THE FITNESS-FOR-DUTY EXAMINATION

I. Overview

A. Fitness-for-duty examinations are sometimes required by employers in order to gauge whether an employee is able to perform essential job functions.

B. Federal law places several restrictions on the way the tests are conducted and what results can be used by the employer

II. Fitness-for-duty examinations for prospective employees

A. A fitness-for-duty examination may only be given after a job offer has been made.

B. It is strictly prohibited to ask a prospective employee in the pre-offer stage to submit to a fitness-for-duty examination.


C. However, an employer can make pre-employment inquiries into the ability of the prospective employee to perform job-related functions.


D. An employer is allowed to make a job offer conditioned upon the successful completion of a medical exam if two conditions are met:

   (1) The examination must be applied uniformly to all entering employees in the same job category.

   (2) The medical information must be kept confidential.


III. Fitness-for-duty examinations for current employees under the ADA

A. In order to ask for a fitness-for-duty examination of current employees, the employer must have a “reasonable belief, based on objective evidence” that:
(1) employee’s ability to perform essential job functions will be impaired by a medical condition; or

(2) an employee will pose a direct threat due to a medical condition.

B. Sometimes this standard may be met when an employer knows about a particular employee’s medical condition, has observed performance problems, and reasonably can attribute the problems to the medical condition. An employer may also be given reliable information by a credible third party that an employee has a medical condition, or the employer may observe symptoms indicating that an employee may have a medical condition that will impair his/her ability to perform essential job functions or will pose a direct threat.

C. An employer cannot “require a medical examination or make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability”

D. However, employers are allowed to ask disability-related questions and mandate mandatory medical examinations if the inquiry is “job-related and consistent with business necessity.”

(1) Example 1: A fork lift driver’s job is to transport and stack pallets weighing several hundred to a thousand pounds in a storage warehouse with numerous workers on the floor. After an impeccable ten-year work record, the fork lift driver crashes into a wall of stacked pallets, narrowly missing a co-worker. The employee explains that he felt dizzy and became disoriented, and that this has happened a few other times, although never at work. The employer believes that the employee may pose a direct threat and sends him for a medical examination to determine if he is fit to perform his job. The employer provides the doctor with a description of the job to help ensure an accurate determination. This examination would be considered job-related and consistent with business necessity.

(2) Example 2: Several months ago, a supervisor overheard two employees talking about another co-worker, who had told them about having a serious heart condition that necessitates the use of medication and frequent doctor’s visits. The individual comes to work every day and successfully performs her duties as a computer
programmer. In this case, the employer does not have a reasonable belief that the computer programmer's ability to perform her essential job functions are impaired or that she poses a direct threat due to a medical condition. The employer may not make disability-related inquiries or require a medical examination.

IV. What if an employee applies for a job transfer or promotion?

A. The EEOC requires employers to treat these employees as job applicants. As a result, the employee may only be given a fitness-for-duty examination after a job offer has been extended to the applicant.

B. The job offer may be conditioned, however, on passing the medical examination.


V. What if an employee requests accommodations for his/her disability?

A. An employer may request documentation to substantiate the employee’s need for the requested accommodation but cannot ask for unrelated documentation.

(1) Thus, the employer cannot ask for the employee’s complete medical record, in most cases.


B. When an employee requests an accommodation, the employee has the choice of which doctor to see

C. An employer can only require an employee to go to a doctor of its choice if the information provided by the employee is insufficient to establish either: 1) that the employee is disabled; or 2) that the employee needs a reasonable accommodation.

VI. What if an employer reasonably believes the employee poses a direct threat?

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A. The employer is allowed to have the employee examined by a medical professional of the employee’s choice.

B. Any medical examination, however, must be limited to determining whether the employee can perform his/her job without posing a direct threat, with or without reasonable accommodation.

VII. Fitness-for-duty examinations for current employees under the FMLA

A. An employer can ask the employee to obtain a medical certificate regarding his/her serious health condition before returning to work. This is usually done to ensure that the current employee is able to perform essential job functions after his/her return.

29 C.F.R. § 825.310

B. The employer can only request information contained in the Department of Labor’s “Certification of Health Care Provider” Form. This information includes:

(1) A certification as to which part of the definition of a serious health condition applies and the facts supporting the certification

(2) The approximate date the condition commenced and its probable duration

(3) A statement as to whether it is necessary for the employee to take intermittent or reduced schedule leave and the probable duration of such a schedule

(4) If the condition is pregnancy, or a chronic health condition, or whether the patient is incapacitated and the likely duration and frequency of episodes of incapacity

(5) If additional treatments are required, the estimated number of treatments, the interval between treatments, and the scheduled dates of treatments, if known

(6) If a regimen of continuing treatment under the supervision of a health care provider is required, a description of the regimen
(7) If medical leave is required, whether the employee will be required to be absent from work, or if not, whether the employee is unable to perform certain duties, including one or more essential functions of the job.

VIII. What about Return to Work Situations?

A. Under the ADA, employers may require examinations for those returning to work from medical leave if the employer has a “reasonable belief that the employee’s present ability to perform essential job functions will be impaired or that he/she will pose a direct threat due to a medical condition.”

B. Any inquiries or examinations, however, must be limited in scope as to what is needed to make an assessment of the employee’s ability to work.

C. The examination must be tailored to: 1) the actual medical condition that caused the absence, and 2) the ability to perform the essential functions of the job.

(1) Example 1: A data entry clerk broke her leg while skiing and was out of work for four weeks, after which time she returned to work on crutches. In this case, the employer does not have a reasonable belief, based on objective evidence, either that the clerk's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition. The employer, therefore, may not make any disability-related inquiries or require a medical examination but generally may ask the clerk how she is doing and express concern about her injury.

(2) Example 2: As the result of problems he was having with his medication, an employee with a known psychiatric disability threatened several of his co-workers and was disciplined. Shortly thereafter, he was hospitalized for six weeks for treatment related to the condition. Two days after his release, the employee returns to work with a note from his doctor indicating only that he is "cleared to return to work." Because the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat due to a medical condition, it may ask the employee for additional documentation regarding his
medication(s) or treatment or request that he submit to a medical examination.

IX. What about drug testing and medication inquiries?

A. Since individuals who use illegal drugs are not protected by the ADA, employers may engage in testing for illegal drugs

B. With regard to medication inquiries, questions regarding their use are appropriate only if the employer can demonstrate that it is “job-related and consistent with business necessity.”

(1) Example: An airline can require pilots to report when they are taking prescription medication which could impair their ability to fly, but a fire department cannot require employees who perform administrative duties to report their use of medication.