

EMPLOYEE FITNESS FOR DUTY CONSIDRATIONS: HOW CAN YOU FIND OUT?

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1

LEGAL DISCLAIMER

- Nothing in this presentation is intended to provide legal advice or apply to any specific situation. All comments and opinions are the author's own and should not be attributed to any other person or company.

2

THREE ISSUES:

- Who can you test for fitness?
- What can you test them for?
- When can you test them?

3

CONSTRAINTS

- Americans with Disabilities Act (ADA)
- Family and Medical Leave Act (FMLA)
- Workers Compensation

4

ADA MEDICAL EXAMS

- Applicants, pre-employment, *and after* an offer has been made
- Current employees-- may require a medical examination of an employee that is job-related and consistent with business necessity. An employer may make inquiries into the ability of an employee to perform job-related functions
- Drug and alcohol tests are permitted if:
 - For cause
 - Random
 - BUT: some states limit the right to test for pot

5

IF ADA COVERED, EMPLOYEE MUST ONLY BE FIT FOR ESSENTIAL FUNCTIONS

- "Essential":
 - job exists to perform
 - limited available employees to perform
- With or Without Accommodation
- What is "Essential"?
 - Employer's Judgment
 - Job Description
 - Time Spent
 - Consequences of Non-Performance
 - Work Experience of Incumbents
 - CBA
- Can't require 100% fit for duty across the board

6

ADA

- Who is disabled?
 - Physical/Mental Impairment + Substantial Limitation one or more Major Life Activities
 - A Record of Impairment
 - "Regarded As"
- Substantial Limitation is an Impairment that
 - Prevents or severely restricts
 - Activities of central importance to most people's daily lives
 - Impact permanent or long-term

7

EXAMPLES OF MAJOR LIFE ACTIVITIES

- Standing
- Sitting
- Bending
- Reaching
- Lifting
- Interacting with others
- **Operation of all major bodily functions**
- Eating
- Sleeping
- Reading
- Communicating
- Thinking
- Concentrating

8

WHAT IS A REASONABLE ACCOMMODATION?

- A reasonable accommodation is any change in the workplace or the way things are customarily done that provides an equal employment opportunity to an individual with a disability.
- Some things are not considered reasonable accommodations (e.g., removal of an essential job function), but reasonable accommodations can cover most things that enable an individual to apply for a job, perform a job, or have equal access to the workplace and employee benefits.
- Determination of whether a reasonable accommodation can be made is done through the "interactive process"

9

REASONABLE ACCOMMODATIONS

- modifying work schedules or supervisory methods
- granting breaks or providing leave
- altering how or when job duties are performed
- removing and/or substituting a marginal function
- moving to different office space
- making changes in workplace policies
- providing assistive technology, including information technology and communications equipment or specially designed furniture
- providing a reader or other staff assistant to enable employees to perform their job functions, where the accommodation cannot be provided by current staff
- removing an architectural barrier, including reconfiguring work spaces

10

FMLA

- Eligibility for FMLA
 - 12 months of employment during the past seven years
 - 1,250 hours worked in the 12 months immediately preceding the date leave is to begin
- Serious health condition that makes the employee unable to perform the functions of the employee's job
- Inpatient care
- Period of Incapacity 3 Days
 - Treatment 2 or more times, or
 - one time + regimen of treatment
- Incapacity Due to Pregnancy or Prenatal Care

11

FMLA RTW

- Employer may require a fitness-for-duty certification for RTW
- May require the certification specifically address the employee's ability to perform the essential functions of their position
- The employee must be provided with a list of essential functions of the employee's job no later than when the Designation Notice is provided to the employee

12

FMLA: RTW RIGHTS

- FMLA "same" or "equivalent" position
- Unconditional Pay Increases
- Same or Proximate Work Site
- Layoffs During Absence
- Resumption of Benefits

13

THREATS TO SAFETY

- Direct Threat
- Health or Safety
- Self or Others
- Cannot be Alleviated by Reasonable Accommodation
- Case-by-Case Basis
- Need Medical Input
- EEOC: "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation"

14

WORK COMP

- Each state has different rules
- Each case will be different
- If the employee has a work comp claim, it's important to coordinate the approach with ADA and FMLA

15

SUMMARY

- Applicants and employees may be tested
- When it is job-related and consistent with business necessity
 - A doctor's note may be required when returning from FMLA
- Can be tested to see if they are capable of doing the essential elements of the job

16