



Employment Auditor's Notepad

PROHIBITED INQUIRIES IN MEDICAL QUESTIONNAIRES

Employers often use medical questionnaires in order to determine whether an employee is able to perform job-related functions. Such inquiries are legal under the Americans with Disabilities Act so long as they are a business necessity. In *Scott v. Napolitano* (2010), a California federal district court recently ruled that the following overly broad questions, which were unrelated to the job functions of a security officer, violated the ADA:

- Have you ever been treated for a mental condition?
- Have you ever had any illness, injury, or other condition (including learning disability, attention deficit disorder, etc.) other than those already noted?
- Have you ever consulted or been treated by clinics, physicians, healers, or other practitioners within the past years for other than minor illnesses?
- Have you or do you currently experience any of the following: psychiatric/psychological consult, episodes of depression, periods of nervousness?
- List all medication (prescription and non-prescription) you are currently taking with dosage and frequency, and reason below.

Who is an “Employer” Under California Wage and Hour Laws?

The Department of Labor estimates that over 70% of employers are not in compliance with wage and hour laws. Employers have every reason to be concerned about unknown violations that may spring up as lawsuits, or even worse, class actions. But who is an “employer?” The California Supreme Court, in *Martinez v. Combs* (2010), recently provided the legal framework to answer this question.

Significantly, the California Labor Code does not specify who will be held liable for unpaid wages, but California case law has limited liability to an “employer” as that term is defined under the Industrial Welfare Commission’s Wage Orders. Using the Wage Order definition, the California Supreme Court found that an individual or entity may become an employer in one of three ways:

1. By exercising control over the wages, hours or working conditions of an employee. In *Munoz*, the Court rejected the employee’s argument that a financial relationship with the employer results in control over the employees’ working conditions;
2. By suffering or permitting an employee to work. In *Munoz*, the Court clarified that to “suffer or permit” someone to work will make an individual an employer only where the individual permitting the work also has the power to stop it. Where the defendant had no power to hire or fire employees, he similarly had no power to suffer or permit the employee to work.
3. By engaging the employee, creating a common law employment relationship. The facts must show the defendant actually hired the employee to perform work for him, and not for another.

If an individual falls under any one of these three categories, that individual may be held liable for wage and hour violations resulting in unpaid wages.

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4330 La Jolla Village Drive, Ste. 310 • San Diego, CA 92122

Tel: (858) 554-0500 • Fax (858) 554-0673

www.fleming-pc.com