

DCA WHITE PAPER
PRE-EMPLOYMENT & MEDICAL EXAMINATIONS
What is ethical and what is not?

The purpose of this document is to outline a comprehensive, accessible and transparent pre-employment overview for potential employers of the ethical and legal obligations surrounding the sensitive issue of medical testing of employees. It is important for employers (and employees) to be aware of their medical examination rights as medical examinations are becoming increasingly common as a preliminary step to recruitment, selection and even termination.

In order for employees or potential employees not to be put at risk in order to perform the duties required by their position, employers have an obligation to provide a workplace to employees that appropriately assesses risks to remove unsafe work practices. To minimise the risk of injury and potential liability, an employer has the right to determine whether an employee is able to safely perform the requirements of the position and therefore pre-employment and workplace screenings are put in place such as:

- Psychological testing
- Physical fitness testing
- Drug and alcohol testing
- Blood testing (in fields of high level of physical contact, especially in the health field)
- Hearing and visual testing

These tests are of benefit to employers and employees alike as they help to minimise the risk of employees injuring themselves or others and reduce the instance of liability for employers.

The Victorian Equal Opportunity Commission has released a publication for pre-employment medical testing to assist employers to comply with the *Equal Opportunity Act 1995* (<http://www.eoc.vic.gov.au/materials/general/pdf/pre-employment.pdf>). The publication identifies the main features of a non-discriminatory pre-employment medical test. These include the following:

- The specific physical capacities required for the job should be identified and should be reasonable;
- Medical tests must specifically relate to the genuine and reasonable requirements for the job;
- Medical tests should only assess current health status and should not predict future deterioration unless it is reasonable to do so;
- Consideration should be given to providing services to and facilities for people with disabilities/ impairments where reasonable; and
- Any assessment of a person's ability to perform the inherent requirements of the job should be made in conjunction with the provision of these services and facilities.

When performing pre-employment and workplace screenings there are certain legal issues that are relevant to medical examinations, as well as, a fine line between safety and discrimination and the risks involved when using medical examinations, which need to be considered.

Two most common problematic workplace tests are drug testing and psychological testing with onus increasingly on the employer to ensure confidentiality as well as awareness of current legal issues surrounding medical testing.

Drug testing is not a new concept, however to avoid claims of discrimination and interferences to privacy, testing must be implemented as a standard procedure rather than on a needs basis such as in times of suspicion. Factors in support of a valid testing regime will include:

- The type of testing. Random testing maybe considered more intrusive than testing for a matter of course.
- The manner in which testing is to be carried out. Privacy must be considered both when the tests are carried out and in relation to accessing the results.
- Careful drafting of the policy, which should be introduced as part of a wider education program. The policy should (a) be drafted in consultation with the workforce and regularly updated (b) be applied carefully and consistently (c) clearly set out the disciplinary consequences for breach of the policy.
- Confidentiality. Ensure responsible handling of the information.

Psychological testing depends upon the use of the tests and relevance to the operational requirements of the position. If psychological testing is to be used:

- Ensure that the form of testing is relevant to the position
- Adopt a form of testing that is accurate and reliable
- Attempt to ensure, where possible, that the testing is not the only tool in making decisions for appointment, promotion and even termination.
- Confidentiality. Ensure responsible handling of the information.

Overall employers must ensure that medical testing is relevant to the requirements of particular positions within their firm. Unnecessary and mismanaged medical testing will increase the risk of liability and potential litigation. The purpose, the context and the subsequent management of this very personal information must be transparent as possible to employees and potential employees. Responsible medical testing plays an integral part of a safe and productive work environment. For more information on the obligations surrounding the ethical and legal obligations of employees with regards to medical testing please visit CCH Employment Law Guide under Medical Examinations pages 12,403 and 12,404 as well as visit Equal Opportunity Commission web sites, www.eoc.vic.gov.au; www.eoc.sa.gov.au, and www.equalopportunity.wa.gov.au.

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