

A man and a woman are smiling and standing behind a podium. The man is holding a pair of glasses. The background is a blurred crowd of people. A purple and white geometric network graphic is overlaid on the left side of the image.

A-Z OF EMPLOYING

Medical Examinations

Our guide for Employers and Managers

**SUPPORTING,
FACILITATING &
REPRESENTING
BUSINESS**

Business**Central** 

Medical Examinations

Our guide for Employers and Managers

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This is only a guide.
It should not be a
substitute for
professional advice.

Please seek advice
from our AdviceLine
Team if you require
specific assistance.

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Overview

- ▶ Whether or not a medical examination is justified or necessary in most employment situations is a complex issue.
- ▶ Pre-employment medical examinations are manifestly discriminatory and that discrimination would be unlawful in most situations.
- ▶ Conditional offers of employment based on the applicant “passing” a medical examination that attests to that person’s suitability for employment are potentially unlawful.
- ▶ Medical examinations for biological monitoring must be limited to that purpose and conducted on the basis of informed consent.
- ▶ Medical examinations to establish fitness to return to work may be fair and reasonable in specified circumstances.

Introduction

There are distinct situations arising out of employment relationships when the issue of medical examinations will be considered. Before proceeding to request, demand or schedule any sort of medical examination at any time during an employment relationship, you should have a comprehensive understanding of how the medical examination will assist you, or not assist you as the case may be, in any decision making process.

There are some legal constraints on medical examinations in employment that you should be conversant with, particularly if you are not clear on how a medical examination will assist your situation and how it does, or does not, relate to a person’s ability to perform the role that he or she is expected to fulfil.

This A-Z Guide covers the most common times when medical examinations and situations in which medical examinations in employment are considered. Particular attention has been paid to the legality of these examinations and the lawful use to which the information obtained from medical examinations can be put.

Additional useful information related to this topic will be gained from the following **A-Z Guides**:

- ▶ Absenteeism
- ▶ Disability
- ▶ Discrimination in Employment
- ▶ Drug Testing
- ▶ Health and Safety in Employment
- ▶ Incapacity
- ▶ Individual Employment Agreements
- ▶ Informed Consent
- ▶ Medical Certificates
- ▶ OOS
- ▶ Privacy
- ▶ Stress and Fatigue

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Timing and Justification

Pre-employment Medical Examinations

Under this heading, pre-employment means that there is no employment relationship between the person or organisation looking to fill an employment vacancy and the applicants who apply to fill that vacancy.

Employment Relations Act 2000

The person who completes a medical examination under this heading is neither an “employee” nor “a person intending to work” under the Employment Relations Act 2000; there is no concluded employment agreement between the parties.

Human Rights Act 1993

The Human Rights Act 1993 prohibits unlawful discrimination in employment. Pre-employment medical examinations are patently discriminatory.

Pre-employment medical examinations may be completed as part of an application process to provide information that is used for screening purposes. In this situation, in most instances, a requisite level of fitness and/or a prescribed level of health (often including being free of cardiac and respiratory diseases) must be met by the applicants before their applications can be progressed any further.

As a rule, there are very few pre-employment situations where it is necessary to conduct a medical examination. Generally pre-employment medical examinations are appropriate and lawful only where international regulations require a prescribed level of fitness (for example, airline pilots) or international standards have normalised a fitness level (for example, police officers).

In New Zealand, the Police Force, the Armed Forces and the Fire Service represent the type of employers who can, and do, conduct pre-employment medical examinations.

Even if certain job-related capabilities are required in prospective employees, it is most likely to be inappropriate to test for those capabilities pre-employment via a medical examination. This is not because the capabilities are not essential to the role, but because the variety and availability of capability aids means that it is inappropriate and meaningless to test for those capabilities before offering employment.

In some employment situations discrimination may be entirely appropriate, but in others it may not be. You should seek specialist advice before considering requiring pre-employment medical examinations of applicants for employment.

Refer to the **A-Z Guide on Discrimination in Employment** (in particular) for more information.

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Privacy Act 2020

The Information Privacy Principles of the Privacy Act 2020 require that personal information collected by an employer must be collected for a lawful purpose connected with a function or activity of the employment, and that the collection of the personal information must be necessary for that purpose.

This applies to pre-employment medical examinations.

Conditional Offers of Employment and Medical Examinations

It is not uncommon for conditional offers of employment to occur on the basis that the applicant must “pass” a medical examination before the employment is capable of being accepted.

Employment Relations Act 2000

In order to be able to have a personal grievance, there must be a duly concluded employment agreement: *Canterbury Hotel etc IUOW v Elms Motor Lodge Ltd* (1989) ERNZ Sel Cas 277; [1989] 1 NZILR 958; (1989) 2 NZELC 97,065. Where a conditional offer of employment is made, unless the applicant is successful in meeting the condition, then the employment agreement cannot be concluded.

It is important that the condition to be “passed” is clear. If the intention is that the applicant meets a required level of health and fitness, and that he or she does not have any health issues that could be aggravated by the employment on offer, then this must be clearly stated in the condition.

If all that is required is that the applicant completes a “satisfactory” medical examination then it may be arguable that the employment agreement is capable of acceptance once the applicant has been medically examined; the outcome of that medical examination may not be relevant to the passing of the condition.

The withdrawal of a conditional offer of employment cannot constitute a dismissal if the employment agreement was not duly completed; careful drafting of any conditional offer of employment is important to ensure that this is in fact the case.

A prospective employee should be provided a copy of the intended employment agreement. It is debatable whether these provisions require employers to set out the nature of the conditional offer in the employment agreement, or whether the agreement should be provided at the time the conditional offer is made.

However, you decide to make a conditional offer of employment, it should be very clear to the applicant what is required before the employment is capable of being accepted.

Human Rights Act 1993

The Human Rights Act 1993 applies to conditional offers of employment.

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If an applicant does not pass a medical examination in these circumstances then that person may lay a complaint of unlawful discrimination with the Human Rights Commission.

Conditional offers of employment involving medical examinations, like pre-employment medical examinations, are patently discriminatory. You should only consider making a conditional offer of employment because:

Of the nature of the work, which is physically and/or mentally and/or emotionally demanding; and/or

An applicant has indicated that he or she has a health issue that could impact on their ability to perform the tasks associated with the position; and/or

A medical examination may identify a justified barrier to the employment which may, or may not, be able to be overcome.

If the medical examination reveals that an applicant may not be suitable for the employment, you should consider:

The extent to which the applicant's health issue impacts, or does not impact, on the person's ability to fulfil the role; and

The extent to which the way the role is performed is, or is not, subject to adjustment; and

Whether it is reasonable, or not, in all the circumstances to make alterations in order to accommodate the applicant concerned.

A decision to withdraw a conditional offer of employment should not be taken without a thorough and objective review of these considerations.

The decision to withdraw an offer of employment should be based on the finding either that it is unreasonable in the circumstances to provide special services or facilities to assist the person in the satisfactory performance of the employment or that the employment of that person would involve an unreasonable risk of harm to that person or others and there are no reasonable measures that the employer could take without unreasonable disruption to reduce that risk to a normal level.

In any situation resembling this it is strongly recommended that specialist advice is sought. You should contact BC Advice for assistance.

Refer to the **A-Z Guides on Discrimination in Employment, Disability, and Individual Employment Agreements**, for more important information.

Privacy Act 2020

The Information Privacy Principles of the Privacy Act 2020 require that personal information collected by an employer must be collected for a lawful purpose connected with a function or activity of the employment, and that the collection of the personal information must be necessary for that purpose.

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This applies to medical examinations agreed to for the purposes of a conditional offer of employment.

Medical Examinations for Biological Monitoring

The nature of some work requires that an employer has knowledge of an employee's base-line medical health and that the employer monitors the employee's health for the effects, or possible effects, of potentially and actually hazardous substances and processes.

A medical examination in these circumstances must be directed at the known and reasonably foreseeable effects of exposure to the hazard, and an employee's ability to perform the tasks of the job. It should not be a general "fishing expedition" which may reveal health information that could be used to unlawfully discriminate against a person.

Health and Safety at Work Act 2015

The Health and Safety at Work Act 2015 requires an employer to identify and manage hazards. Any biological monitoring and medical examination undertaken pursuant to this legislation should relate to the hazards identified in an employee's workplace. If a particular hazard does not actually exist where an employee is concerned, then a medical examination is going too far if it extends to the possible effects of that hazard.

Business Central recommends obtaining the informed consent from an employee in order to monitor that employee's health in relation to exposure to a hazard. The provision of information to an employee is an important aspect of informed consent.

Obtaining informed consent to medical examinations for the purpose of biological monitoring should be completed during the recruitment phase of employment.

New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 (which does not apply to private employers) protects the right of a person to refuse to undergo medical treatment, and treatment includes medical examination. However, this right is not an overriding right and is subject to reasonable limitation. It is the basis on which the legality of many medical examinations will be challenged.

Privacy Act 2020

The Information Privacy Principles of the Privacy Act 2020 require that personal information collected by an employer must be collected for a lawful purpose connected with a function or activity of the employment, and that the collection of the personal information must be necessary for that purpose.

This applies to medical examinations for biological monitoring.

Refer to the **A-Z Guides on Health and Safety in Employment**, and **Privacy**, for more information.

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Medical Examinations after Illness or Injury

From time to time employees suffer injuries and illnesses which require time off work and/or require periods of recuperation.

In this situation you are obliged to manage the workplace so that the health and safety of all of your employees is ensured, and the workplace is productive and functional.

You may include a provision in your employment agreement that stipulates that your employee is fit for work when the employee presents for, and undertakes, work for you. As well, you may want to include the right to require that an employee undergo a medical examination in specified circumstances.

If a medical examination is requested under the terms of an employment agreement, and the request is fair and reasonable in the circumstances, then the employee may be in breach of that agreement if he or she unreasonably refuses to comply with the request.

A request for a medical examination may be fair and reasonable if:

There is a binding contractual provision in which the employee has agreed to undergo medical examinations in specified circumstances; and

The employee's fitness for work is at issue; and

The employee has been absent with illness or injury for a prolonged period; and

The employer has had insufficient evidence from the employee on which to base a decision about the employee's fitness work.

In its decision in *Radio New Zealand Limited v Snowdon* (Unreported) WA 24A/03; 17 July 2003; Shaw J; the Employment Court stated that:

"This is a case where both parties assert rights which are in conflict...There are also obligations on both parties: the mutual obligations of trust and confidence; the contractual obligations to cooperate on matters of health and safety; and statutory obligations under the Health and Safety Act 1995 (sic) for the employer to ensure a safe workplace and for the employee to cooperate in good faith with the employer in that regard."

And later:

"Radio New Zealand is entitled to require medical examinations in certain limited circumstances and access to an employee's medical information at the rehabilitation phase. But that is not an unfettered entitlement, as already discussed. It is only contractually entitled to do this for particular reasons, and I would add, only when it is fair and reasonable for it to do so. The employment principles do not expressly entitle the employer to insist on an independent medical examination before an employee returns from sick leave. However, an employer in the circumstances of this case was entitled to considerably more information about its employee's medical status that was provided by Ms Snowdon in order for it to act fairly and appropriately to her when she returned, including consultation with her medical practitioners and specialists in terms of the employment principles. The fact that one of the medical reports suggested that she

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could only commence on a part time work trial was enough to set off warning bells. In the opinion of Dr Robinson, the subsequent report from Dr McBain was not sufficient to allay those fears. Radio New Zealand was acting reasonably in relying on his opinion and was justified in not having Ms Snowden back until it was in receipt of more information.”

Refer to the **A-Z Guides on Disability, Incapacity, OOS and Stress and Fatigue** for further information.

Conclusion

A medical examination is, on the face of it, invasive. It is a mechanism for obtaining a substantial amount of personal information about a person that may, or may not, have little relevance to a person's ability to perform work. For these reasons, conducting a medical examination in employment is fraught with issues and questions of legality.

This **A-Z Guide** has identified the major concerns that exist with medical examinations in employment. Before considering the option in your organisation you should obtain specialist advice for your circumstances.

You can contact one of our employer advisors for telephone advice and assistance: **0800 800 362** or email AdviceLine at advice@businesscentral.org.nz

Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings to keep up to date with all changes.
- ▶ Send your staff to Business Central Learning courses and conferences designed for those who manage employees.

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[Reviewed: May 2021]