

Cautions When Doing Workers' Compensation Searches

The following brief summary describes the major points involved in obtaining and using workers' compensation records.

1. State Rules. There are wide variations between the states in the availability of these records. In a few states, the records are not available to the public under any circumstance. In other states, it can take **two to three weeks** to obtain a record. In some states, there are special requirements before obtaining the records, such as a notarized release. By becoming familiar with these state regulations, American DataBank can assist employers in obtaining workers' compensation records.

2. Inquiry Timing. Under the Americans with Disabilities Act ("ADA"), an employer may not inquire about an applicant's medical condition or past workers' compensation claims until a conditional job offer has been made. According to the U.S. Department of Justice: "Under the ADA an employer may only ask about an applicant's disability or give a medical examination after the employer has made a job offer. The job offer can be conditioned on successfully passing a medical examination. Thus, if the person with a disability is denied the job because of information obtained from the medical examination or because of the applicant's disability, the reason for this decision is out in the open. This procedure should limit impermissible consideration of disability." See: <http://www.ada.gov/copsq7a.htm>

3. Business Necessity. Job requirements that screen out or tend to screen out people with disabilities are legitimate only if they are job-related and consistent with business necessity. Any questioning in a job interview should be restricted to whether the person can perform the "essential" (as opposed to marginal or incidental) functions of the job. This is another good reason to have well-written job descriptions so it is clear in an interview exactly what the job entails.

4. Reasonable Accommodation. If a candidate discloses a disability, then any follow-up questions should be limited to whether that applicant can perform the job with or without reasonable accommodation.

5. Revoking an Offer. If a history of filing workers' compensation claims is found POST-OFFER, the offer may only be rescinded under very limited circumstances. A

best practice may be to have an attorney review the matter, however, before taking an adverse action. These situations may include:

- a. The applicant has lied about a workers' compensation history or medical condition, usually during a medical examination;
- b. The applicant has a history of filing false claims;
- c. The past claims demonstrate the applicant is a safety or health threat to himself or others in the opinion of a medical expert;
- d. The past claims demonstrate the applicant is unable to perform the essential functions of the job even with a reasonable accommodation.

6. Dishonesty. If the applicant has lied on a medical questionnaire, or to a doctor performing a pre-employment physical, then the employer may be justified in rescinding the job offer based upon dishonesty. If an applicant has a history of multiple claims that have been denied, then an employer may be justified in rescinding the offer based upon a history of dishonest conduct. The reason is based upon an inference of fraud, not disability.