

Recruiting & Staffing Channel

Workers' Comp Screening Has Its Risks as Well as Rewards

While background screening firms are adding workers' comp checks alongside drug testing, credit reports and court records, collecting information on injuries and claims could expose companies to legal risks, including ADA compliance issues.

By Fay Hansen

With a prolonged hiring slump still dogging many industries, employment screening vendors are expanding their offerings and promoting new services to boost business. A number of vendors, such as LexisNexis, HireSafe and TalentWise, now include a review of workers' compensation claims to their list of tools that employers can select to screen job candidates.

Screening companies commonly claim that checking potential employees for workers' compensation claims can reduce the number of claims filed, lower workers' compensation insurance premiums, identify fraudulent claimants and improve workplace safety.

But employers seeking workers' compensation screenings should consider compliance issues. Screening for workers' compensation claims carries some risk and can open employers to a range of legal concerns including violations of the Americans with Disabilities Act, state disability laws and state laws that prohibit retaliation against employees who file workers' compensation claims.

Neil Martin, a labor and employment law partner in the Houston office of Gardere Wynne Sewell, cautions employers that under the ADA and state laws, previous workers' compensation claims or workplace injuries are not grounds for rejecting a candidate.

"The theory behind screening is that someone who was injured in the past may be injured again, or someone who filed a claim before may file one in the future," he says. "But refusing employment on this basis is unlawful. The employer would have to establish that the workers' compensation claim is a valid predictor of job performance. I don't know of any job where it would be permissible."

TalentWise general manager Todd Owens says workers' compensation checks are not a typical part of his clients' background screenings but are occasionally requested for a particular job role.

"The primary reason an employer would request a workers' compensation search is to determine if a candidate who has been extended a conditional job offer from the employer has misrepresented their workers' compensation history or medical condition," says Owens, who adds that Bothell, Washington-based TalentWise began offering the checks in 2006. The company provides the service to "about a dozen" of its 3,000 customers, he says.

"It helps employers determine if the candidate has a history of filing false claims or if those past claims can demonstrate the applicant is a safety or health threat to him or herself or others in the organization, based on a medical opinion."

The Equal Employment Opportunity Commission construes screening for workers' compensation claims as a request for medical information, says **Angelo Fillipi, director of employment law at Kelley Kronenberg**, a Fort Lauderdale, Florida-based law firm that devotes a significant part of its practice to representing employers in workers' compensation cases.

At the conditional job offer stage, employers can ask medical questions, including workers' compensation questions, but must ensure that the questions are job-related.

"A history of workers' compensation claims is generally not job-related unless it results in certain restrictions on the candidate's ability to do the job," Fillipi notes.

Owens says clients that utilize the service are often trying to fill jobs that require physical labor, such as waste management and construction. Martin says screening for workers' compensation claims is most common in manufacturing.

"Employers have the idea that more information is better than less in deciding where to place employees, and they're concerned about loss experience and workers' compensation premiums," he says.

An employer's loss experience, or claims costs relative to other employers in the industry, plays a large role in determining premium rates.

Workers' compensation premium costs average 1.6 percent of payroll, according to the Bureau of Labor Statistics. In some sectors with high injury rates, premiums may top 4 percent of payroll, and employers are scrambling to hold down claims and costs.

Some states don't provide or heavily restrict access to workers' compensation claims information. Most states that offer access require signed releases or special forms, or provide access only to the first report of an injury. The limited information doesn't always allow employers to make informed decisions, Martin says.

Owens says his company explains to employers the limits and potential risks in using workers' compensation as a screening tool.

"Employers must understand the Americans with Disabilities Act with regard to workers' compensation claims before engaging with their employment screening provider to perform this type of search," he says. "Employers should seek legal counsel to understand the details governing ADA."

The risk of a lawsuit brought under disability laws is compounded by the risk of a retaliation lawsuit.

"In addition to other costs, in retaliation cases employers may be liable for attorneys' fees and punitive damages, which are not capped," Martin says.

The advantages of asking workers' compensation questions in an interview are outweighed by the risks, Fillipi says. "There may be a risk in hiring someone with a significant history of workers' compensation claims, but I don't know of any correlation between making past claims and filing new claims," Fillipi says. "But there are legal liabilities for the employer if an employment decision is based on an irrelevant factor."

"Better questions focus on whether candidates have any restrictions on their ability to perform certain tasks," he says. "If they do, then employers have the right to follow up and obtain information to see if an accommodation is possible. This is preferable to asking workers' compensation questions."

According to the EEOC, employers may not use a post-offer medical examination to disqualify a disabled individual who is able to perform essential job functions simply because of speculation that the disability could cause a future injury. Also, an employer may not base an employment decision on the speculation that an applicant may cause increased workers' compensation costs in the future.

The EEOC notes that information from all medical examinations and inquiries must be kept apart from general personnel files as a separate, confidential medical record, available only under limited conditions.