

Post-Offer Pre-Placement Testing and Functional Capacity Evaluation Under ADA Title I



Our Objectives

- Understand the Purpose, Benefit, and Cost of Post Offer Testing and of Functional Capacity Evaluation
- Understand the Four Stages of Employment
- Understand the Legal Foundation Testing Under the ADAAA



The Purpose of Testing



The Purpose of Testing

- The goal of employment testing is to determine if you have the right person for the job based upon safety, skills, aptitudes, knowledge and “fit”
- Testing happens after it has been decided that this is a qualified individual who meets the employer’s needs for the job in question



The Purpose of Testing

- The next question asked is, “Does the applicant have the capability of safely performing the physical demands of the ‘essential functions’ of the target job?”
- Requires that the employer define the purpose of the job including the essential functions and their associated physical demands



The Purpose of Testing

- Sets *consistent* guidelines for testing so there is no appearance of discrimination
- Determines a person's "*abilities*" to perform the job
- Potentially facilitates improvement of job methods
- In the long run, may aide in the accommodation process



The Purpose and Benefits of Testing

Post-Offer testing benefits employers in a variety of ways including maintenance of a productive workforce and reduction of lost-time costs (loss of productivity, costs related to temporary disability, and costs associated with permanent workers' compensation benefits).



Selecting Jobs for Post-Offer Testing



The Cost-Benefit Approach to Selecting Jobs For Post-Offer Testing

The ideal job for post-offer testing has some portion of these elements:

1. Unacceptable lost-time injury history
2. Physically demanding job tasks
3. Medium to heavy physical demand rating on the Physical Demand Characteristics of Work Chart
4. Highly repetitive physical demands
5. Significant awkward postures
6. High exertion, low frequency demands



The Cost of Post-Offering Testing



Costs of Post-Offer Testing

- Essential Function Job Analysis
 - Billed at \$750
 - Two hours on-site plus write-up time



Costs of Post-Offer Testing

- Test Development
 - Billed at \$100 per hour
 - Composed in 4 hours

This is a major step in creating a defensible paper trail



Costs of Post-Offer Testing

- Test Validation
 - \$100 to \$125 per hour
 - Documented and tested over 6 to 10 hours



Costs of Post-Offer Testing

- Test Administration
 - Flat rate \$100
 - Requires about 45 to 90 minutes to conduct



Annual Amortized Cost

Job analysis	\$750
Protocol development	\$400
Test validation	<u>\$1,000</u>
Total Test Development Cost	<u>\$2,150*</u>

*Amortized over three years \$717



Annual Cost Analysis

Fifty tests (50 @ \$100 each)	\$5,000
Three year amortization	<u>\$717</u>
Single Year Amortized Cost	<u>\$5,717</u>



Benefit Analysis

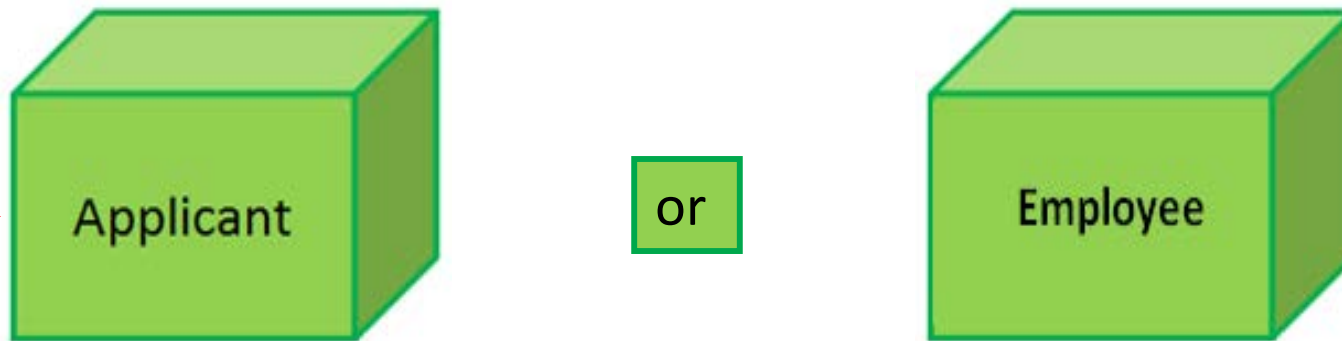
Cost of one injury in Vermont	\$16,000
Single year amortized cost	<u>-\$5,717</u>
Single year amortized cost savings	<u><u>\$10,283</u></u>
Cost of two injuries in Vermont	\$32,000
Single year amortized cost	<u>-\$5,717</u>
Single year amortized cost savings	<u><u>\$26,283</u></u>



The Stages of Employment



The Status of the Individual



“...such position that the individual holds or desires.”



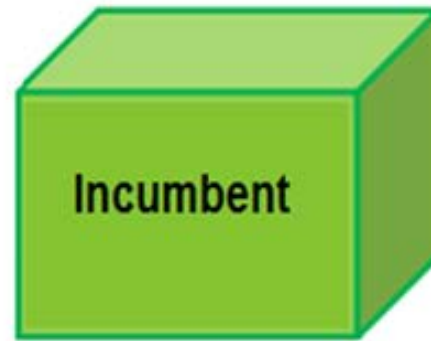
The Application Stage



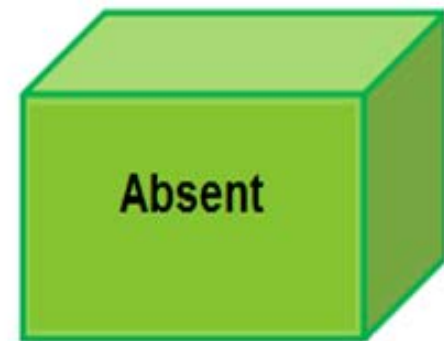
The Employment Stage



- ✓ Post-Offer Test



- ✓ Stay-at-Work FCE
- ✓ Specific Safety Questions



- ✓ Return-to-Work FCE
- ✓ Confirm Restrictions
- ✓ Identify Safe Abilities Tied to Essential Functions



The Legal Foundation for Testing



The Americans with Disabilities Act Amendments Act Title I



Discrimination

Sec. 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.



The Individual's Status: Pre-Offer Applicant



Medical Examinations or Inquiry

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.



Prohibited Examination or Inquiry

(2) Preemployment

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.



Prohibited Examination or Inquiry

(B) A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.



Pre-Offer Prohibitions

Prohibited Inquiries

- A **question** that is *likely to elicit* information about a disability
- This includes directly asking whether an applicant has a particular disability. It also means that an employer cannot ask questions that are *closely related* to a disability



Pre-Offer

Medical Examination

- At the pre-offer stage, an employer cannot require **examinations** that seek information about physical or mental impairments or health.
- A procedure or test that seeks information about an individual's physical or mental impairments or health.



Pre-Offer

Medical Examination

- Measurement of an applicant's performance of a task, *or* the applicant's physiological responses to performing the task.
- **Administered** by a health care professional or someone trained by a health care professional.
- Results are **interpreted** by a health care professional or someone trained by a health care professional.



Pre-Offer

Medical Examination

- Is designed to reveal an impairment, physical health or mental health.
- Is invasive (for example, the drawing of blood, urine, breath or hair samples).
- Is normally administered in a **medical setting** (for example, a health care professional's office).
- Uses medical equipment.



Pre-Offer

Physical Agility Tests

- measure an individual's ability to perform actual or simulated job tasks, i.e. “show me how you would...”

Physical Fitness Tests

- measure an individual's performance of physical tasks

Neither are considered medical examinations.



The Individual's Status: Conditional Hire



Employment Entrance Examination

(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if



Employment Entrance Examination

- (A) all entering employees are subjected to such an examination regardless of disability;
- (B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that



Employment Entrance Examination

- (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and



Employment Entrance Examination

- (iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and
- (C) the results of such examination are used only in accordance with this subchapter.



Examination and Inquiry

- (4) Examination and inquiry
- (A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with **business necessity**.



Examination and Inquiry

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.



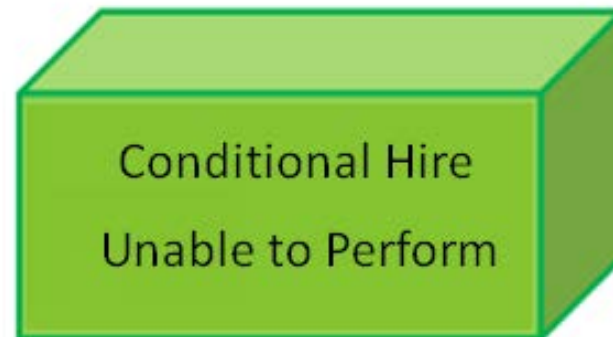
Examination and Inquiry

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).



The Individual's Status



Withdrawing Offer of Employment

- If employer withdraws a conditional job offer from an individual with a disability based on medical information learned during the post-offer stage, the employer must show that the decision to reject the individual was job-related and consistent with business necessity.



Withdrawing Offer of Employment

- The employer must be able to show that the individual was unable to perform essential functions of position in question, with or without reasonable accommodation.
- Where the reason for withdrawing offer is related to safety, i.e. "direct threat", the nature of the threat must be documented.



Defenses

Sec. 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter that an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter



Direct Threat

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.



Direct Threat

- Significant risk of substantial harm to her/himself or others
- Determination of direct threat must be based on objective, factual evidence, including the best recent medical evidence.



Essential Functions Job Analysis

To Support
Post-Offer Employment Testing
or
Functional Capacity Evaluation for
Stay-at-Work or Return-to-Work



Essential Function

(n) Essential functions

(1) In general. The term essential functions means the fundamental job duties of the employment position the individual holds or desires. The term “essential functions” does not include the marginal functions of the position.



Essential Function

- (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
- (i) The function may be essential because the reason the position exists is to perform that function;
 - (ii) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed;
- and/or



Essential Function

(iii) The function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.



Essential Function

- (3) Evidence of whether a particular function is essential includes, but is not limited to:
- (i) The employer's judgment as to which functions are essential;
 - (ii) Written job descriptions prepared before advertising or interviewing applicants for the job;
 - (iii) The amount of time spent on the job performing the function;



Essential Function

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job;
and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. §1630.2(n), the ADA Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act.



Essential Function v. Physical Demand

Reflection on the definitions of essential function and reasonable accommodation as found in the legal code supporting the amended Americans with Disabilities Act, and recent judgments in the federal Court of Appeals, lead one to think deeply about the differences between essential function and physical or cognitive demands.



Marginal Functions

- The ADA defines a "qualified" person with a disability as one who can perform the essential functions of the position, with or without reasonable accommodation. If a person with a disability is unable to perform a marginal function, then the employer cannot use that fact to disqualify the individual.
- Rather, the employer would have to reassign the marginal function as a reasonable accommodation. The employer, however, may be able to substitute another marginal function that the individual would be able to perform.



Questions about Essential Functions

- ***Can an employer change the functions of a job?***

Yes, an employer may change the functions of a job for business reasons. "The ADA does not limit an employer's ability to establish or change the content, nature, or functions of a job."



Questions about Essential Functions

- ***Can an employer establish production standards?***

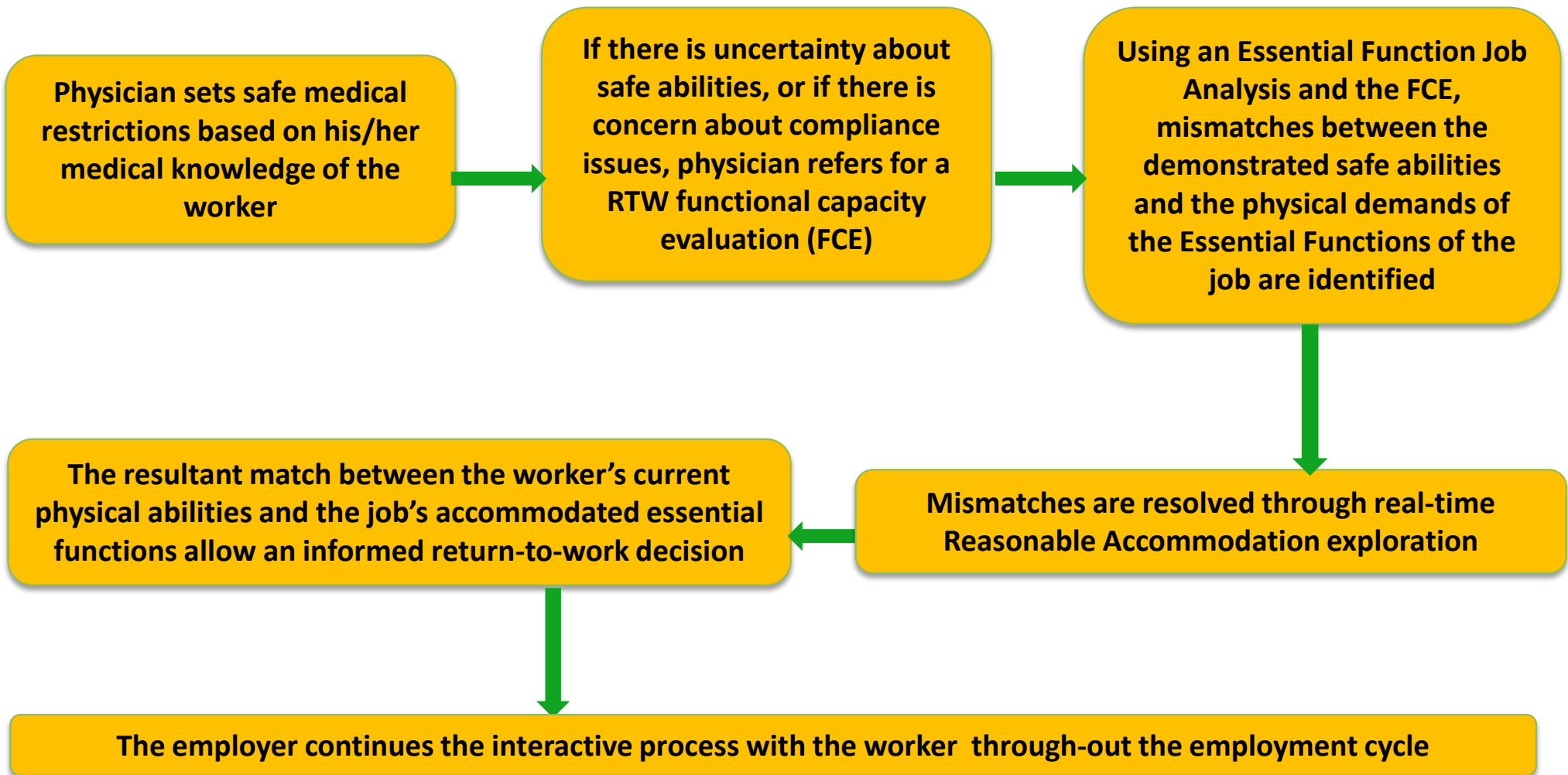
Yes. However, the standards must uniformly apply to all applicants and employees in that job. An employer may not intentionally select a particular level of production for the purpose of excluding an employee.



The Accommodated Return-to-Work Decision Model



The Accommodated Return-to-Work Decision Model





Roy O. Matheson, ADAC

Reasonable Accommodation, LLC
Reasonable Accommodation.com

877-352-1262

603-770-3484

