

# Fitness-for-duty evaluation: Walking the medical-legal tightrope

Safety professionals are often called upon to help determine an employee's fitness-for-duty due to concerns about medical or psychological fitness. These concerns may arise in a variety of circumstances and contexts. This paper explores the fitness-for-duty obligations that an employer has and some of the legal aspects of an evaluation of which an employer should be aware.

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## INTRODUCTION

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The purpose of a fitness-for-duty evaluation is to assess whether an employee has the physical, mental and emotional capacity to perform assigned tasks competently and in a manner that does not unreasonably threaten safety, health, or property. An employer has not only the right but also often the duty to conduct a fitness-for-duty evaluation if there is a reasonable belief that an employee is impaired and cannot perform the job safely and effectively. An integrated medical-legal perspective frames this manuscript to provide guidance on how to walk the legal tightrope of balancing the employee's and employer's interests (and, at times, those of the public) when conducting a fitness-for-duty evaluation.

An employer has a legal obligation to mitigate unreasonable health and safety risks posed by an unfit worker. At best, impaired workers can disrupt work processes, burden co-workers and drain productivity. At worst, an impaired employee can become a threat to his/her own safety or to that

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of co-workers and/or the public. Regardless of the cause of impairment – which may include disease, injury, prescription medication usage, mental health disorders, substance abuse, or family issues – fitness-for-duty evaluations must be conducted using an approach that balances the privacy interests of the employee with the employer's goal of ensuring the safety of co-workers and the public.

Employers are often unclear as to the exact circumstances that may require an employee to be tested. A common employer perception is that the testing process is ambiguous and fraught with thorny medical-legal issues. However, case and statutory law point toward proven, definitive practices that can help employers manage the process with a legally defensible approach. Components of a successful and legally compliant fitness-for-duty testing program include:

1. Development of policies and procedures that leverage key resources in advance;
2. Formalized training of selected staff on how to identify triggers;
3. Established protocols on how the employee, employer and medical unit may disclose and utilize protected health information;
4. Strategies to manage the outcomes of fitness-for-duty evaluations;
5. Coordination with applicable federal, state and local regulations, including the Americans with Disability Act (ADA).

## **THE EMPLOYER'S ROLE IN FITNESS-FOR-DUTY EVALUATIONS: A RIGHT OR A DUTY?**

Many employers do not have a formalized policy that describes the medical-legal protocols for conducting and/or interpreting fitness-for-duty exams. Without clear guidance from management, legal counsel, and medical personnel, environmental health/safety (EHS) professionals face a litigious minefield when deciding on the necessity and contours of such exams. EHS professionals are then forced to weigh the risks of conducting an exam, possibly triggering litigation by the employee, versus not conducting an exam, potentially creating threats to workplace or public safety. This requires careful balancing and consideration of the employee's right to privacy with the interests of workplace and public safety. The EHS department is often charged with the assessment of these risks.

EHS professionals can view managing fitness-for-duty cases as an extension of their role to deploy effective controls that minimize workplace health/safety hazards. This function is aligned with the EHS responsibility to educate and advise management on workplace best safety practices. The objective in such a case, however, is not personal protective equipment or administrative and engineering controls, but personal health, which is also a predictor of workplace safety risks.

Highlighting this point is a case-control research study that identified a number of work and individual factors that predicted occupational injury frequency. The study found that sleep disorders, smoking and lack of physical activity – all personal health factors – were strongly associated with frequent injuries.<sup>1</sup> This suggests that those responsible for safety policies and processes should consider health risk factors as potential determinants of accident proneness, and deploy appropriate preventive measures.

### **PROGRAM POLICY AND DEVELOPMENT**

Development of a formal fitness-for-duty program is essential. The lack of

written protocols and a formalized policy can put employers at risk in a court of law, as without such established, documented procedures, any specific request for examination can be interpreted – especially by an employee's attorney – as prejudicial, vindictive or a violation of the employee's right to privacy. A well-structured program should include a written policy with clearly defined protocols on when and how to access medical and legal consultation resources, descriptive, plain language on how employee confidential medical information should be handled, and a robust training program that educates appropriate staff on proper procedures to handle physically or mentally impaired employees.

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### **TYPE OF EVALUATIONS AND COMMON TRIGGERS**

There are several types of fitness-for-duty evaluations that can be conducted along the continuum of employment. The appropriate guidelines for these differ slightly depending upon the reason and time the exam is conducted.

For example, the most common type of fitness-for-duty exam takes place as part of the pre-placement/post-offer exam. This type of exam provides baseline medical information that is used to assess an individual's health status prior to employment. Employers generally have more discretion in requesting fitness-for-duty exams when they are associated with a pre-placement/post-offer medical evaluation. This legal structure is based on the pragmatic reality that an applicant is in a better position to decline the test (and opt out of the hiring process). In contrast, a current employee does not have the same degree of choice as a fitness-for-duty exam may be a pressing condition of continued employment. When done during the window

between offer of employment contingent on medical evaluation, and actual placement in the job, medical evaluations are given broad leeway by most regulation, including the ADA.

Drug and alcohol testing is frequently a component of post-offer/pre-placement exams. Whether or not it is mandated by law, the ADA specifically defines such testing as NOT being a medical evaluation. (For-cause alcohol/drug testing is covered later in this article.) A current employee may be required to submit to a variation of the post-offer/pre-placement exam when the worker is assigned to a new position with different physical requirements and/or new environmental exposures than the previously held position.

In addition to post-offer/pre-placement exams, there are four primary circumstances that trigger a fitness-for-duty exam. They are as follows:

1. An employee is returning to work after a job-related or non job-related injury or illness;
2. An employee exhibits abnormal behavior that causes concern;
3. An employee expresses concern to management about his/her own fitness to work. For example, an employee is diagnosed with a serious health condition, such as cancer or epilepsy, that may impede work performance or safety;
4. A co-worker expresses concern about a fellow employee's mental/physical health status.

### **THE MEDICAL EXAMINATION FOR FITNESS FOR DUTY**

Regardless of the specific trigger, once the employee is seen by the evaluating physician for the purpose of a fitness-for-duty exam, the process is similar.

First, the physician should know what concerns prompted the referral by the employer. Second, a written job description should be supplied, with particular attention to any safety-sensitive features and to any duties that appear to be impaired. Third, a focused examination is performed, which includes obtaining a relevant

history from the employee, physical examination as pertinent, and whatever testing is needed to reach a medical conclusion. In some situations, this may include “for-cause” drug testing. As in the pre-placement situation, this is best done via a predetermined protocol, so that refusal to test has firmly structured consequences. It should be emphasized that if an employee demonstrates apparent mental impairment, substance abuse is only one possible explanation; a medical evaluation may be needed to consider other causes including disease, prescription medication reaction, and psychological disturbance, all of which have considerably different sets of recommendations and prognoses.

Finally, reporting is made to the employer regarding any work restrictions or accommodations that are needed, and if possible a timeline as to how long such restriction is expected to be necessary. In this same regard, if the individual presents a threat to person or property while on active duty employment, the examining physician may advise the employer as to the existence and level of the threat. The doctor should discuss the medical issues with the examinee, and – if needed – the examinee is told what additional information may be necessary from outside sources including his/her own healthcare provider.

#### **REASONABLENESS STANDARD**

Irrespective of how an exam is triggered, employers must be able to demonstrate that the testing is reasonable in scope to stave off successful legal challenges. Testing cannot be unnecessarily intrusive to the employee in question, and each component of the testing must be job-related. That is, fitness testing components and protocols must be driven by the required functions of the job. This is best accomplished where employers have written, supportable work demands/job descriptions for the position, particularly for safety-sensitive jobs or those with unique physical requirements. It is highly recommended – where fiscally practic-

able – that this be maintained for each position that the employer utilizes.

This approach is especially important in companies with disparate work groups. For example, testing criteria for a line production worker are going to be very different than those for a knowledge or “white collar” worker.

An impaired employee working on the production line is perhaps easier to identify than an impaired knowledge worker whose human capital output is intellectual product. If a line worker is impaired, performance may slip and productivity quotas may decline. In contrast, an impaired knowledge worker may exhibit signs of presenteeism. Impaired presenteeism occurs when workers are physically present but function at less than full productivity because of illness or other health conditions.<sup>2</sup>

Clear-cut job descriptions that specifically outline work requirements are an essential tool used by health professionals to determine fitness for work. In the case of a knowledge worker, a well-documented job demand list can aid health professionals in assessing whether the specific impairment substantially impedes work output. Thus, it would not be appropriate to require a knowledge worker to submit to fitness testing that requires exceptional physical strength. As stated, the testing has to be job-related, as well as reasonable.

The determination of what is “reasonable” is based upon the employer’s analysis of the situation, and expert advice from medical and legal resources. For instance, if an employee returns to work from a protracted medical absence, the employer first and foremost should request a doctor’s note that denotes an employee’s fitness-to-work status. If the doctor’s note appears to be inconsistent with the employee’s ability to work, or is unintelligible, then it is reasonable for the employer to investigate the matter and determine whether formal evaluation is required.

This approach not only protects the employee by ensuring that testing is job-related, but also offers the employer a quantifiable – and legally defensible – method of determining fitness to work.

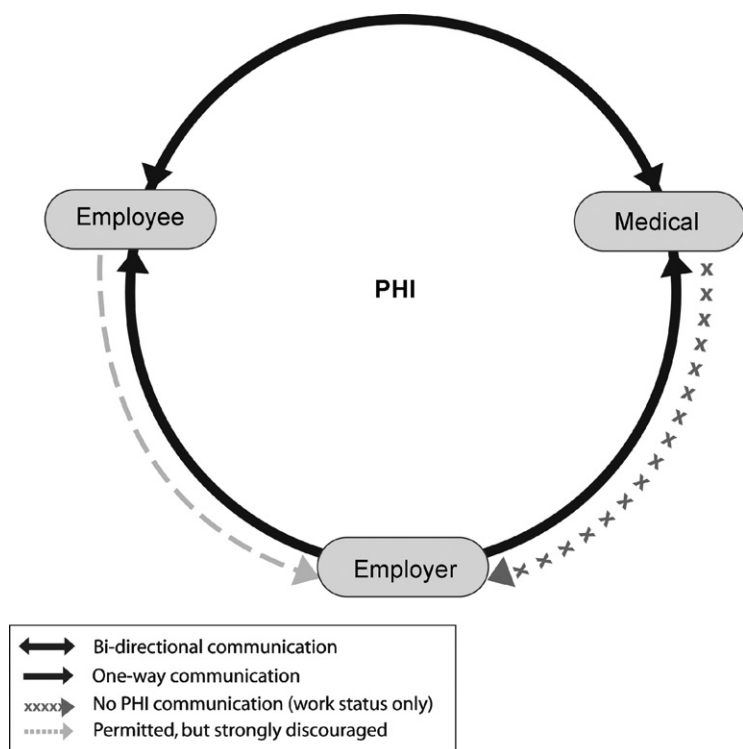
#### **PROTECTING HEALTH DATA PRIVACY: ROLES AND RESPONSIBILITIES**

The dissemination of confidential employee medical information is perhaps the most commonly misunderstood process of fitness-for-duty testing. The propriety of disclosing medical health information is governed by the roles of the parties imparting and receiving such information. The medical unit, the worker and the employer each have different roles and responsibilities in maintaining confidentiality of employee health data. Within the company, only the legal and medical departments have true confidentiality firewalls; management and human resources may possess such information in limited instances and for limited purposes; no other department should have *any* access to confidential medical information.

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#### **COMMUNICATION BY THE MEDICAL UNIT**

Federal legislation known as the Health Insurance Portability and Accountability Act (HIPAA) requires covered entities such as healthcare providers, healthcare clearinghouses and health plans to obtain a consent and/or authorization form from the patient in order to disclose protected health information that is individually identifiable. Healthcare providers, including physicians, clinics and on-site health personnel, are specifically prohibited from sharing, releasing or



**Figure 1. Permissible routes for protected health information (PHI).**

disclosing employees' personal health information to management or company representatives without full authorization from the employee/patient. The principal exception to this rule occurs when an injury or illness is claimed to be work related. Also, a healthcare provider usually does have the legal right to discuss certain health aspects of the case to company staff if the data directly pertains to a work-related injury/illness claim.

Whether in-house or as an external consultant, reporting the results of a fitness-for-duty health exam requires a healthcare provider to obtain informed written consent from the employee including the designation of intended recipients of the data and the type of information that will be disclosed. Refusal by the employee to allow appropriate disclosure would be the same as refusing the evaluation, a situation that should be addressed by the employer's personnel policies, potentially with the guidance of legal counsel.

For example, if a physician conducts a fitness-for-duty exam that reveals the employee has a non-occupational health impairment, the physician is generally forbidden from discussing

the specific nature of the health ailment with company representatives. The physician can, however, openly discuss needed job accommodations or work restrictions with the employer, yet must steer clear of disclosing the details of an employee's health such as diagnosis or prognosis. Highly sensitive issues such as HIV status, drug/alcohol use, sexual conditions and mental health issues require an even greater degree of confidentiality.

Figure 1 describes the permitted routes for communicating employee health data. While the medical unit is prohibited from discussing protected employee health information with the employer, the physician is permitted to discuss this information with the employee. Physician-employee dialogue is required in order for the doctor to assess treatment options, recommend job accommodations and evaluate other medical issues.

#### **COMMUNICATION BY THE EMPLOYER**

If the employer (with appropriate consent) legitimately receives confidential

medical information about the employee, there is no prohibition on discussion between the company and the evaluating physician about such health issues. Human resources experts and labor law counsel generally advise managers to refer all medical issues to the medical unit for further evaluation, though there is nothing illegal (per se) to a manager listening to an employee volitionally conveying otherwise confidential medical information.

#### **COMMUNICATION BY THE EMPLOYEE**

The employee is advised against sharing confidential medical information with company management and co-workers. This helps ensure that the employer manages workers on the basis of observable performance, and not health-related issues.

#### **MANAGING OUTCOMES OF FITNESS-FOR-DUTY EXAMS**

Fitness-for-duty exams may result in several outcomes that affect the employee and employer. The treating physician's duty is to help guide and facilitate this process by integrating fragmented employee health data. The physician uses this information to develop an evidence-based, fitness-for-duty report that details whether the employee poses an unacceptable risk of harm to himself/herself, co-workers or the public, or to property.

Typical outcomes of the exam include the recognition of a previously unidentified health issue that may have no impact on the employee's job. In this case, the physician may refer the individual to his/her primary doctor for follow-up as needed.

The exam may also reveal a health problem that can be aggravated by physical demands of the job or environmental hazards. At this point, the physician's responsibility is to integrate disparate pieces of data to determine if work restrictions are a medical necessity. The physician, at that time, may request further information, such as laboratory tests, health records, and

consultation with the employee's primary physician. If work restrictions are necessary, the physician collaborates with the employer, the employee, and other necessary parties to recommend a course of action that returns the employee back to work in a safe manner.

### **COORDINATION WITH THE AMERICANS WITH DISABILITY ACT**

If an employee has a physical or mental health condition that is covered under the ADA (or comparable state laws), the employer is prohibited from discriminating against the employee regarding job application, testing/hiring, training, promotion, medical examination, compensation, leave and benefits. However, the employee must be able to perform the essential job functions with or without accommodations, and the employer must make "reasonable" efforts to provide such accommodation if needed. Obviously, this requires knowledge of both the essential job functions as well as the employee's disabilities.

The ADA defines a disability as "physical or mental impairment that substantially limits one or more major life activities," which includes common everyday functions as seeing, walking, talking, thinking and sleeping. Notably, several states – including California – have far less restrictive definitions of "covered disability"; California, for example, only requires that the impairment limit – not "substantially" limit – a major life activity. The U.S. Supreme

Court has ruled that the person must be presently disabled, so transitory health conditions are not covered. Other conditions not covered include mental or health disorders that can be controlled by medicine or medical devices. Physical characteristics such as excessive weight are also not usually covered under the ADA.

Employers must provide reasonable job accommodations to individuals meeting the ADA criteria of disability. The reasonable accommodation arises when an employer is put on actual or "constructive" notice of the need for an accommodation, which can occur at any point during the employee's employment.

Reasonable accommodation is developed through an interactive dialogue between the employer, employee, and healthcare providers. The purpose is to permit individuals to perform the essential functions of the job by providing a reasonable accommodation. Depending on the nature of the disability, reasonable accommodations may consist of job medications, ergonomic adjustments to the work area, or even a leave of absence. There is no defined period to offer reasonable accommodations, as the law is founded on the principle of assessing reasonableness on a case-by-case basis.

Although the ADA is designed to protect covered employees from unfair discrimination, employers do not have to agree to accommodations that pose a safety/health risk to the employee, co-workers or the public. Such an

accommodation would be considered unreasonable under the ADA law. In addition, an employer is not required to provide (or to continue to provide) an accommodation that poses an undue business burden. If no reasonable accommodation can be provided, termination is allowed.

### **SUMMARY AND CONCLUSION**

In many situations, an employer may raise concern over an employee's ability to work safely due to a medical or psychological issue. Having policies and procedures in place in advance of such an event protects against legal pitfalls and guides decisions that augment safety while protecting confidential medical information. Appropriate use of medical and legal advice is invaluable in this process. Properly done, such procedures serve to protect the employee, employer, and the public at large from preventable harm.

### **REFERENCES**

1. Gauchard, G. C.; Mur, J. M.; Touron, C.; Benamghar, L.; Dehaene, D.; Perrin, P.; Chau, N. Determinants of accident proneness: a case-control study in railway workers. *Occup. Med. (Lond.)*, **2006**, *56*, 187–190.
2. Turpin, R. S.; Ozminkowski, R. J.; Sharda, C. E.; Collins, J. J.; Berger, M. L.; Billotti, G. M.; Baase, C. M.; Olsen, M. J.; Nicholson, S. Reliability and validity of the Stanford Presenteeism Scale. *J. Occup. Environ. Med.* [Online], **2004**, *46*(11), 1123–1133.