, Margaret Gentzen, and Colter Kennedy of Fox Galvin, LLC. www.foxgalvin.com. Please note that this article is not intended to provide specific legal advice with regard to employment practices. Legal determination about how best to handle employment situations are always fact intensive. In the employment area of law, there are very few principles which do not have exceptions.

[2] Kansas City Ordinance No. 190380, Effective 10/31/19.

- Birthdates. Inquiring as to an applicant's date of birth may be evidence that the employer is using age in the application process. If state law requires a minimum age for employment, then ask the applicant if they are at least the minimum age.

- Previous sick days used in employment. Employers should generally avoid asking questions about an applicant's history of sick leave. Both the Family Medical Leave Act and the Americans with Disabilities Act prohibit discrimination and retaliation against applicants who have utilized their rights under those acts.

- Military discharge information. Questions relevant to work experience and training are permissible, as are inquiries on the dates of service, duties performed and rank at the time of discharge. However, an employer should not ask an applicant why s/he was discharged or request to see discharge papers.

One ongoing "hot topic" in the application process concerns an applicant's disclosure of his or her criminal history.[3] Federal law does not prohibit employers from asking about an applicant's criminal history. However, federal and state anti-discrimination laws do prohibit employers from using criminal history in a discriminatory way. Title VII, for example, prohibits employers from implementing policies or practices which screen individuals based on their criminal history if they significantly disadvantage a protected class and those policies do not help the employer accurately decide if the person is responsible, reliable, or a potentially safe employee.

The focus on an applicant's criminal history comes in two forms: arrests versus convictions. The fact that an individual was arrested is not proof that he or she actually engaged in criminal conduct. Therefore, standing alone, an arrest record may not be used to justify a not hire decision. Excluding an individual based on an arrest is only justified if the conduct is job-related, relatively recent and the applicant actually engaged in the conduct for which s/he was arrested. A conviction alone, in contrast, is usually sufficient to demonstrate that a person did engage in the criminal conduct and, therefore, may be considered as a basis for disqualification from employment.[4]

Over the past decade, there has been a trend at the state and local levels to protect prospective employees from automatic disqualification of employment because of their conviction. This trend is commonly referred to as "Ban the Box Legislation." The ban the box laws in effect vary by state and municipality. The principal purpose of each is to prevent an employer from requesting a prospective employee's criminal history information on an employment application. For example, neither Missouri nor Kentucky has a ban the box law.

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[3] The Equal Employment Opportunity Commission's Guidance documents are a good tool for employers. As to arrest and conviction records, see EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.

[4] The EEOC cautions employers when it comes to disqualifying an individual solely based on conviction. For example, there should be a business need to exclude the person with conviction records from particular jobs. The exclusion can depend on the nature of the job, the nature and seriousness of the offense and the length of time since conviction or incarceration.

While Missouri does not have an applicable law, Kansas City[5] and Columbia[6] do ban criminal history questions until after a job interview or a conditional offer is made. Additionally, the Illinois Human Rights Act specifically prohibits employers from asking on an application or in a job interview about an applicant's arrest record.[7] Illinois prohibits employers with 15 or more employees from inquiring into or considering any criminal records or criminal history in the application process.[8] Covered employers must wait to inquire about criminal history until the employer has determined the applicant is qualified for the position and has either notified the applicant s/he has been selected for an interview or, if there was no interview, a conditional offer of employment has been made.

### B. Reference Checks

Reference checks are an additional tool employers often utilize in securing information about potential employees. A reference check generally involves contacting an applicant's former employers, supervisors, co-workers and educators to verify previous employment, while obtaining information about the applicant's skills, character and knowledge. Surprisingly, according to a 2018 CareerBuilder survey, 75% of human resource managers surveyed uncovered an outright lie or misrepresentation on an applicant's resume or application.[9]

Some employers never respond to reference check requests. For those who do, the general trend is to only provide the applicant's previous job title and dates of employment. While some employers are wary of providing too much information, others are wary of not providing enough. With that said, when performing reference checks it is best practice to first inform the prospective employee, either in a written disclosure on the job application or during the interview, that you will be contacting the references listed and former employers identified on the job application. Additionally, during the interview process you may ask prospective employees what their previous employer is likely to say about them. By having the prospective employee's response in advance of the reference check, you are able to have a more direct starting point with their past employer. By notifying the employee of the reference check and asking them what you, as the prospective employer, are likely to uncover may diminish if not eliminate any misrepresentation during the application process. In the end, if during a reference check you are able to confirm with a previous employer a misrepresentation made by the employee on his/her application, that may be a sufficient basis to deny employment. Including a provision in the employment application which addresses misrepresentation may further minimize risk. One such provision may be, for example:

> You acknowledge that as part of the application process, [insert company name] may contact your previous employer or the references identified. You further acknowledge that any misrepresentation made on this application or during the

[5] Kansas City Ordinance No 180034, effective February 1, 2018.
[6] *See* Columbia, Missouri "Fair Chance Hiring Law," effective December 1, 2014.
[7] 775 ILCS 5/2-103.
[8] 820 ILCS 75/1.
[9] www.careerbuilder.com, "The Truth about Lying on Resumes," August 24, 2018.

interview process (in the event you are selected for an interview) is a legitimate, nonpretextual, nondiscriminatory reason for [company name] to deny your employment.

As the above discussion demonstrates, a cause of action against an employer can ripen even before a prospective employee is hired. Inquiring into employee's medical history, sick days or questions geared towards their protected class raises distinct legal issues. Ensure the questions asked during a reference check are neutral and job-related. [10]

### C. Compliant Background Checks

When making personnel decisions, including hiring, reassignment, promotion or retention, employers may want to consider the background of a prospective employee.[11] Depending upon the position for which the employee is applying, the individual's work history, criminal history, education or medical history, among others, may be relevant. Except for restrictions related to medical inquiries (noted in the section below), generally, it is not illegal for an employer to condition employment on a successful background check.

Despite the legality of background checks, employers are required to comply with various laws when performing them. In particular for this article, an employer must comply with the Fair Credit Reporting Act[12] ("FCRA") when it utilizes a company in the business of compiling background information. The FCRA mandates that an employer take various steps at the following stages of hiring:

At the <u>outset of the employment</u>, if you will be requiring applicants to submit to a background check, the FCRA requires:

1) The employer must provide written notice, in a stand alone document, that it might use the information learned during the background check for decisions related to the employment. This notice cannot be in the employment application. The notice must also seek the applicant's written permission to perform the background check. An applicant's release for the background check is required.

2) If the employer opts to include an "investigative report" in the background check, it must similarly inform the applicant of his or her right to a description of the nature and scope

[10] For additional information on this topic, the Missouri Human Rights Commission's website (or your state's equivalent Human Rights Commission) is a good starting point. *See,* https://labor.mo.gov/mohumanrights/Discrimination/pre_employ_inquiries.

[11] The requirements noted within this paper similarly apply if an employer performs a background check on a current employee. In other words, if an employee applies for a promotion and the employer wants to perform a background check, it must similarly adhere to the various applicable laws, including the Fair Credit Reporting Act, state and federal anti-discrimination laws, among others.

[12] *See* 15 U.S.C. §1681 *et seq.*

of the investigation. An investigative report is based on personal interviews regarding an applicant's lifestyle, personal characteristics and reputation.

3) The employer must certify to the company performing the background check that the employer has (a) notified the applicant of the background check and received their permission to perform the background check; (b) complied with the FCRA requirements; and (c) that it will not discriminate against the applicant, or otherwise misuse information in violation of state law.

Once the background check is completed, it is up to the employer to utilize the information legally (*i.e.*, not discriminatorily) in making employment decisions. In the event the employer opts to not hire an individual based on information learned during the background check, the FCRA places additional notification requirements on the employer:

1) Before taking the adverse employment action, the employer must provide notice to the applicant which includes a copy of the report relied upon in making the decision and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act." By providing this notice, the applicant is given the opportunity to explain any negative information obtained.

2) After taking the adverse employment action, you must tell the applicant orally or in writing:

    a. s/he was rejected because of information contained in the previously provided report;
    b. the name, address and phone number of the company which sold the report;
    c. that the company compiling the report did not making the hiring decision; and
    d. s/he has a right to dispute the accuracy of the report and get an additional report for free within 60 days.

Finally, after the adverse employment decision is made, the Equal Employment Opportunity Commission and the FCRA impose additional requirements. For example, the EEOC requires the employer to maintain any personnel or employment records for one year, whether or not the individual was hired. Once the employer has satisfied these record keeping requirements, the FCRA then requires the employer to properly dispose of the information obtained securely. This requires that any paper documents be shredded and any electronic information be disposed of so it cannot be read or reconstructed.

### D. Drug Testing pursuant to Coast Guard Regulations

A marine employer needs to conduct a pre-employment test on a prospective employee before hiring.[13] This is for all crewmembers, particularly those involved in vessel operations and safety sensitive positions.[14]

The potential hire should read and acknowledge the company's drug and alcohol testing policy before administration of the test. The policy should outline the expectations of employees in conducting drug testing policies for common illegal substances and the actions the employer may take as a consequence of the results. Based on the Coast Guard's minimum recommendations, the policy should cover:

1. That all company personnel, full-time, part-time, year-round, seasonal, or contracted, that meet the definition of a crewmember, are subject to U.S. Coast Guard Drug and Alcohol Testing, in accordance with 46 CFR Parts 4 and 16.2.
2. That any crewmember who tests positive or has a drug test violation will be immediately removed from their safety sensitive duties.
3. Dismissal policy. Nothing in the regulations requires the marine employer to fire a crewmember that tests positive or refuses to test, only that they be removed from their safety sensitive duties. It is up to each individual employer to decide if a positive test or refusal will result in termination. If so, it needs to be stated in the company policy. It is recommended that phrases that are subjective or open to different interpretations be removed from the policy.
4. A referral to a [Substance Abuse Professional] that is used by a marine employer for all drug test violations. The referral shall include the name and contact information for the [Substance Abuse Professional].
5. Policy regarding alcohol use and possession and the consequences for being found aboard a commercial vessel with a blood alcohol concentration greater than or equal to, 0.040%.[15]

An employer may want to include any similar policies regarding the discovery of illegal drugs, drug paraphernalia, and the use of prescription drugs or over the counter medications discovered in the possession or control of an employee. The Coast Guard also recommends that a potential crewmember sign a form stating that they have read and understood the company's drug and alcohol testing policy, which will remain in the crewmember's file for the duration of employment.[16]

An employer cannot put a prospective employee to work in a safety-sensitive position until the results of the pre-employment test are received. The drug test is a urine test performed

[13] 46 CFR 16.205; 46 CFR 16.210.
[14] Safety Sensitive Duties: Include but are not limited to; (a) Directing and mustering passengers in emergencies; (b) Passing out lifejackets; (c) Controlling and operating lifesaving equipment; or (d) Controlling and operating firefighting equipment
[15] Marine Employers Drug Testing Guidance
[16] *Id.*

at a specimen collection facility, tested at a Substance Abuse and Mental Health Services Administration (SAMHSA) approved laboratory, and reviewed by a Medical review officer. The lab must perform the Department of Transportation 5-panel test. To appropriately perform the drug test and ensure that the performance of the test, chain of custody, and review of the test is conducted in accordance with federal statutes and regulations, an employer may seek to employ the services of Consortium/Third Party Administrator (C/TPA). An applicant's positive test result prohibits the employer hiring him or her.[17]

There are two instances in which an employer may waive a pre-employment drug test where a mariner:

1. Passed a chemical test for dangerous drugs, required by this part, within the previous six months with no subsequent positive drug tests during the remainder of the six-month period; or
2. During the previous 185 days been subject to a random testing program required by [46 CFR 16.230] for at least 60 days and did not fail or refuse to participate in a chemical test for dangerous drugs.[18]

In both instances, the marine employer is required to obtain documentation that supports either of the exemptions. Such documentation comes in the form of a letter from the potential employee's previous employer or in the form of a drug test result that has been verified by a qualified Medical Review Officer.[19]

If the potential employee's pre-employment drug test is negative and the mariner passed the drug test, the Coast Guard requires that the test result should be kept for at least one year—keeping the result for the duration of employment may be better practice. If a Drug and Alcohol Program Inspector conducts an audit to verify compliance with 46 CFR 16.210(a), he or she will ask for proof that the marine employer did not "engage or employ any individual to serve as a crewmember unless the individual passed a chemical test for dangerous drugs for that employer."[20]

A **positive** or **non-negative** test result must be kept on file for five (5) years, no matter if the mariner was hired or not. If the mariner holds a license or merchant mariners document, the positive or non-negative test result must be reported to the U.S. Coast Guard.

Employers are required to obtain prior drug and alcohol testing information on new hires, especially those intending to perform safety sensitive duties.[21] An employer, after obtaining an employee's written consent, is required to request the information from all previous Department of Transportation employers, about the individual. This request is to be submitted before 30 days has passed from the date the employee first starts performing operation or safety-sensitive duties,

[17] 46 CFR 16.210.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] 49 CFR §40.25

but preferably before any safety sensitive duties are performed.[22] It is recommended that employers document the date of the request and save a copy of the request with all attachments and responses.

Additionally, employers are required to request the following information from the employee's previous Department of Transportation regulated employers who have employed the employee during the two years prior to his or her application or transfer:

1. Alcohol tests with a result of 0.04 or higher (not available from marine employers);
2. Verified positive drug tests;
3. Refusals (including adulterated or substituted samples);
4. Other violations of Department of Transportation drug and alcohol testing regulations;
5. If an individual has violated a Department of Transportation drug and alcohol regulation, documentation of the individual's successful completion of the Department of Transpiration return -to-duty requirements; and
6. Any other Drug and Alcohol information from previous employers.[23]

If information from a former employer reveals what is considered a Department of Transportation drug violation, the individual may not be employed in any safety-sensitive position until the Department of Transportation return-to-duty requirements are met.[24]

Any communication of drug testing information must be in a written form that ensures confidentiality. Additionally, a marine employer is obligated to respond to all requests from other Department of Transportation regulated employers. Before responding, you should make sure that the employee's signature is on the information request. You should respond as soon as possible and document the date of your response. If an employer does not receive a response within 30 days from previous employers of the individual being placed in a safety-sensitive position, the employer may continue to employ that individual in a safety-sensitive position. If the employee begins a safety-sensitive position, documentation of this is to be maintained for three years.[25]

An employer must also ask the employee whether he or she has tested positive, or refused to test, on any pre-employment drug or alcohol test administered by an employer to which the employee applied, but did not obtain, safety-sensitive transportation work covered by Department of Transportation agency drug and alcohol testing rules during the past two years. If the employee admits that he or she had a positive test or a refusal to test, you must not use the employee to perform safety-sensitive functions, until and unless the employee documents successful completion of the return-to-duty process.[26]

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[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id*.

Violations of these regulations can result in the imposition of penalties such as:

1. Certificate of Inspection (COI) may be removed or not issued;
2. Civil Penalty may be assessed of up to $5,500.00 per violation, per day;[27]
3. Suspension and Revocation (S & R) proceedings may be initiated against an individual's license, MMD, or COR;
4. Captain of the Port (COTP) order may be issued (prohibiting the operation of the vessels involved until compliance is gained);
5. Letter of Warning; or
6. CG-835 (deficiency ticket) may be issued.

It should also be remembered that for liability purposes, these regulations compose common standards that could be interpreted as industry standards. Therefore, any failure by an employer to adhere to these regulations opens that employer to liability.

The Coast Guard's Manual with more detailed explanations of drug testing regulations and enforcement is found the Marine Employers Drug Testing Guidance (What Materials Employers Need to Know About Drug Testing).[28]

## II. Post Offer – Pre-Employment Phase

### A. Conditional Offer

After an employee has completed an application and passed the interview, background check, and drug screening process, a conditional offer of employment must be made before the applicant's medical history is explored. Once a conditional offer of employment letter has been signed by the employee, the employer's medical inquiries regarding the applicant's ability to physically perform as a mariner can begin.

A conditional offer letter allows an applicant to accept the position, once certain conditions are met, namely satisfactory completion of medical testing. The letter may include the position offered, the requirements of that job (including a detailed job description), compensation package, as well as certain contingencies. Specifically, the conditional offer letter can highlight the requirement that the applicant must submit to and satisfactorily demonstrate that s/he has the physical capabilities to perform the duties of the position being offered. By including language that failure to submit to or satisfactorily complete the examination is a basis for withdrawal of the offer, allows an employer to further minimize, though not completely eliminate, risk associated with the withdrawal.

### B. Americans with Disabilities Act and the medical examination of a prospective employee?

[27] 46 U.S.C. §2115

[28] Prepared by: U.S. Coast Guard Headquarters Office of Investigations Analysis (G-MOA) Drug and Alcohol Program Manager, June 2005. https://www.transportation.gov/sites/dot.dev/files/docs/USCG_Marine_Employers_Drug_Testing_Guide_2005.pdf (last visited August 22, 2019).

Medical examinations and disability-related inquiries are governed predominately by the Americans with Disabilities Act ("ADA"). The ADA places restrictions on an employer's ability to make medically-related inquiries of prospective employees. As noted at the outset of this paper, employers should not make such inquiries on the job application or during the screening process outlined above. If an applicant makes it through these stages of the hiring process, the employer can then extend a conditional offer of employment subject to the employee's passing of a medical examination. Once a conditional offer of employment has been made and accepted, the employer may inquire as to a prospective employee's medical fitness, make disability-related inquiries, and conduct medical examinations. This is so regardless of whether such inquiries are related to the person's particular job functions, as long as such inquiries are made for *all* those entering the same job category.[29] Once an employee is hired and employment has begun, an employer may continue to make disability-related inquiries and conduct medical examinations, but such inquiries are limited to those which are "job-related" and consistent with "business necessity."[30]

### C. Medical Inquiries[31] of Prospective Employees

Ensuring a potential employee has the capabilities to comply with the physical demands of the job is essential for many employers, especially those in the marine industry. As to Deck Hands, for example, the Department of Labor's Dictionary of Occupational Titles defines the strength necessary to perform the deckhand position as "heavy work."[32] This classification means a deckhand should be able to "exert 50 to 100 pounds of force frequently (frequently: activity or condition exists from 1/3 to 2/3 of the time) and/or 10 to 20 pounds of force constantly (constantly: activity or condition exists 2/3 or more of the time) to move objects. Physical demand requirements are in excess of those for medium work."[33] Considering the physical demands of this position, it only makes sense that an employer would want to have knowledge of a potential employee's physical capabilities before they begin their employment. So, when and how may an employer legally obtain this information? These questions are answered below.

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[29] While medical examinations at this stage do not have to be job-related and consistent with business necessity, if "certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodations as required in this part." 29 C.F.R. § 1630.14(b)(3).

[30] In plain language, "job-related" and "consistent with business necessity" means the employer must reasonably believe, based on objective evidence, that the employee will not be able to perform their job because of a medical condition or the employee's medical condition poses a direct threat to him/herself or others.

[31] Addressing medical examinations in the employment context may raise complex legal issues due to specific factual instances related to a specific prospective and/or current employee, as well as the interplay of various state and federal laws which may come into play. This section is not meant to be exhaustive, but merely a high level analysis of when medical examinations may be conducted.

[32] DICOT 911.687-022 (1991).

[33] *Id.*

### D. What medical information[34] may you obtain after a conditional offer is made?

The conditional employee can be required to complete a medical history questionnaire and to submit to medical examination and testing. A medical examination, according to the ADA, is a procedure or test usually given by a healthcare professional or in a medical setting which seeks information about an individual's physical or mental impairments or health. The ADA permits a variety of medical examinations, including vision tests, blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans and MRIs.[35]

During the conditional offer stage, if an employer learns an employee has a preexisting injury, an employer may request a follow-up examination.[36] The Equal Employment Opportunity Commission provides guidance on this issue:

> Example: At the post-offer stage, an employer asks new hires whether they have had back injuries and learns that some of the individuals have had such injuries. The employer may then conduct medical examinations to diagnose back impairments to persons who stated they had prior back injuries, as long as these examinations are medically related to those injuries.

This scenario illustrates two potential avenues for an employer who is concerned with a pre-existing injury to further minimize risk. First, the employer may have the prospective employee examined by the employer's own physician. Utilizing a physician to conduct an examination allows an employer to more adequately assess whether the employee poses a risk based on the injury.[37] It similarly allows the employer to determine the effects of the condition on the employee's ability to perform the job. Second, the employer may request the applicant(s) submit their relevant medical records to the employer.[38] Either (or both) request(s) is permissible, so long as the employer is asking for it uniformly among applicants in the same position, with the same or similar injury.

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[34] Once an employer obtains medical information, it must be kept strictly confidential in a location separate from the employee's personnel file. Disclosure of such information may only be disclosed in certain limited circumstances. These medical records are subject to the provisions of HIPPA. The full nature and extent of HIPPA regulations is beyond the scope of this article.

[35] *See* The U.S. Equal Employment Opportunity Commission's Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act.

[36] *Id.*

[37] *Id.*

[38] *See* The U.S. Equal Employment Opportunity Commission's Discussion Letter regarding ADA: Disability-Related Inquiries and Medical Examinations, October 1, 2015.

Note: employers are not prohibited[39] from asking prospective employees to submit to non-medical tests prior to a conditional offer.[40] Non-medical tests include agility and physical fitness tests. An agility test is a non-medical test requiring an applicant to demonstrate his or her ability to perform actual or simulated job tasks. A physical fitness test allows an employer to measure the applicant's performance of physical tasks. While these non-medical tests are permissible at the pre-employment stage, an employer who wants to measure an applicant's physiological responses to such tests would convert a non-medical test to a medical examination.

### E. How far should the employer go in medical testing and examining a conditional employee?

Most marine employers will have the applicant complete a health questionnaire and submit to a medical examination. Hearing and vision testing is also a good idea. Some employers will perform x-rays. A few marine employers will have a conditional employee submit to a CT scan or MRI. In some regards, the question about how far to go with he medical inquiry and examination is a question of cost.

There are also issues which arise with regard to more sophisticated testing. Suppose an x-ray is performed and reveals a spondylolisthesis? This is a condition where one vertebrae in the spine has slid forward relative to the vertebrae directly below it. It normally happens in the early part of a person's life and may not produce any symptoms until the person reaches age 35, 40, or older. People with this condition are more susceptible to debilitating back pain which may ultimately lead to spine surgery, including a spine fusion. If such a condition is found in a conditional employee, should the marine employer refuse employment? A medical expert should be consulted. If a medical professional advises the employer that the spondylolisthesis prevents the conditional employee from performing heavy manual labor, then the conditional offer could be withdrawn.

As another example, assume that an MRI shows that a conditional employee has a bulging disc in his lower lumbar spine. However, this person has never had any pain in his back. Do you hire him? Can you withdraw your offer to him? This is a difficult question. Refusing employment on this basis is proper if you have a basis to say that this condition presently prevents the conditional employee from performing the heavy manual duties of a deckhand. However, there are cases which suggest that you can't refuse employment on the basis that they are more likely to become injured in the future. Again, you should consult a medical professional.

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[39] Although employers may not obtain medical information before making a conditional job offer, they may ask questions and potentially obtain documentation to evaluate an applicant's qualifications for the job. *See* The U.S. Equal Employment Opportunity Commission Discussion Letter regarding ADA: Disability-Related Inquiries; State Laws, July 13, 2018. As the EEOC has stated, an employer may ask an applicant whether s/he can (1) satisfy the physical demands of a job; (2) demonstrate that he/she can perform the job tasks or (3) whether applicant's known disability will affect applicant's ability to do the essential functions of the job and, if so, if s/he needs accommodations to perform the job. *Id.*

[40] *See* 42 U.S.C §12112(d); 29 C.F.R §1630.13.

Finally, there is the issue of hiring somebody, despite an abnormality found on an x-ray, CT scan, or MRI. If such a person is hired and later develops debilitating pain in his back because of the condition revealed on the testing, what happens then? If that deckhand hires a lawyer, the maritime employer is sure to face allegations that the maritime employer hired the person with this abnormality and it made no difference to the company. An allegation might even be made that you should have notified the employee of the existence of this condition when you offered him or her full time heavy manual labor employment. The possibility of this scenario has to be weighed against the benefits of doing the test.

Under maritime law, if a perspective employee intentionally fails to disclose a pre-existing condition when specifically asked about it during the hiring process and then later develops medical problems associated with that condition in the same part of the body, then the maritime employer has a basis to refuse to pay maintenance and cure. This is known as the *McCorpen*[41] defense. If you hire somebody who has an abnormality revealed in an MRI but the employee denies prior symptoms in his back, can the employer use the *McCorpen* defense? There is no definitive answer to this, but it is important that maritime employers recognize that this issue can be involved.

### F. May an employer withdraw a conditional offer based on an employee's medical examination?

Once an applicant submits to a conditional offer medical examination, there is undeniably a heightened standard under which an employer may operate in determining whether the employee satisfactorily completed the medical examination. However, the ADA permits withdrawal of an offer based on medical information obtained during the conditional offer stage. To withdraw the offer, the employer must be able to demonstrate either (1) the applicant cannot perform the essential functions of the job or (2) the employer is concerned the applicant cannot perform the job safely, thereby posing a direct threat to him/herself.[42] A direct threat is a "significant risk of substantial harm to the individual with a disability or others that cannot be reduced or eliminated by reasonable accommodation." [43]

Withdrawing an offer can be tricky because of the potential implications which arise since the employer now knows an employee has an existing medical condition which creates concern for the employer. In all likelihood, the medical condition likely qualifies as a "disability" under the ADA and, therefore, the employer could be exposed to liability for discrimination under the ADA or the state disability discrimination law. Utilizing a conditional offer letter, however, may limit the risk associated with withdrawing an offer.

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[41] *See McCorpen v. Central Gulf SS Corp.* 396 F.2d 547 (5th Cir. 1968).
[42] *See* 42 U.S.C. §12113(b); 29 C.F.R. §1630.2(r).
[43] *See* 42 U.S.C. §12113(b); 29 C.F.R. §1630.2(r).

### G. Forms to have conditional employees sign

As a final component of the conditional process, maritime employers should strongly consider having new employees sign variety of forms as a condition of their employment. Such forms are useful as risk management tools. Those forms may include:

a. Venue Selection Agreement;

b Acknowledgment of company expectations regarding honesty, the drug and alcohol policies, and safety;

c. Company ethical expectation, mission statement, or value statement.

## CONCLUSION

A thorough screening process when hiring can increase the chances that you hire the right person and not the wrong one. Reference and background checks can be very useful as screening tools. Drug testing and medical screening are essential when hiring vessel crew. However, it is important to recognize that there are many legal restrictions governing how the screening process can occur. It is the authors' hope that this article assists marine employers in finding the right employees while not creating new lawsuits related to the employment law.

Remember, employers should never conduct or require health questionnaires or pre-employment medical exams until a conditional offer of employment is made. Any medical exam, including a medical questionnaire, should tie the necessary physical qualifications to the specific job duties. Additionally, any contract medical provider retained by the employer should be thoroughly familiar with the actual job requirements for which they are conducting an examination. Finally, utilizing a conditional offer letter will allow the employer to set-out and define the conditions which must be satisfactorily completed prior to employment beginning. Employing this tool will allow the employer to withdraw a conditional offer in the event the potential employee is unable to perform the essential functions of the job and/or if the employee's "disability" would create a direct safety risk to him/herself or others.