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Mr. Charles Paske
President/CEO
Work Wright, Inc.
1235 Birch St. Ste. 5
Helena, MT 59601

RE: Pre-Screening for Employee Impairments

Dear Mr. Paske:

You have requested the Behlmann Law firm, LP review certain issues related the ability of an employer to make hiring decision based on the results of pre-employment testing. The more specific question which is a subset of that issue is whether an employer can pre-screen employees using an FDA approved medical device or your Work Wright service to determine their physical ability to perform certain job functions and if their functionality is impaired deny employment on that basis.

The main statute covering this area would be the Americans with Disabilities Act. The basis for a legal challenge would be that the denial of employment through the use of pre-employment screening or testing would result in discriminating against someone due to a disability. This has been the basis of the court challenges to employment screening to date.

The regulations issued as guidance for the implementation of the Americans with Disabilities Act that are directly on point are at 29 CFR Part 1630. Section 1630.14 provides in subsections (a) and (b) that pre-employment inquiries are acceptable and that employment can be denied based on the inability to perform job-related functions, including the failure to pass a medical examination or inquiry. Section 1630.14:

"(a) *Acceptable pre-employment inquiry.* A covered entity may make pre-employment inquiries into the ability of an applicant to perform job-related functions, (and/or) may ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions.

(b) *Employment entrance examination.* A covered entity may require a medical examination (and/or inquiry) after making an offer of employment to a job applicant and before the applicant begins his or her employment duties, and may condition an offer of employment on the results of such examination (and/or inquiry), if all entering employees in the same job category are subjected to such an examination (and/or inquiry) regardless of disability."

These regulations indicate that the Americans with Disabilities Act permits strength and agility testing, if related to the position. Employers can legally refuse employment to applicants who are not physically capable of performing the essential functions of the job. Since the implementation of the Americans with Disabilities Act, litigation related to specific physical abilities and employment screening have been limited. However, there are a number of cases in which the courts have ruled that employers can refuse to hire employees into a position based on pre-employment screening for conditions that could be exacerbated or worsened by the condition of the job the applicant is applying for.

The leading Supreme Court decision, *Chevron USA v. Echazabal*, was decided in June, 2002. Echazabal was denied employment due to a medical condition that could have been aggravated by the performance of the essential elements of the job applied for. In ruling in favor of Chevron USA the court supported an employer's ability to deny employment to employees with a physical condition, illness or disease where the job activities would have posed a direct threat to the employee's personal health. In Echazabal the applicant was not excluded from all jobs, just the jobs that would have placed him at risk due to the job-related activities involved. In ruling in favor of Chevron the court said, "... the statutory defense for qualification standards are job-related and consistent with business necessity."

In *Equal Opportunity Employment Commission v. Woodridge*, (8th Cir.2001), a 2001 case from the Eighth Circuit, the EEOC sued Woodridge on behalf of 19 workers who were denied employment based on the results of a screening test for the likelihood of carpal tunnel syndrome. Woodridge was a manufacturer of foam auto seats. In ruling in favor of the employer the court stated, "the evidence in this case, when construed in a manner most favorable to the EEOC, reflects that the test administered was specifically designed for the activities required.... The neurometric test, however faulty, was an effort to screen out individuals who were likely to become disabled or sustain an injury while performing one specific type function.... As such, the EEOC's argument that Woodridge regarded these 19 applicants as substantially limited in their ability to work must fail." In other words the screening of applicants for specific positions and the denial of employment does not make the person disabled and/or a victim of discrimination.

The Seventh Circuit ruled similarly in *EEOC v. Rockwell* (7th Cir. 2001). Rockwell's policy, in place since 1985, tested all non-skilled applicants for its entry-level positions, (trimmer, finisher, final finisher and assembler) all of which involved continuing repetitive motions and/or [the use of] vibratory power tools". Because these put workers at risk for developing cumulative trauma disorders, applicants were rejected if they scored outside the normal range on the nerve conduction test.

The Equal Employment Opportunity Commission brought suit on behalf of 72 job applicants rejected by Rockwell on the basis of abnormal nerve conduction test results, alleging the company's policy violated the Americans with Disabilities Act.

Rockwell stipulated that the 72 job applicants, except for flunking the test, were qualified for its entry-level positions. The Court further noted that the applicants did not suffer from any impairment at the time they were turned away by Rockwell, but Rockwell merely regarded them as having an "enhanced likelihood of developing impairments in the future".

The appellate court upheld the ruling of the district court that Rockwell's actions were not discrimination against disabled workers and did not violate the provisions of the Americans with Disabilities Act.

The footnotes to the case state that Rockwell's policy applied only to nonskilled applicants. The Company did hire skilled trade workers such as electricians and tool and die makers regardless of their scores on the nerve conduction test. Additionally the EEOC included the UAW and the Aerospace and Agricultural Implements Worker's of America as defendants in the case which were derivative of the action against Rockwell.

In a dissenting opinion in this case, Circuit court Judge Diane Wood, while not claiming pre-employment screening could not exclude employees with a greater likelihood of injury, argues against the court's ruling on the basis that Rockwell' did not offer any evidence to support the enhanced likelihood assumption.

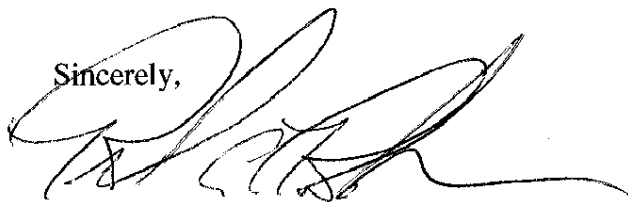
A review of the regulations and the supporting case law indicates that an employer does have the ability to make hiring decisions based on an applicant's ability and physical suitability to perform a job, if the requirements of the job involve a certain level of functionality to be performed safely. However, an employer's ability to make hiring decisions based on medical or physical functionality remains subject to general discrimination standards and the need to be job-related. Any tests or examinations must be applied in a nondiscriminatory manner.

Although the facts of each situation are different there are certain parameters found in both the regulations and court cases that would appear to be essential component of a corporate policy or screening program involving denial of employment.

1. The job description and the positions being pre-screened must support the fact that the positions involve repetitive motion or other physical demands, such as operating vibratory machinery, etc. that could further injure or increase the likelihood of an injury for a worker with less than normal functionality or an existing condition. This will include selecting an appropriate minimum acceptable level.
2. Test all applicant for the given job classification, without interruption or exception.
3. Make no exception to hire/no hire based upon test score.

If the above criteria were followed, the physical functionality standards set were related to the position and the policy was followed consistently an Employer should be able to screen out employees with existing conditions or injuries that would be aggravated by the activities of the position.

Sincerely,



Richard A. Behlmann
Attorney