

DEALING WITH PRE-EXISTING CONDITIONS IN JONES ACT SEAMEN –
PART ONE – THE EMPLOYMENT SCREENING PROCESS

We have all heard the term “pre-existing condition” in the context of health insurance under The Affordable Care Act (“Obamacare”). For a marine employer, a pre-existing medical condition can significantly impact the bottom line. For example, what if a job applicant has a pre-existing condition which disables him from deckhand work? Of course, you want to know this before you put him to work on a boat. This article provides general principles about when, how, and what you can do to screen applicants for disqualifying pre-existing conditions.

Under federal law, medical examinations and disability related inquiries are governed predominantly by the Americans with Disabilities Act (“ADA”). (Note, there are state laws which also apply but not addressed here.) The ADA places restrictions on an employer’s ability to make medically related inquiries of prospective employees. Employers should not make medical inquiries on the job application or during the initial screening process. However, the initial screening process can include asking prospective employees to submit to non-medical tests prior to an offer of employment. A non-medical test includes agility and physical fitness tests. This would include things like a job simulation test.

Once an applicant makes it through the initial stages of the hiring process, the employer can then extend a conditional offer of employment, subject to medical screening. After a conditional offer of employment has been made and accepted, the employer may inquire as to the 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 function, as long as such inquiries are made of all those entering the same job category.

Ensuring a conditional employee has the capabilities to comply with physical demands of the job is essential to employers, especially those in the marine industry. Considering the physical demands of a deckhand's position, it only makes sense that the employer would want to know of the employee's physical capabilities before he begins work. The conditional employee can be required to complete a medical history questionnaire and 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 analysis; blood pressure screening and cholesterol testing; and diagnostic procedures such as x-rays, CT scans, and MRIs.

During the conditional offer stage, if the employer learns an employee has a pre-existing injury, the employer may request a follow up examination. 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.

The employer has the right to select the physician that will perform the examination. Also, the employer may request the applicants submit their relevant medical records to the employer.

Finally, it is very important to remember that once an applicant submits to a conditional offer medical examination, there is undeniably a heightened standard under which an employer must operate in determining whether the employee satisfactorily completed the medical examination. The ADA permits withdrawal of an offer based on medical examination obtained during the conditional offer stage. However, the employer must be able to demonstrate either (1) the applicant cannot perform the essential functions of the job without reasonable accommodation or

(2) the employer is concerned the applicant cannot perform the job safely thereby posing a direct threat to him/herself or others. 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.

When an employer withdraws an offer of employment, the employer could be exposed to a claim for discrimination under the ADA or under state disability discrimination laws. For this reason, it is important for the employer to utilize a conditional offer letter which specifically advises the applicant that the offer of employment is conditioned on passing further medical testing and that failure to pass may result in withdrawal of the conditional offer of employment. Solid documentation of the reason(s) for withdrawing the employment offer must be maintained.

Please note: The information provided herein is NOT legal advice. This article does not address any state laws which apply. Do not rely on this article to establish company employment, hiring, or medical screening practices. You should seek the advice of legal counsel with regard to employment law issues. Failure to do so could result in exposure to legal liabilities.

Two subsequent newsletters on pre-existing conditions will address issues arising from (1) applicants who failed to disclose pre-existing conditions during the employment process and (2) defenses available in Jones Act personal injury lawsuits related to pre-existing or inevitably worsening conditions.

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