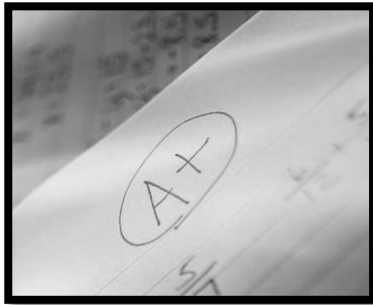


# ***“Can You Pass the Test?”*** -- Testing Job Applicants Prior to Hire

---

By Karen L. Gabler, Esq.  
LightGabler LLP



“I want to hire this person, but first I want to know if he is disabled...has filed workers’ compensation claims...is mentally stable...is using drugs....” Many employers want to ensure that a new hire will be productive, fit for duty and a valuable contributor to the organization. Maintaining responsible hiring practices necessarily involves conducting detailed research into the applicant who is seeking a position in your company. Unfortunately, using pre-hire testing to obtain such information is ripe with discrimination pitfalls, and employers must be cautious before utilizing such tests.

## **Physicals/Fitness for Duty Testing**

Most employers want to know that the applicant is healthy and physically capable of performing the job. That said, however, employers may not inquire about prior injuries or illnesses, or previous worker’s compensation claims, without running afoul of anti-discrimination and equal employment opportunity laws.

Employers have a right to test an applicant’s ability to perform the essential functions of the job when physical capacity is at issue. An applicant expected to lift up to 100 pounds may be asked to demonstrate his ability to do so. An applicant who will have to climb stairs, crawl through a tube, or drive for long hours can be asked to undergo a physical exam to ensure they are able to perform those functions without injury.

It is not permissible, however, to conduct a physical examination for every applicant, regardless of position. An employer who tests applicants for warehouse positions might have good reason to test whether those applicants can lift over 50 pounds. The same employer who recruits applicants for a receptionist position likely does not need to know whether that receptionist can lift over 50 pounds, and could not apply the same testing requirements to both applicants.

When the employer does choose to conduct a physical fitness examination prior to hire, it must be only after a conditional offer of employment has been extended to the applicant. An applicant must have passed all pre-hire processes and received an offer of employment before any physical testing is conducted, so that if the offer is withdrawn, the applicant can demonstrate that they would have been hired but for the outcome of the physical examination.

## **Drug and Alcohol Testing**

Employers may test employees for the presence of drugs or alcohol only in very limited circumstances, such as when the employee is reasonably believed to be the cause of a workplace accident or injury, when the employer has a reasonable suspicion that the employee is currently under the influence of drugs or alcohol, when the employee works in a safety-sensitive position, and as a pre-hire condition of employment for applicants who have received a job offer. Random drug testing of the workforce at large is not permitted.

Employers may test applicants prior to hire only after a conditional offer of employment has been extended but before employment commences. Once the applicant has begun employment, any drug or alcohol test that does not fall into the above categories would fall under the umbrella of “random testing” and would not be permissible.

Note also that although medicinal use of marijuana is permissible in California, employers need not permit employees to work under the influence of marijuana. If an applicant presents a medical marijuana card, the employer can inform the applicant that use of marijuana is not permitted on the job, but can choose to reasonably accommodate the otherwise-qualified applicant by giving him an opportunity to obtain an alternative medication from his physician before commencing work.

## **Personality Testing**

Reasonable minds differ about the viability and usefulness of personality testing for applicants. What is clear, however, is that employers who ask applicants to take a personality or behavior test must ensure that the test does not reveal information which might indicate a protected disability, such as a personality disorder or other mental disability or the genetic characteristics of the applicant. Obtaining information regarding disabilities or genetic issues prior to employment can improperly impact the employer’s hiring decision, and it leaves the employer open to lawsuits for discriminatory hiring.

Employers who use personality testing can best protect themselves by contracting with an outside expert who can conduct non-discriminatory testing and then provide the employer with a summary of work-related tendencies or traits, rather than the employer directly reviewing and analyzing its own test results.

Employers can maintain compliance with pre-hire testing laws by ensuring that any pre-employment testing conducted is directly related to the position sought and consistent with business necessity. If the purpose of the test is to obtain information necessary to implement discriminatory hiring practices, such as to avoid hiring disabled persons, the employer would be best served by skipping the test altogether.

*Karen Gabler is a partner in the employment law group at LightGabler LLP in Camarillo. She advises employers on compliance with the myriad of California employment laws and defends employers and managers against employee claims. For further information about pre-hire testing, contact Karen at [kgabler@lightgablerlaw.com](mailto:kgabler@lightgablerlaw.com) or go to [www.lightgablerlaw.com](http://www.lightgablerlaw.com).*