



- Have you ever been hospitalised? If so, for what condition?

Questions which may be asked

Questions should relate to the requirements of the job, for example, about candidates' willingness to work long hours or the ability to communicate with people when marketing the company's products. Where it is necessary to assess whether personal circumstances will affect the ability to carry out the duties of the job (for example, business trips or shift work), the job requirements should be discussed objectively without detailed questions based on assumptions about marital status, pregnancy or family status. Furthermore, such questions should be asked of all candidates. Employers may ask applicants with a disability questions about the ability to perform specific job functions or the need for any special facilities to perform the functions of the job.

Selection tests

If selection tests are used, employers should ensure that they are directly related to job requirements and measure the candidates' actual or potential ability to do the job. Tests should be standardised, but may be modified flexibly according to the needs of applicants with a disability. Where the ability to speak, listen, read or write in a particular language is necessary for the satisfactory performance of a job, employers may require applicants to take the selection tests in that language. Otherwise, employers should provide the test in languages which are understandable by applicants where reasonably practicable.

The contents and standard of the tests should be reviewed regularly to ensure that they remain relevant and free from any possible bias.

Personnel records

Information necessary for personnel records can be collected after a job offer has been made. Such information includes data regarding the spouse, number of children or the applicant's medical history, which may be necessary for the purpose of arranging medical benefits, education allowances or to ascertain whom to notify in case of emergency.

(5) Pre-employment Medical Examinations

Pre-employment medical examinations are commonly included by employers in the selection process of candidates for jobs and are usually conducted in the final stage of the recruitment process. Some employers ask for pre-employment medical examinations to be conducted as a matter of routine practice, without considering what the purpose behind such examinations is. Often an applicant who is found to be pregnant or to have a certain disability is not offered the job after the medical examination, regardless of whether the applicant is able to perform the job. This may be unlawful under the Sex Discrimination Ordinance (SDO) and/or the Disability Discrimination Ordinance (DDO).

Can an employer insist on a pre-employment medical examination?

Pre-employment medical examinations, in themselves, are not prohibited under the law. However, if the purpose of the examination is to discriminate against an applicant on the ground of disability, it may contravene the DDO. Furthermore, if the examination is used to screen out pregnant women, this may contravene the SDO. It is important that employers who insist on pre-employment medical examinations do so for the right reasons.

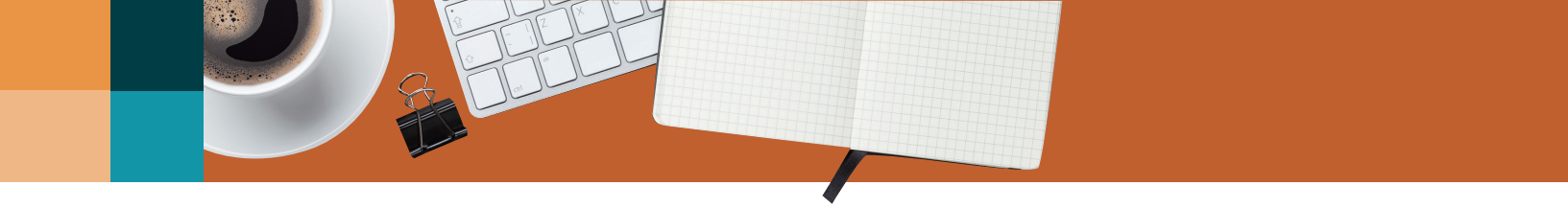
Justifiable purposes for conducting pre-employment examinations

An employer should only ask for a pre-employment medical examination for the purpose of:

- determining whether the applicant is able, with or without any adjustment, to perform the inherent requirements of the job; or
- checking whether the applicant has any infectious disease so that the employer may act reasonably in order to protect public health.

Is the applicant able to perform the inherent requirements of the job?

The DDO makes it unlawful to discriminate against



job applicants on the ground of disability. It is not unlawful, however, to reject an applicant who is unable to carry out the inherent requirements of the job concerned or, in order to carry out the inherent requirements of the job, requires some adjustments which would cause unjustifiable hardship to the employer.

If the purpose of the pre-employment medical examination is to assess whether a candidate is able, with or without any adjustment, to perform the inherent requirements of the job, the employer should ensure that the doctor or institution carrying out the examination is suitably qualified to make such assessment. For example, if it is an inherent requirement of the job to be intellectually and technically able to work on a computer, the doctor or institution carrying out the examination of an applicant with 'retinopathy of prematurity' (i.e. condition rendering the applicant legally blind although he or she is able to read if some equipment are provided) should be competent to assess whether the applicant can actually perform the requirement, with or without adjustment. In fact, the applicant in this example would be able to perform the inherent requirement of the job if provided with special magnifying and lighting equipment⁷.

Checking for infectious diseases to protect public health

The DDO provides that it is not unlawful to reject an applicant who has an infectious disease, if it is reasonably necessary for the protection of public health. An employer may therefore be justified in requiring applicants to undergo a medical test to check for infectious diseases if it is consistent with business necessity. For example, a restaurant owner may require an applicant for the job of chef to undergo medical testing to check for certain infectious diseases. As the chef would be handling food which could, in turn, transmit certain infectious diseases to persons eating at the restaurant, the employer could reject the applicant who has tested to have such diseases in order to protect the public.

Although the common meaning of infectious diseases may include any disease which is communicable in nature, such as influenza, the definition of 'infectious diseases' under the DDO

is restricted to those diseases set out in the First Schedule to the Prevention and Control of Disease Ordinance (Cap. 599)⁸, and any communicable disease specified by the Director of Health.

For the purposes of this exception under the DDO, neither AIDS nor HIV infection are to be treated as infectious diseases. Pre-employment HIV testing is clearly unlawful in respect of most jobs.

Employers should bear in mind that even if an applicant is found to have an infectious disease, it does not mean that the employer may reject the applicant straight away. For some infectious diseases which can be cured or which can be rendered not communicable after proper medical treatment, such as tuberculosis, it may be reasonable for the employer to offer employment subject to recovery from the illness rather than to reject the applicant immediately.

The content of medical examinations

Pre-employment medical examinations should not be conducted as a matter of course to determine who should be offered employment. An employer who insists on a pre-employment medical examination should identify the purpose of such examination and ensure that there is no intention to unlawfully discriminate. Medical examinations are normally justified only in limited cases, such as when the job involves working in a hazardous environment, requires a high standard of fitness, is required by law, or involves public health or safety.

The doctor conducting the examination should be informed of the purpose of the examination and the inherent requirements of the job concerned in order to conduct the most appropriate tests to determine whether the applicant is able to carry out those requirements. It is advisable that employers check with the doctors in advance about the purpose of the medical and occupational tests to be performed and their relevancy to the job in question.

Questions and/or tests about the applicants' general state of health may not be relevant to the ability of the applicant to perform the inherent requirements of the job. In such a case, such questions should not be asked nor should such tests be conducted. The health assessment



should be appropriate to the task requirement.

In particular, employers should think carefully before asking for chest x-ray examinations to be conducted. It is quite common for chest x-ray examinations to be conducted in pre-employment medical examinations to detect pulmonary tuberculosis. However, because of the possible damage to fetus, medical opinions suggest that pregnant women should avoid x-ray examinations unless it is necessary to do so in case of medical emergency. Employers who require applicants to undergo such x-ray examination may be liable for indirect discrimination against pregnant women under the SDO, unless they can justify the requirement.

Confidentiality regarding the clinical information

The clinical information supplied by the applicant to the doctor or institution conducting the medical examination is confidential and should not be disclosed to the employer without the consent of the applicant. In any event, it is more appropriate that a report providing broad conclusions and employment implications be provided to the employer, with the prior consent of the applicant, rather than the full medical details of the applicant.

Often employers will request applicants to consent to full disclosure of general practitioner or other medical records at the pre-employment stage, as a matter of routine. Many applicants consent to this, as they feel refusal will jeopardize their job prospects. Such practice by employers should not be condoned. Disclosure of information is justified only in light of specific job requirements or for reasons of public health or safety.

After the medical examination

If applicants are not offered the jobs after the medical examination, it is advisable that they be clearly informed of the reasons why. If they are rejected on medical grounds, employer should explain to them why they are considered unable to carry out the inherent requirements of the job, or why the adjustments at work which they would require because of their disabilities would impose unjustifiable hardship. If the medical ground for refusal of the job is a communicable disease, the applicant should be informed by the employer of the reasonable need to protect public health.

⁷ Please also read "Absence of Disability as a Genuine Occupational Qualification" and "Reasonable Accommodation and Unjustifiable Hardship" in this publication.

⁸ The following diseases are specified under the Schedule as infectious diseases: Acute poliomyelitis, Amoebic dysentery, Anthrax, Bacillary dysentery, Botulism, Chickenpox, Chikungunya fever, Cholera, Community-associated methicillin-resistant Staphylococcus aureus infection, Creutzfeldt-Jakob disease, Dengue fever, Diphtheria, Enterovirus 71 infection, Food poisoning, Haemophilus influenzae type b infection (invasive), Hantavirus infection, Invasive pneumococcal disease, Japanese encephalitis, Legionnaires' disease, Leprosy, Leptospirosis, Listeriosis, Malaria, Measles, (Meningococcal infection (invasive)), Middle East Respiratory Syndrome, Mumps, Novel influenza A infection, Paratyphoid fever, Plague, Psittacosis, Q fever, Rabies, Relapsing fever, Rubella and congenital rubella syndrome, Scarlet fever, Severe Acute Respiratory Syndrome, Shiga toxin-producing Escherichia coli infection, Smallpox, Streptococcus suis infection, Tetanus, Tuberculosis, Typhoid fever, Typhus and other rickettsial diseases, Viral haemorrhagic fever, Viral hepatitis, West Nile Virus Infection, Whooping cough, Yellow fever, Zika Virus Infection.