Fitness for Duty Evaluations:
Navigating Employer Obligations and Employee Rights

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INTRODUCTION

A safe workplace is more than smart business, it is legally required. According to the Occupational Safety and Health Act of 1970, the employer "… shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees [Section 5(a)(1)].” Concurrently, government agencies have a duty to citizens to operate effectively and efficiently [Yin v. California (9th Cir. 1996) 95 F.3d 864, 873].


Intersecting and complicating the employers’ safe and productive workplace obligations are the nondiscrimination and privacy protections which are afforded to applicants and/or employees under the following laws:

- Americans with Disabilities Act (ADA)
- California Confidentiality in Medical Information Act (CMIA)
- California Fair Employment and Housing Act (FEHA)
- Family Medical Leave Act (FMLA)
- Genetic Information and Nondiscrimination Act (GINA)
- Rehabilitation Act
- United States Constitution (Fourth Amendment)

As such, it has become increasingly complicated for employers to meet their legal obligations while ensuring employees’ rights are protected. Determining, without violating employee protections, what functions an employee can perform (with or without an accommodation) is necessary to distinguish poor performance from an accommodation issue and critical to ensuring a safe, productive, and discrimination-free workplace.

Fearful of making a mistake which could lead to employer liability, a supervisor or manager might be inclined to ignore fitness issues. This paper is centered on the fitness-for-duty evaluation and is intended to heighten the public manager's awareness of his/her obligation to respond to observations of potentially unfit employees in the workplace. How an employer, in its effort to conduct a fitness-for-duty evaluation (FFDE), can meet its obligation to ensure a safe,
A fitness for duty evaluation (FFDE) is a medical and/or psychological evaluation undergone by an applicant or employee at the direction of the employer. The FFDE is performed by a licensed physician who evaluates the individual’s ability (emotional, mental, and physical) to perform the essential functions of a specific classification.

The evaluation results indicate whether or not the individual can safely (without risk of harm to the health and safety of himself/herself and/or others) and successfully perform the essential job functions of his/her position with or without accommodation. Results are relied on by the employer to make employment decisions such as hiring, granting accommodations, and assigning work. Each and every time an employer desires to inquire about an individual's fitness, the employer must carefully navigate the need for information relating to the fitness of applicants and employees (employer obligations) with the various laws prohibiting discrimination and protecting employee privacy (employee rights). Therefore, it is necessary to consider under what authority an employer may inquire into an applicant or employee’s fitness and when an employer can require a fitness-for-duty evaluation.

Several state and federal laws prohibit disability discrimination yet allow employers to inquire about an applicant or employee’s fitness and/or require the individual to undergo an FFDE (with a defense against discrimination). A summary of these provisions follows and links to these laws are provided as resources at the end of this paper.
The Americans with Disabilities Act (ADA) allows employers to inquire about medical information and/or require a medical examination under limited conditions. According to Title I of the ADA an employer may:

Inquire into the ability of an applicant to perform job-related functions

Require a medical examination (after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant) IF (A) all entering employees are subjected to such an examination regardless of disability; (B) information obtained regarding the medical condition or history of the applicant is…treated as a confidential medical record…(C) the results of such examination are used only in accordance with this subchapter.

Require a medical examination and/or inquire about the medical information of a current employee as long as the examination or inquiry is shown to be job-related and consistent with business necessity.

Require that an individual (applicant or employee) not pose a direct threat to the health or safety of other individuals in the workplace

California Fair Employment and Housing Act (FEHA), Government Code §§ 12940 et seq.

The California Fair Employment and Housing Act (FEHA) provides applicants and employees broad protection, but allows for employers to inquire about medical information and/or require FFDE of applicants and employees under limited conditions. An employer may:

Require an applicant undergo a medical or psychological examination when “…an employment offer has been made to an applicant, but prior to the commencement of employment duties …provided that the examination or inquiry is job-related and consistent with business necessity and; that all entering employees in the same job classification are subject to the same examination or inquiry.” The exam may be used to determine whether the applicant would endanger his/her or others health or safety.

Require a medical/psychological examination and/or inquiry of a current employee as long as the examination is job-related and consistent with business necessity.

California Government Code § 1031(f)

The California Government Code not only allows an employer to inquire about the fitness of a public safety applicant or employee, it, in essence, requires it. Peace officers shall “…be found to be free from any physical, emotional, or mental condition that might adversely affect the exercise of the powers of peace officer” This code requires employers to ensure the
fitness of their peace officers. As a result, public employers conduct thorough pre-employment medical and psychological evaluations of their peace officer candidates.

**Family Medical Leave Act (FMLA), 29 C.F.R. Part 825**

Under the FMLA, employers are permitted to have a policy or practice that requires employees (in similar job positions) who take leave for similar health conditions to provide a return to work certification from the employee’s physician. An employer may prohibit an employee’s return to work until the fitness-for-duty certification is provided, as long as the employer provided notice (to the employee) regarding the certification requirement. According to the U.S. Department of Labor Wage and Hour Division Fact Sheet #28G:

> The employer may request a fitness-for-duty certification only with regard to the particular health condition that caused the employee’s need for FMLA leave. (Intermittent or part-time leave generally does not warrant a return to work certification.) However, if the employer has a reasonable belief that the employee’s return to work presents a significant risk of harm to the employee or to others, the employer may require a fitness-for-duty certification up to once every 30 days...If State or local law or collective bargaining agreement governs an employee’s return to work, those provisions must be applied.


As with the ADA and FEHA, the Rehabilitation Act of 1973 prohibits disability discrimination by federal employers and governmental agencies which receive financial assistance from the federal government. Employers complying with ADA and FEHA are generally in compliance with the Rehabilitation Act (section 504).

**WHEN IS AN FFDE ALLOWED?**

With the understanding that, under limited conditions, an employer has legal authority to inquire about an applicant or employee’s fitness and/or require an FFDE, an employer must establish if those conditions apply in any given situation. To do so, an employer must acknowledge that the “limited conditions” which allow for FFDE are different for an applicant versus an employee. At the same time, a general principle exists. Generally, the FFDE is allowed when it is job-related and consistent with business necessity. With this principle in mind, typical scenarios of when an employer may be prompted to initiate an FFDE are presented below.

**Applicant**

An applicant may be required to undergo an FFDE after the employer has extended a job offer to the applicant, but before employment begins (the job offer can be conditioned upon successfully passing a pre-employment medical exam) or when the applicant has requested an accommodation in order to participate in the selection and/or hiring process.
Employee

An employee may be required to undergo an FFDE when the employer believes the employee’s inability to perform his/her duties successfully and/or safely is due to a medical condition or when the employee has requested an accommodation in order to perform his/her duties. Some examples of when an employer may believe an employee is unable to perform his/her duties successfully and/or safely may include: an employee’s self-disclosure of a medical or performance issue; observations of performance issues; excessive absence due to illness or injury; observations of unsafe behavior or conduct; and return to work after leave under the Family Medical Leave Act (FMLA), ADA, Short Term Disability (STD), Long Term Disability (LTD), Industrial Accident, or other injury/illness.

The United States Equal Employment Opportunity Commission (EEOC) enforces federal laws that make it illegal to discriminate against a job applicant or an employee, in part, because of the person's disability or genetic information, complaint about discrimination, filing of a charge of discrimination, or participating in an employment discrimination investigation or lawsuit. In regards to when an employer can require an employee to submit to an FFDE, the EEOC states, “Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee’s request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition.”

INITIATING THE FFDE

Re-Evaluate the Need for an FFDE

Assuming, in a particular case, an employer believes an FFDE is necessary, i.e., that it is job-related and consistent with business necessity; it would be prudent for the employer to carefully re-evaluate its belief before ordering the FFDE. As a reminder the FFDE process is triggered by a (1) conditional job offer, (2) employer belief that an employee’s inability to perform is due to a medical condition, or (3) an employee's request for an accommodation.

In the case of an applicant with a conditional job offer, the employer should, prior to ordering the medical evaluation, ensure that the job offer is truly conditional, which entails confirming that all other steps in the selection process have been successfully completed. In *Leonnel v. American Airlines* (9th Cir. 2005) 400 F.3d 702, the Court of Appeals ruled that for a job offer to truly be conditional the employer must have already completed all of its non-medical evaluations of the candidate.

In a case where an employer believes that a current employee is unable to perform his or her duties due to a medical condition, the employer should evaluate whether its "reasonable belief" will hold up in court. As defined by case law, significant evidence must exist that could cause a reasonable person to question whether an employee is currently capable of performing his/her job [*Sullivan v. River Valley School District* (6th Cir. 1999) 197 F.3d 804, 811].
Two separate cases further delineate when an employer may require an FFDE. In *Yin v. California* (9th Cir. 1996) 95 F.3d 864, 868 it was established that an employer can require an FFDE of a current employee in order to determine the employee’s ability to work “when health problems have had a substantial and injurious impact on an employee’s job performance,” and in *Brownfield v. City of Yakima* (9th Cir. 2010) 612 F.3d 1140 it was established that business necessity may be met even before an employee’s performance declines when the employer has significant evidence (outside of performance) which would compel a reasonable person to question whether an employee is still capable of performing his/her job.

Finally, in the case of a current employee requesting an accommodation, his/her request can often be processed utilizing medical certification provided by the employee's own physician. However if the information provided by the physician is unclear, incomplete, or vague, the employer may require a second opinion (FFDE) at the employer's expense.

**Determine Whether Treating Physician or Independent Physician Will Conduct FFDE**

After determining that the FFDE requirement is reasonable, job-related and consistent with business necessity, a decision should be made as to whether the employee’s treating physician or an independent (agency-approved) physician will conduct the FFDE. An independent occupational health physician is often preferred by the employer because the independent physician is more familiar with job functions and reviewing job descriptions, and is more inclined to contact the employer for more information and less inclined to provide an opinion biased toward the employee than the treating physician. Additionally, the services of an independent physician may be required in order to clarify or complete an unclear, incomplete, or vague certification provided by the treating physician. Conversely, the advantages of working with a treating physician include the physician’s familiarity with the employee’s condition(s), quicker response time, and less or no expense to the employer.

**Notify Employee and Coordinate with Physician**

The Human Resources Department ("HR") should inform the employee of the requirement that he/she undergo an FFDE and secure any medical waivers requested by the examining physician (sometimes physicians will request to review the employee's medical records in conjunction with the FFDE). As previously mentioned, employees have privacy rights that the employer should not violate. For example, employers are only permitted to receive information regarding an employee's ability to perform essential functions (not the medical cause of any inability to perform) and functional limitations [California Medical Information Act (CMIA), Civ. Code §§ 56.10, subd. (c)(8)(b); 56.20 subd. (b)].

Absent employee authorization, the evaluating physician cannot receive or review the employee's medical records. However, CMIA does not prohibit an employer from taking action (against the employee) as needed in the absence of medical information due to an employee's refusal to release his/her medical records.
HR should provide the physician the basis for initiating the FFDE (e.g. performance observations, return to work, accommodation request), as well as a copy of the employee’s classification specification identifying and describing the essential job functions of the employee’s position. HR should direct the physician to respond to the following:

- Does the employee have a disability as defined by ADA and FEHA?
- If yes, does the disability affect the employee's ability to perform the essential functions of the position?
- If yes, what accommodations are recommended which would enable the employee to perform the essential functions?
- Can employee continue to perform the assignment without current risk of harm to himself/herself or others?
- If no, provide the duration, nature, severity, likelihood, and imminence of each risk.
- What accommodations would reduce or eliminate the risk(s)?

THE FFDE RESULTS

After conducting the FFDE and evaluating all relevant information, the physician will provide answers to the questions listed above. The physician’s evaluation should reveal one of three results:

1. Fit - the employee is fit to perform all essential job functions;
2. Unfit - a disability exists which affects employee's ability to currently perform his/her essential job functions and there are no accommodations which would enable the employee to perform those functions; or
3. Fit with accommodations - a disability exists which affects the employee's ability to perform his/her essential job functions, but accommodations are recommended which would enable the employee to perform.

If the FFDE results are unclear, incomplete, or vague, the physician (treating or independent) should be contacted to obtain the necessary follow-up information.

When coordinating an FFDE an employer is legally required to keep medical information confidential by filing it apart from personnel records in separate medical files and releasing it only as legally permitted. According to 29 C.F.R. § 1630.14 subd. (b)(1)(i)(ii)(iii); § 1630.14 subd. (c)(1)(i)(ii)(iii)} the release of an applicant or employee's medical information is permissible as follows:

1. Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
2. First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
3. Government officials investigating compliance with this part shall be provided relevant information on request.
The Genetic Information and Nondiscrimination Act of 2008 (GINA), 42 U.S.C. §§ 2000ff prohibits employment discrimination on the basis of genetic information and makes it unlawful for employers to request, require, or purchase the genetic information of an employee or family member (with limited exceptions). Genetic information received through the allowed exceptions must be kept confidential by filing it in separate medical files and releasing it only as legally permitted. The release of an applicant or employee’s genetic information is permissible as follows:

1. to the employee or employee’s family members, at the written request of the employee;
2. specified occupation health research;
3. in response to a court order;
4. in compliance with FMLA;
5. to a health agency pursuant to contagious disease outbreak

Without fear of unintentionally engaging in disability discrimination, employers can hold a “fit” employee accountable for his/her poor job performance. However, should the employer make new observations which cause a reasonable belief the employee is unable to perform due to a medical condition, or should the employee makes a new accommodation request, the employer will likely need to initiate another FFDE.

Employers must engage in the interactive process when employees are found unfit or fit (with restrictions/accommodations). During the interactive process an employer may grant an “unfit” employee an attendance accommodation which allows time off in order to bring his/her medical condition under control, may re-assign the employee, or may separate the employee from employment.

The interactive process provides an opportunity for an employer to consider the accommodation recommendations made through the FFDE and either agree with, modify, or deny the recommended accommodations. Denial of a recommended accommodation is permitted when such accommodation would cause an “undue hardship” or would require the employer to eliminate an essential function of the employee's position (Note: an individual who is unable to perform the essential functions, with or without reasonable accommodation, is not qualified under ADA). The EEOC provides guidelines for determining whether an accommodation creates an undue hardship. Several factors are considered:

- the nature and cost of the accommodation needed;
- the overall financial resources of the facility making the reasonable accommodation; the number of persons employed at this facility; the effect on expenses and resources of the facility;
- the overall financial resources, size, number of employees, and type and location of facilities of the employer (if the facility involved in the reasonable accommodation is part of a larger entity);
the type of operation of the employer, including the structure and functions of the workforce, the geographic separateness, and the administrative or fiscal relationship of the facility involved in making the accommodation to the employer;

the impact of the accommodation on the operation of the facility (such as those which would fundamentally alter the nature or operation of the agency)

WHAT IF AN APPLICANT OR EMPLOYEE REFUSES TO UNDERGO AN FFDE?

Under the Fourth Amendment people are protected from unreasonable searches and seizures; “The right of the people to be secure in their persons...against unreasonable searches and seizures, shall not be violated…” As might be expected, public employees have alleged that mandated FFDE, (especially drug-tests), are an intrusion of their Fourth Amendment rights. Therefore, it is possible that an applicant or employee will refuse to undergo an employer-required FFDE.

However, as described in some of the statues, under certain conditions an employer is able to legally require an employee to undergo a FFDE. In these cases, employers have options. In the case of an applicant’s refusal, the employer may simply withdraw the offer of employment based on the applicant’s inability (refusal) to successfully pass the pre-employment medical exam.

In the case of an employee’s refusal, the employer may direct the employee to undergo the FFDE and discipline the employee for insubordination if he/she refuses (Black v. Napolitano, Appeal No. 0120111349, Agency No. HS-05-TSA-002002), may stop processing his/her accommodation request for failure to engage in the interactive process, or may make a determination regarding his/her fitness based on all other information available.

SHOULD AGENCIES INCLUDE FFDE LANGUAGE IN THEIR MOUS/RULES?

Since individuals may voluntarily undergo an FFDE, it may be advantageous for employers to incorporate FFDE language in their bargaining agreements. In Thomas J. Verzeni, Appeal No. 019752586, Agency No. 4C-179-1008-95, Hearing No. 170-9508508X, the final agency decision upheld the administrative judge’s decision that the appellant was not aggrieved when the U.S. Postal Service ordered him to undergo an FFDE because, “the agency’s Employee & Labor Relations Manual...permits the agency to order an FFD examination at any time and repeat, as necessary, to safeguard the employee or coworker.”

BEST PRACTICES

In summary, public employers have a duty to provide a safe, effective, and efficient workplace. At the same time, public employers must not engage in disability or genetic information discrimination and must protect employee privacy. This intersection of employer obligations and
employee rights is complicated and requires careful navigation. Therefore, the following guidelines are suggested:

1. Understand a public employer’s obligation to ensure safe, effective, and efficient operations.
2. Understand and be familiar with the laws, statutes, and court interpretations protecting individuals from disability and genetic information discrimination and invasion of privacy.
3. Require an FFDE only after establishing it is reasonable, job-related, and consistent with business necessity.
4. Know your options if an applicant or employee refuse to undergo an FFDE.
5. Request additional information if the FFDE results come back unclear, incomplete, or vague.
6. Protect medical and genetic information by filing it separately and releasing it only as legally permissible.
7. Engage in the interactive process.
8. Understand when “undue hardship” applies to your agency.
9. Make employment decisions after the interactive process has revealed whether the individual can perform the essential functions of a position, with or without accommodations.
10. Have a written FFDE policy and negotiate FFDE language into bargaining unit agreements.

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Resources (contain hyperlinks to documents/websites)

- Americans with Disabilities Act (ADA) of 1990, as Amended
- California Confidentiality in Medical Information Act (CMIA)
- California Fair Employment and Housing Act (FEHA)
- California Government Code (§ 1031f)
- Family Medical Leave Act (FMLA) of 1993
- Federal Occupational Safety and Health Act of 1970
- Genetic Information and Nondiscrimination Act (GINA)
- Rehabilitation Act of 1973
- U.S. Code of Federal Regulations
- United States Constitution (Fourth Amendment)

The EEOC website provides decisions to federal sector appellate decisions. Three cases are listed below as examples.
Black v. Department of Homeland Security (TSA) [EEOC Appeal No. 0120111349 (May 3, 2013)] – suspension for refusal to attend FFDE was upheld.

Hampton v. United States Postal Service [EEOC Appeal No. 01986308 (Jul. 31, 2002)] – reasonable belief was defined as (1) an 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.

Kowalski v. Department of Army [EEOC Petition No. 03980003 (Oct. 29, 1998)] - dismissal of employee who failed to sign medical release did not constitute disability discrimination.