Fitness For Duty For Employers:

Guidelines on medical inquiries, accommodation and managing injury, illness, attendance and work assignments under FMLA, ADA and workers compensation regulations.

1. Q: What are the restrictions on an employer's right to require medical exams?

   A: The answer depends on the status of the employee and the information sought by the exam as well as the purpose stated for the exam. Employers are generally prohibited by the Americans With Disabilities Act (ADA) from making medical inquiries prior to a job offer. A conditional job offer may be given by the employer, after which the employer is free to make medical inquiries or require medical exams, so long as all employees for the particular job category are treated the same. An employer cannot send only those applicants, who look injured or disabled for an exam, and not send others, or use a questionnaire on medical issues as a method to sort out applicants who will be examined. However, if it is apparent that an applicant who has been given a job offer is going to need an accommodation to be able to perform the job or poses a direct threat (see Question 2) the employer may send the individual for an examination as part of the accommodation effort.

The inquiry as to a current employee's medical status is regulated by workers compensation laws, disability discrimination law (ADA) and family and medical leave laws (FMLA) as discussed below.

Work Comp:

**102.13 examination; competent witnesses; exclusion of evidence; autopsy.**

(1) (a) Except as provided in sub. (4), (100 mile limitation) whenever compensation is claimed by an employee, the employee shall, upon the written request of the employee's employer or worker's compensation insurer, submit to reasonable examinations by physicians, chiropractors, psychologists, dentists, physician assistants, advanced practice nurse prescribers, or podiatrists provided and paid for by the employer or insurer. No employee who submits to an examination under this paragraph is a patient of the examining physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist for any purpose other than for the purpose of bringing an action under ch. 655, unless the employee specifically requests treatment from that physician, chiropractor, psychologist, dentist, physician assistant, advanced practice nurse prescriber, or podiatrist.

Generally, the worker's compensation judges feel that an IME every six (6) months is reasonable, or if there is a change in circumstances (healing plateau,
permanency rating, etc.) or if you go to another specialty (e.g. first IME was orthopaedic and second IME is neurologist), more frequent than six (6) months is reasonable.

ADA:

Inquiries About Disabilities and Medical Examinations

1. Inquiries Prohibited. Employers are prohibited from making the following types of inquiries:
   a. It is unlawful for an employer to make inquiries as to whether an applicant has a disability or as to the nature or severity of any disability before an offer or employment is made.
   b. An employer may not inquire regarding an applicant's worker's compensation history before an offer of employment is made.
   c. An employer may not ask about potential disabilities or impairments on application forms.
   d. An employer may not make inquiries about the disabilities of an employee unless they are job-related and consistent with medical necessity.

2. Medical Examinations Prohibited. The ADA prohibits requiring medical examinations under the following circumstances:
   a. It is unlawful for an employer to require an applicant to submit to a medical examination before an offer of employment is made.
   b. It is unlawful for an employer to require a medical examination of an employee unless job-related and consistent with medical necessity.

3. Inquiries Permitted. Employers are permitted to make the following types of inquiries:
   a. Employers may ask questions about an applicant's ability to perform job-related functions as long as these questions are not phrased in terms of disability (e.g. an employer may ask if the applicant has a driver's license if driving is job-related, but may not ask if the applicant has a visual disability.)
   b. An employer may ask about an applicant's ability to perform both marginal and essential job functions.
c. An employer may describe or demonstrate the job duties and inquire whether or not the applicant can perform that function with or without reasonable accommodation.

d. An employer may ask an applicant to describe or demonstrate how, with or without accommodation; he/she will be able to perform job-related functions. This request may be made of all applicants or only of an applicant whose known disability may interfere with or present the performance of a job-related function (e.g., an employer may ask an applicant for a home washing machine repair job who has only one leg how he/she will climb stairs.

4. Medical Examinations/Other Tests Permitted. The ADA permits requiring medical examinations under certain circumstances:

   a. An employer may require a medical examination after making an offer of employment to a job applicant and before the applicant begins his/her employment duties.

   b. An employer may condition an offer of employment on the results of a medical examination, if all entering employees in the same job category are subject to such an examination regardless of disability.

   c. Medical examinations of current employees are allowed so long as they are job-related and consistent with business necessity.

   d. § 1630.14(c) of the EEOC regulations on the ADA says that an employer may make inquiries into an employee’s ability to perform job-related functions or require medical examination for this purpose or necessary to the reasonable accommodation process. Independent medical examinations under worker's compensation and second and third opinions under FMLA would be permitted under this standard.

   e. An employer may conduct voluntary medical examinations and activities, including voluntary medical histories, which are part of an employee health program available to employees at the work site.

   f. Physical agility tests are not medical examinations and may be given at any point in the application or employment process.

   g. Tests for the use of illegal drugs are not medical tests under the ADA and may be performed at any point in the application or employment process.

   h. Information obtained regarding the medical condition or history of the applicant must be collected and maintained on separate forms and in
separate medical files and must be treated as confidential documents. An employer should not place any medical information in employee personnel files. Medical records should be kept in a separate area (file cabinet) away from the personnel files. Medical files should be locked up and only one or more persons should be designated to have access to those files. Only those who need to know should have access to medical records, including:

- Supervisors and managers who need to be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
- First aid and safety personnel who need to be informed if emergency treatment may be required;
- Government officials investigating compliance with the ADA;
- State worker's compensation offices or "second injury" funds may be provided with relevant medical records; and
- Insurance companies may be provided with relevant information when required (e.g., medical examination results to qualify for health or life insurance).

FMLA:

(a) As a condition of restoring an employee whose FMLA leave was occasioned by the employee's own serious health condition that made the employee unable to perform the employee's job, an employer may have a uniformly-applied policy or practice that requires all similarly-situated employees (i.e., same occupation, same serious health condition) who take leave for such conditions to obtain and present certification from the employee's health care provider that the employee is able to resume work.

(b) If State or local law or the terms of a collective bargaining agreement govern an employee's return to work, those provisions shall be applied. Similarly, requirements under the Americans with Disabilities Act (ADA) that any return-to-work physical be job-related and consistent with business necessity apply.

(c) An employer may seek fitness-for-duty certification only with regard to the particular health condition that caused the employee's need for FMLA leave. The certification itself need only be a simple statement of an employee's ability to return to work. A health care provider employed by the employer may contact the employee's health care provider with the employee's permission, for purposes of clarification of the employee's fitness to return to work. No additional information may be acquired, and clarification may be requested only for the serious health condition for which FMLA leave was taken. The employer may not delay the
employee’s return to work while contact with the health care provider is being made.

29 C.F.R. § 825.310(a) – (c).

It is important to note, however, that nothing in the FMLA, or its implementing regulations, forbids a more stringent fit-for-duty examination once the employee has returned from FMLA leave, so long as any such examination is job-related and consistent with business necessity in accordance with Americans with Disabilities Act guidelines. The FMLA and its regulations simply prevent an employer from denying a return to work by an employee who has been absent on FMLA leave and who presents, upon his return, the requisite certification from his physician. If the employer has further doubts about the employee's ability to do his job, it is free to address that issue after the employee is reinstated from FMLA leave.

Harrell v. United States Postal Service.

2. Q: What can an employer do if it is concerned that an employee may be injured or re-injured at work?

A: Such concerns are very common and understandable. Workers compensation and disability costs have sky-rocketed and can put an employer at a significant disadvantage. Government agencies such as OSHA now target employers based upon history of injuries. Employers are legitimately concerned that employees will risk their own health and safety due to the need for a paycheck, and the responsibility falls on the employer to protect employees from themselves and the workplace too.

An employer who believes an employee cannot do the job at all, or cannot do it safely, must base its employment decision on reasoned judgment of a health care professional (HCP). The HCP should first address whether the employee can do the job at all. For example, a job requiring a person to lift 75 lbs cannot be performed at all by a person who is incapable of lifting that weight. However, the employer must also consider whether a reasonable accommodation exists which would allow the employee or applicant to do the job. (See Question 4.)

More often the employee will be able to do the job or some part of it, but there is a risk of injury in doing so. In those cases, the HCP should be asked to determine whether the individual poses a “direct threat” to self or others. Direct threat is defined as a high risk of substantial harm and takes into consideration the nature, severity, probability and duration of the risk. Generally, imminent risks or risks that pose a high severity of injury are going to be considered a direct threat, but each case is different.

The employer also must consider whether there is an accommodation that would reduce the risk to an acceptable level. For example, if a particular task poses a
direct threat, but that task is not essential or the employee can still perform most of the job satisfactorily, that task may need to be reassigned.

If an employee is released to return to work by a treating HCP, and the employer has questions about the employee's ability to do so, in spite of the doctor's release, an employer may seek clarification from the HCP. The employer may also require the employee to be evaluated by a HCP selected by the employer, but must do so consistent with the answers to Question 1 above.

3. **Q:** What if an employee refuses a fitness for duty exam or refuses to provide medical records that may be relevant to the exam?

   **A:** If the injury or illness is work related or alleged to be work related, the employee waives the physician patient privilege with respect to any records that are reasonably related to the alleged injury. Therefore, the employer or its insurer has the right to request and obtain those records without an authorization.

   An employer has the right to require reasonable examinations of employees who claim workers compensation. Wisconsin Statute § 102.13(1). Such independent medical exams (IMEs) may include a fitness for duty exam. If the employee refuses, after written request of the employer or insurer to submit to, or in any way obstructs the examination, the employee's right to begin or maintain any proceeding for the collection of compensation is suspended.

   However, if the FFD exam is not performed as part of an IME, the employer must have another basis for requiring the exam that is consistent with the ADA *i.e.* it is job related and consistent with business necessity. FFD exams that are part of the employers effort to evaluate reasonable accommodations are permitted by the ADA. Such exams may be triggered by medical restrictions from an employee's doctor, or by an employee who appears to be having difficulty performing his/her job. Where an employer is faced with restrictions that require the employer to make an accommodation, or the employee is otherwise not fully or satisfactorily performing the job, the employer is expected to interact with the employee to evaluate reasonable accommodations. An FFD exam and request for employee medical records may be part of this interactive evaluation. Where an employee refused to provide medical information or submit to an FFD exam as part of the accommodation process, some courts have held that the employee caused a breakdown in the interactive accommodation process, which relieved the employer of the burden under the ADA to provide a reasonable accommodation.

   An employee who is returning from FMLA leave may not be denied reinstatement pending the fitness for duty exam (See Question 1 above.) Instead, the employer should return the employee to work, taking care not to have the employee work beyond his/her capacity (*i.e.* providing a temporary accommodation) until the FFD exam can be completed.

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4. Q: Has anything changed as far as what accommodations are required for employees with disabilities?

A: Under the ADA, a reasonable accommodation includes:

- making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
- job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications or examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

The Americans with Disabilities Act was amended in 2009. While the changes did not alter the above requirements relative to accommodation, the definition of disability was expanded, such that many more employees and applicants will be covered. Therefore, the accommodation requirement has indirectly been expanded to apply to more conditions.

5. Q: Is an employer obligated to make work schedule adjustments?

A: Under the Americans with Disabilities Act, part time and modified work schedules may be considered a reasonable accommodation, unless such changes would pose an undue hardship, or impede the performance of essential job functions. Under the Wisconsin Fair Employment Act, adjusting hours of work may also be required as an accommodation, unless such changes pose an undue hardship. See Hutchinson Technology v. LIRC, et al. In order to demonstrate an undue hardship, the employer must be able to demonstrate the impact of the modified work schedule on its operations. In Hutchinson Technology, the fact that an employee had a work restriction that limited the employee’s hours and duties to performance of only three (3) out of four (4) job tasks, combined with the fact that the employer had accommodated the restriction for eight (8) months without showing an undue hardship, resulted in the Wisconsin Supreme Court holding that was a required permanent accommodation.

Therefore, the employer should not merely alter the work schedule to accommodate doctor restrictions for work or non-work related conditions assuming it will be temporary. The employer should document the impact of such temporary accommodations on production, quality, co-employee complaints, customer concerns, and other operational concerns, before denying a permanent accommodation.
6. **Q:** What is enough light duty?

A: Most employers provide light duty, temporary alternative duty or other return to work options for employees who have suffered a work related injury. They do so because this can speed up recovery from an injury and reduce worker's compensation costs. But, when light duty becomes extensively used by an employee, and a seemingly minor injury results in months of light duty or restricted work, employers (and co-workers) can become frustrated. This often leads to the question: What is enough light duty?

Employers should design temporary alternative duty programs to provide mechanisms for addressing this concern. The employer's program should recognize that temporary accommodations, such as modified work schedules or duties, can become permanent legal requirements. (See Question 5.) If extended light duty is significantly and negatively impacting employer operations, this should be documented. As light duty stretches on, its benefits become outweighed by its costs, because an employee is usually being paid their regular wage for much less productivity. Due to worker's compensation experience rating, the expense of payments to an employee for lost time has a greater impact on a claim's cost in the early stages of the claim, than it does in the later stages of the claim. So, for employers who do not self-insure worker's compensation liability, long term light duty may not make financial sense.

Some employers place a limit on temporary alternative duty or light duty (e.g. three (3) or six (6) months). Others require a Fitness for Duty or other medical evaluation at specific intervals to assess continuing eligibility under the program. Employers should consult qualified professionals to design a temporary alternative duty program that defines the limits of light duty.

7. **Q:** Who gets light duty?

A: Many employers limit light duty or temporary alternative duty to employees who have a work-related injury. Sometimes this distinction can be problematic because work-relatedness is disputed. In some cases, the employee who wishes to return to work is denied that opportunity, because a worker's compensation claim has not been made. There exists an incentive for the employee to claim that the injury is work related so that he/she can get back to work, thereby increasing the number of worker's compensation and OSHA recordable injuries. Employees may wish to consider applying temporary alternative duty to work related and non-work related injuries for that reason. However, if an employer does so, it should define light duty or temporary alternative duty to be temporary as discussed below.

Under the ADA, the EEOC takes the position that an employer does not have an obligation to create light duty. However, an employer who provides light duty for employees who are injured on the job, but refuses to provide such work to employees who have non-occupational conditions may be found to have violated the ADA. The EEOC focuses upon several issues in this regard. The ADA requires reassignment to a vacant position as an example of reasonable accommodation. So, if certain positions are
"reserved" for light duty, the EEOC will take the position that any disabled individual, regardless of the cause of the disability may be entitled to the position as an accommodation. Also, if light duty for a particular employer means simply excusing the employee from performing those functions that he/she is unable to perform because of an impairment; that may be a required reasonable accommodation for all employees unless the duties that the employee is excused from performing are essential to the job. However, the EEOC states in its guidance documents, that "an employer is free to determine that a light duty position will be temporary rather than permanent. Thus, if an employer provides light duty positions only on a temporary basis, it need only provide a temporary light duty position for an employee with a disability related occupational injury." (See EEOC Notice No. 915.002, EEOC Enforcement Guidance: Worker's Compensation and ADA.)

See also EEOC v. Supervalu, et al.; Consent decree resolving Case No. 09-CV-5637.

8. Q: What is the employer's obligation to tolerate poor attendance?

A: Leaves of Absence: An employer may not discriminate against an employee due to absence related to a work injury. An employee has the right to rely on his/her doctor in good faith regarding absence from work. So for example, where the employer's (or its insurer's) doctor disagrees regarding ability to return to work, the employer may not terminate the employee who relies on his doctor's recommendation to remain absent. However, the employer has no obligation to keep the injured employee's job open during a period of absence due to a work related injury unless required by the FMLA or ADA.

The FMLA provides "job protected leave." Attendance rules, such as no-fault attendance policies, must not be applied without regard to protections under state and federal family and medical leave laws. The ADA requires additional unpaid leave as a possible reasonable accommodation. So for example, an employee whose need for leave might extend shortly beyond the FMLA leave entitlement, depending on his/her disability status, might be entitled to additional leave as an accommodation.

Attendance Policies: Employees who have a work related injury are subject to the same attendance policies as other employees. An employee who has been released to return to work with restrictions may not fail to return to work, or arrive late, unless the need to do so is under doctor orders and the employee provides proper notice.

Under the ADA, employers may have to modify a work schedule or attendance requirement as a reasonable accommodation (see also Question 4). However, the EEOC does recognize that "although the ADA may require an employer to modify its time and attendance requirements as a reasonable accommodation (absent undue hardship), employers need not completely exempt an employee from time and attendance requirements, grant open-ended schedules (e.g. the ability to arrive or leave whenever the employee's disability necessitates), or accept irregular, unreliable attendance. Employers generally do not have to accommodate repeated instances of tardiness or absenteeism that occur with some frequency, over an extended period of time and often
without advance notice." (See EEOC Guidance: The Americans With Disabilities Act: Applying Performance and Conduct Standards to Employees With Disabilities.)

Under the FMLA, employees with chronic health conditions may require intermittent leave. In some cases, unpredictable attendance may be required under the FMLA. However, once FMLA leave has been exhausted, or in cases where the employer is ineligible because he/she has not worked the required hours in the previous year to be eligible for FMLA, unpredictable attendance need not be tolerated.