MEDICAL EXAMINATIONS AND MEDICAL CERTIFICATIONS UNDER THE ADA AND FMLA

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Americans with Disabilities Act (ADA)
Pre-Hire

- You cannot
  - ask a job applicant if he or she has a disability, or about the nature of an obvious disability
Pre-Hire (cont’d)

- this includes asking the applicant if he or she will need an accommodation to perform the essential functions of the job (because it is likely to elicit information about the disability), unless
you have a reasonable belief the applicant will need a reasonable accommodation, for example the applicant has an obvious disability or the applicant voluntarily disclosed his or her hidden disability

in these situations, you may ask about the need for an accommodation, but you may not ask any questions about the underlying physical condition
Pre-Hire (cont’d)

You cannot

- ask a job applicant to answer medical questions
- ask a job applicant about their workers' compensation history
Pre-Hire (cont’d)

- You cannot
  - require a job applicant to undergo a medical examination before making a job offer
    - requiring the applicant to demonstrate that they can lift certain objections to take a physical agility or physical fitness test is not a medical examination
      - remember -- is the test job related and consistent with business necessity
Pre-Hire
(cont’d)

- checking their heart rate after they lift an object is a medical examination
- drug tests for illegal drugs is not a medical examination, but testing for alcohol is a medical examination
You can
- ask a job applicant whether they can perform the job and how they would perform the job
  - for example -- you may tell the applicant the physical requirements of the job (such as the ability to lift a certain amount of weight, or the ability to climb ladders), and ask if an applicant can satisfy those requirements
- inform the applicant of your attendance requirements and inquire whether the applicant can meet them
You can

- ask the job applicant if they will need a reasonable accommodation for the hiring process
  - for example -- allowing the applicant to stand during the interview, assistance with taking a written test
  - and you can ask the applicant for medical documentation such as a medical certification supporting the requested accommodation in the hiring process
You can

- condition a job offer on the applicant answering certain medical questions or successfully passing a medical exam, but only if all new employees in the same job category have to answer the questions or take the exam

- beware of GINA and avoid questions about family medical history
if the question or examination screens out an individual because of a disability, the employer must demonstrate that the reason for the rejection is "job-related and consistent with business necessity," and performance of the essential job functions cannot be accomplished with a reasonable accommodation that does not cause an undue hardship.
if the individual is screened out for safety reasons, the employer must demonstrate that the individual poses a "direct threat," meaning the individual poses a significant risk of substantial harm to him/herself or others, and that the risk cannot be reduced below the direct threat level through reasonable accommodation
Post-Hire

- You cannot
  - ask medical questions or require a medical exam, unless
    - you need medical documentation to support an employee's request for an accommodation (ADA medical certification)
Post-Hire
(cont’d)

- have the physician identify
  - whether the employee can perform the essential functions of his or her job without a reasonable accommodation
  - if no, for how long the employee will be unable to perform those job duties
  - if the employee suffers from an impairment, describe the impairment
Post-Hire
(cont’d)

- what limitations are caused by the impairment, and how those limitations interfere with the employee's ability to perform the job functions
- what adjustments to the work environment or position responsibilities would enable the employee to perform the essential functions of their job
- whether any adjustments to the employee's typical work schedule are necessary given the limitations caused by the impairment
Post-Hire (cont’d)

- how the health care providers suggestions will improve the employee's job performance
- how long will the employee need the recommended workplace adjustments, and if unable to provide a date, when the employee will be medically reevaluated
Post-Hire
(cont’d)

➤ You cannot
  ■ ask medical questions or require a medical exam, unless
    ♦ you have a good faith basis to believe the employee is not able to perform their job successfully or safely because of a medical condition (fitness for duty exam)
    ♦ you must prove that the medical questions or medical exam is job-related and consistent with business necessity
EEOC V. Dillard's  
(S.D. Cal. 2012)

- FACTS -- Dillard's attendance policy required that an employee absent for a health related reason provide a doctor's note stating the nature of the absence and the condition being treated in order for the absence to be considered excused. Dillard's policy also stated that an employee with more than four unexcused absences would be terminated.

- HOLDING -- Dillard's policy violates the ADA because it is an impermissible inquiry into a medical condition that may tend to reveal a disability. Further, Dillard's failed to establish the inquiry was job-related and consistent with business necessity.

- SIGNIFICANCE -- Court noted that Dillard's policy may not have violated the ADA if it just asked for the date on which the employee was seen, that their absence from work was medically necessary, and stating a date on which the employee would be able to return to work.
Post-Hire
(cont’d)

➢ You can

▪ 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, so long as that medical information is kept confidential
Record Keeping and Confidentiality

- You must keep all medical records and all medical information confidential
Exceptions
  - may be disclosed to decision makers in determining issues related to accommodation
  - may be disclosed to health care providers to determine whether a reasonable accommodation is possible for a particular individual
  - limited information to supervisors and managers -- they may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations (but not the underlying medical condition)
Record Keeping and Confidentiality (cont’d)

- first aid and safety personnel may be told if the disability might require emergency treatment
- government officials investigating compliance with the ADA
- may disclose medical information for workers' compensation matters and insurance purposes
You must keep all medical records and medical information in a medical file that is separate from the employee's personnel file.
ADA Statute and Regulations

- 42 USC Section 12112(d) -- medical examinations and inquiries
- 42 USC Section 12114 -- illegal use of drugs and alcohol
- 29 CFR Section 1630.3 -- illegal drug use and exceptions to definitions of "disability" and "qualified individual with a disability"
- 29 CFR Section 1630.2(4) -- "direct threat"
- 29 CFR Section 1630.10 -- qualification standards, tests, and other selection criteria
ADA Statute and Regulations (cont’d)

- 29 CFR Section 1630.11 -- administration of tests
- 29 CFR Section 1630.13 -- prohibited medical examinations and inquiries
- 29 CFR Section 1630.14 -- medical examinations and inquiries specifically permitted
- 29 CFR Section 1630.16(b) - (e) -- regulation of alcohol and drugs, drug testing regulation of smoking, infectious and communicable diseases and food handling jobs
Rules of the Idaho Human Rights Commission

- IDAPA 45.01.01.200 -- medical issues
Family Medical Leave Act (FMLA)
You may request medical certification from the employee's health care provider to support an employees request for FMLA leave associated with:

- the employee's own serious health condition
- the employee's family members serious health condition and the necessity for your employee to care for that family member
FMLA Medical Certifications (cont’d)

- **Timing**
  - within five (5) business days of the date the employee gives notice for leave, or in the case of unforeseen leave, within five business days after the leave commences
  - you may request certification at some later date, but only if you have reason to question the appropriateness of the leave or its duration
FMLA Medical Certifications (cont’d)

- Employee must provide certification within 15 calendar days of your request, unless not practicable or you give employee additional time.

- You may request the employee to provide a new medical certification if their leave extends beyond a single leave year.
What can you ask in the FMLA medical certification

- the name, contact information, and qualifications of the health care provider
- the date on which the serious health condition commenced
- the probable duration of the condition
FMLA Medical Certifications (cont’d)

- the medical facts regarding the patient's health condition for which FMLA leave is requested, including symptoms, diagnosis, hospitalization, doctor visits, medication prescribed, referrals for further evaluation, or any other regimen of continuing treatment
FMLA Medical Certifications (cont’d)

- certification that the employee is needed to care for a family member, and an estimate of the frequency and duration of the leave required to care for the family member

- a statement that the condition necessitating the leave prevents the employee from performing the essential functions of their job as well as the nature of any other work restrictions, and the likely duration of such restrictions
in the case of certification for intermittent leave, or leave on a reduced leave schedule:

- a statement of the medical necessity for the intermittent leave or leave on a reduced leave schedule, and the expected duration of the intermittent leave or reduced leave schedule
- if needed for planned medical treatment, the dates on which such treatment is expected to be given and the duration of such treatment
FMLA Medical Certifications (cont’d)

- if needed for the care of another family member, a statement that intermittent leave or leave on a reduced leave schedule is necessary for the care of the family member and the expected duration and schedule of the intermittent leave or reduced leave schedule
FMLA Medical Certifications (cont’d)

- you must advise the employee, in writing, that you may deny their request for FMLA leave if they fail to provide a complete and sufficient certification.
if the employee is on FMLA leave concurrently with a worker's compensation absence, you may request additional information if allowed by the applicable state’s worker's compensation laws and consider that information when determining employee's entitlement to FMLA leave.
FMLA Medical Certifications (cont’d)

- you may request additional information in accordance with a paid leave policy or disability plan that requires greater information to qualify for payments or benefits, provided you inform the employee that the additional information only needs to be provided if they are seeking paid leave or disability benefits -- if additional information is provided you may consider this additional information when determining employee's entitlement to FMLA leave
employee can elect to give you an authorization, release, or waiver in lieu of certification, that allows you to communicate directly with their health care provider or the health care provider of their family member.

- you cannot require an employee to give you authorization, release or waiver.
Incomplete certifications

- you must advise the employee if the certification is incomplete or insufficient and advise the employee in writing what additional information is necessary to make the certification complete and sufficient
  - you must provide employee with seven calendar days to cure any deficiency, unless not practicable
FMLA Medical Certifications (cont’d)

- what constitutes an incomplete certification:
  - one or more of the applicable entries has not been completed
  - the information provided is vague, ambiguous, or non-responsive
FMLA Medical Certifications (cont’d)

- if deficiencies are not cured, you may deny taking of FMLA leave
- employees are not entitled to cure period if they fail to provide certification within prescribed time periods
FMLA Medical Certifications (cont’d)

- Clarification of certification
  - remember it is the employee's responsibility to provide a complete and sufficient certification
  - you may contact the health care provider, but only if you have given the employee an opportunity to cure any deficiencies
FMLA Medical Certifications (cont’d)

- the only people within your company that can contact such health care provider are:
  - a human resources professional
  - a leave administrator
  - a management official
- the employee's supervisor may not contact the health care provider
FMLA Medical Certifications (cont’d)

- what can you ask the health care provider:
  - verify that the information contained on the form was completed or authorized by the health care provider
  - to clarify illegible handwriting
  - clarification on the meaning of their response
FMLA Medical Certifications
(cont’d)

- what you cannot ask the health care provider
  - you cannot ask for additional information beyond that required by the certification form
Second and Third Opinions

- Second Opinions -- If you have reason to doubt the validity of the employee's medical certification
  - must be at your expense
  - you can designate the second health care provider so long as that health care provider is not employed by you on a regular basis
FMLA Medical Certifications (cont’d)

- you must pay for any travel expenses
- you may not require the employee or family member to travel outside of normal commuting distances
FMLA Medical Certifications (cont’d)

- Third Opinions -- If the second opinion differs from the first opinion, you may require a third opinion
  - must be at your expense
  - health care provider must be jointly approved by you and employee
  - the third opinion is final and binding on the employer and employee
FMLA Medical Certifications (cont’d)

- Recertification
  - you may require an employee on FMLA leave to provide subsequent recertifications on a reasonable basis
  - may request recertification every 30 days, unless the last certification indicated that the leave would be more than 30 days, whereupon you cannot ask for recertification until the duration specified in the last certification expires or the circumstances described the previous certification have changed significantly
in all instances, you may request recertification if the medical condition extends beyond six months

you may ask for recertification at any time if the employee asks for an extended period for leave or if you obtain information that casts doubt on the employee's stated reason for absence

you must give the employee at least 15 calendar days to provide recertification
Intent to Return to Work

- you may require an employee on FMLA leave to report periodically on their status and intent to return to work
- must continue to provide health care benefits until employee gives unequivocal notice of intent not to return to work
- you can require the employee to provide at least 2 days notice of any request to extend or shorten the leave period
FMLA Medical Certifications (cont’d)

- Fitness-For-Duty Certification
  - you may require your employee to provide medical certification that they are fit to return to work, so long as:
    - you require fitness-for-duty certifications for all similarly-situated employees
    - the certification is limited to the medical condition that necessitated the leave
Fitness-For-Duty Certification (cont’d)

- you must provide the employee with a list of the essential functions of their job and you must tell the employee that the certification must address the employee's ability to perform those essential functions.
- the employee must pay the cost to complete the certification, and the employee is not entitled to compensation for travel costs.
FMLA Medical Certifications (cont’d)

- you must notify the employee of their requirement to provide a fitness-for-duty certification in your first notice granting the FMLA leave
- an employee who does not provide a fitness-for-duty certification or request additional FMLA leave is no longer entitled to reinstatement under the FMLA
- any request for fitness to return to work must comply with the ADA, i.e. they must be job-related and consistent with business necessity
FMLA Medical Certifications (cont’d)

- Consequences for Failing to Provide the Required Certifications
  - See 29 CFR Section 825.313
FMLA Statute and Regulations

- 29 USC Section 103 -- medical certification
- 29 CFR Section 825.305 -- leave certification, general rules
- 29 CFR Section 825.306 -- medical certification for employee's own health condition or family member's health condition
- 29 CFR Section 825.307 -- authentication and clarification of medical certification
- 29 CFR Section 825.308 -- recertifications
- 29 CFR Section 825.310 -- certification for military caregiver leave
- 29 CFR Section 825.311 -- intent to return to work
- 29 CFR Section 825.312 -- fitness-for-duty certification
- 29 CFR Section 825.313 -- failure to provide certification
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