

When Performance is Impacted by Health:

Understanding When and How an Employer May Obtain Health Information

The webinar will begin promptly at 12:00 p.m.

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Webinar, May 7, 2014

When Performance is Impacted by Health



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Rose has extensive experience in the employment law field and regularly advises and represents large and small companies in employment and labor law issues and litigation across a broad spectrum of industries. Having served as in-house counsel for a Fortune 500 company, she brings knowledge and experience from a corporate perspective. Rose is a frequent speaker at seminars for human resources professionals and business executives about key employment and labor law trends. She has served as a mediator in a wide variety of civil disputes.



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Travis advises clients on a full range of employment law issues and represents them in employment related litigation in state and federal courts and agencies throughout North Carolina and the Southeast. His experience includes defending employers against claims involving discrimination, wrongful discharge, retaliation, harassment and civil rights claims and representing clients in investigations conducted by both federal and state departments of labor, the Equal Employment Opportunity Commission and the U.S. Department of Justice.

Today's Focus

- Medical inquiries / exams
- Existing employees

Potentially Applicable Laws

- ADA
- FMLA
- GINA
- Workers' comp
- Other state laws

Triggering Events

- Performance affected by health
- Attendance / tardiness issues
- Requests for leave
- Requests for accommodations
- Health-related episode on the job
- Outbursts / threats
- Aberrant behavior

What is a medical inquiry?

- Asking about:
 - Past / present medical conditions
 - Medical excuses or documentation
 - Family medical history
 - Workers' compensation claims
 - Current or past use of prescription medications
 - Impairments in a way that is likely to elicit information about a disability

What is a medical exam?

- Vision tests by professional
- Blood, urine, breath analysis for alcohol
- Blood pressure or cholesterol screening
- Nerve conduction tests (for example, to screen for carpal tunnel syndrome)
- Range of motion tests to measure muscle strength and motor function
- Pulmonary function tests
- Psychological tests designed to identify mental issues
- X-rays, CAT scans, MRIs

What is not a medical exam?

- Drug tests
- Physical agility and physical fitness tests (provided they do not include medical tests such as heart rate or blood pressure)
- Evaluation of ability to read labels or distinguish objects
- Personality tests measuring honesty, preferences, habits
- Polygraphs

When may an employer request medical information / exams?

- When the request is “job-related and consistent with business necessity”

Job-related / business necessity

- Employer reasonably believes that:
 - Employee's ability to perform essential job functions has been or will be impaired by a medical condition
 - Employee poses a "direct threat"
- Employee requests a reasonable accommodation
- Applicable law requires periodic exams to determine fitness for duty

Job-related / business necessity

- Condition may impair performance
 - Employer knows about employee's condition through observation or reliable third party reports
 - Employer observes performance problems resulting from condition, or reasonably anticipates problems

Job-related / business necessity

- Direct threat
 - Significant risk
 - Substantial harm
 - To employee or others

Job-related / business necessity

- Requests for accommodation
 - Employer may require employee to provide documentation to substantiate:
 - the disability
 - the need for the accommodation

Job-related / business necessity

- Managing absences and leaves
 - Employer may:
 - Ask “why”
 - Request doctor’s note
 - for all employees or employees with excessive absences
 - Require periodic updates on condition / return to work date
 - unless employer has granted a fixed period and employee has not requested extension

Job-related / business necessity

- Requests upon return to work
 - Require return to work certification
 - Especially if employer has a reasonable belief that:
 - Present ability to perform essential job functions will be impaired by condition, or
 - Employee will pose a direct threat due to condition

How to request medical information

- Send letter to treating physician
 - From HR, not manager / supervisor
- Draft narrowly to request only information necessary for purpose
- Describe reason for request
 - Accommodation, behavior, performance, request for leave, return to work, etc.
- Describe the job and enclose copy of job description

How to request medical information

- Ask:
 - What is the nature of the condition?
 - How does this condition impact the employee's daily activities, both on a personal basis and at work?
 - How long will the condition last, including how long the employee will be subject to any restrictions on daily activities?
 - Is the employee able to perform the essential functions of the job?

How to request medical information

- Tailor to reason for request
 - For example, if employee has requested accommodation, ask:
 - What limitations, if any, should be placed on his / her work activities?
 - How long will these work-related restrictions be in place?
 - What accommodations, if any exist, would enable the employee to perform the essential functions of her job?

Requesting medical exams

- Whose doctor?
 - Start with treating physician – and stop there, if information provided is sufficient
 - If not, consider physician of employer's choice
 - Employer must pay all costs

Pre-offer inquiries / exams

- Don't even think about it
- ADA prohibits all disability-related inquiries and exams at this stage, even if job-related
 - Unless needed for participation in application / hiring process

Post-offer, pre-employment inquiries / exams

- Employer generally may make disability-related inquiries and conduct medical exams
 - Provided that all entering employees in same job category are subject to same inquiries / exams
 - Use sparingly and with caution
- Some inquiries / exams required (e.g., CDL, respirators)

Tips

- Identify person(s) responsible for managing medical information
- Develop consistent processes for requesting medical information
- Train managers and supervisors on restrictions on medical inquiries and confidentiality of medical information

Thank you!

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