Mitigate Legal Risks

Risk of Harm
Overview

- Introduction to Fitness for Duty (FFD) Evaluations
- FFDs: Why, How, Pitfalls
- Sharing Confidential Medical Information
- Case Studies
- Q&A
Introduction to FFD Evaluations
Definition

- “Fitness for Duty” (FFD) means that an individual is in a state (physical, mental and emotional), which enables the employee to perform assigned tasks completely and in a manner which does not threaten the safety or health of themselves or others.
FFD Evaluations

- Workplace trends
- Department roles
- Transferable skills
- Related activities
Workplace Trends

WORKPLACE

WORKERS

More Healthy

Less Healthy
Factors

- Increased
  - Obesity
  - Hypertension
  - Diabetes
- Some External Triggers
- “Too Busy” for Wellness
Department Roles

- HR
- EHS
- Occupational Health
- Legal
- Executive-Level Management
- Risk Management
Transferable Skills: EHS, IH

- Fundamental focus on employee health
- Profession inspires trust
- Coaching is an integral skill
- Multi-dimensional approach to problem intervention
- Natural extension of IH skills into Wellness Programs
Related Activities

- Pre-placement medical evaluations
- For-cause drug testing
- Absence management
- Pre-assignment clearance
Why, How, Pitfalls
FFDs: Why, How, Pitfalls

- FFD part of Corporate Health
- Purposes of FFD
- Triggers for FFD
- FFD process/structure
- Suggested protocol by Occupational Health personnel
- Role of the Medical Consultant/Director
- Pitfalls and legal implications
Corporate Health Hierarchy

Corporation Health

Productivity Enhancement

Health & Wellness

Disease Management

Case Management

Complex Care Management

Disability/Absence Management

Medical Surveillance

Workers’ Compensation - Injury/Illness Care
Impairment at Work

= Presenteeism

- Impairment at work occurs in employees at work who are not fully productive
- Traditionally overlooked, as it is hard to measure
- Can be measured in piecemeal manufacturing
- Research (self-report survey information) has shown huge productivity losses from impairment
- Impairment can be caused by stress, family tension, ailing elders, medications, physical symptoms and medical or mental diseases
Purposes of FFD

Risky?

Self  Coworkers  Workplace  Community
To FFD…or Not to FFD
To FFD…or Not to FFD

Employee’s Interest

Employer’s Interest

Public’s Interest
FFD Junction Points

- Administered after job offer
- Administered to all in job class
- Results DQ’d – applicant may submit evidence
- Employer must still assess accommodations
- Results kept confidential
FFD Junction Points

Administered to all in job class
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ADA Compliant 2006
FFD-Related Job Related
FFD Junction Points

Return-to-work or during work
- Reasonable belief disabling condition may pose risk to EE’s health/safety, that of others or Company’s pecuniary interests

Employee Tenders Issue
- Directly seeks help
- Responding to personal action
Triggers for FFD Exams
Return to Work

Employee returns to work after work-related or non-work related injuries.
Observed Behavior

Employee demonstrates abnormal behavior that causes concern.
Employee Reveals Concern to Management
Co-worker or Family Member Expresses Concern
Outcomes of FFD Testing

- Preventive: may identify previously unknown health conditions that have no impact on job
- Identifies any health problems that could be aggravated by physical demands of job or environmental hazards of job
  - Employee advised—no info conveyed to employer
- Assessment of individual’s medical status and functional ability to perform
- Employer can have liability where exam and follow-on notice to applicant/employee is neglectful – *Coffee vs. McDonnell Douglas Corp.*
FFD Uncovers Protected Disability

- Discovery of covered disability mandates reasonable accommodation analysis
- ADA protected disability – recognized physical/mental condition that substantially impairs major life activity
  - Also covers individual with record of impairment or perceived to be impaired
- Broadly interpreted as to what is a disabling condition
What Is Not A Covered Disability

- Generally does not cover transitory conditions – e.g., broken leg
- If condition is controlled by medication or devices (e.g., nearsightedness), will not be considered covered
- Physical characteristics – height, weight, build
Physical Characteristics
Not Considered A Disability

“An employer is free to decide that physical characteristics or medical conditions that do not rise to level of impairment are preferable to others”

-10th Circuit Court, Sutton & Hinton vs. UAL
The Reasonable Accommodation Obligation

- What is it?
- When does it arise?
- How is it arrived at?
  - “Interactive Dialogue”
- How long does it last?
What is a reasonable accommodation? It may consist of job modifications, ergonomic changes, schedule adjustments, a leave of absence, *etc.*

What is not reasonable? An accommodation is not reasonable if danger is posed to employee, co-workers or third parties through its provision.
The Reasonable Accommodation Obligation - What Is Not Reasonable

- An accommodation is not reasonable if danger is posed to employee, co-workers or third parties through its provision
- An accommodation is not reasonable where it will pose an undue burden on the business
Design-Implementation of FFD Process

- Ideally, comprehensive written policy
- Written/supportable job demands for each position
- Alcohol and Drug Testing
  - Pre-employment
  - Govt. mandated or safety/security-sensitive
  - Reasonable suspicion
  - Post-damage or injury
  - Least intrusive possible means
  - Random – generally out
Policy Elements

- Junction points on administration
  - Job change and pre placement
  - Return to work after illness or injury
  - Employees returning to work after prolonged absence
  - Reasonable cause assessment where it is believed that fitness for work may be compromised
Consulting Medical Unit Is The Nerve Center

- FFD process should be Quarterbacked through confidential medical unit
- CMU has expertise on medical issues and referral opportunities
- CMU has authority knowledge to gather and disseminate info. as appropriate and otherwise maintain confidentially
Suggested Protocol by Occupational Health Personnel

- OH clinic becomes aware of question regarding employee’s FFD
- Info is gathered as appropriate:
  - Employee: (Hx, PE, labs, outside records)
  - Job requirements (safety-sensitive functions, physical exertion, chemical exposure/respiratory, etc.)
  - Specific concerns raised, if any (by coworkers, supervisor, clinic personnel)
Suggested Protocol by Occupational Health Personnel

- Determine if restrictions are medically indicated to avoid unacceptable risk to employee, other people, product, or property on an immediate basis, issue paperwork with time limit.
- Arrange to obtain additional info (results outside MD evaluation, usually PMD; possibly lab tests, etc.); document instructions to employee and time limits.
- When needed info is received, issue long-term (or continuing, time-limited) restrictions and document any follow-up agreements with employee.
Role of the Medical Consultant/Director

- Integrates information from various sources: HR, supervisor, confidential medical
- Issues opinion on FFD: whether essential job functions can be accomplished without unacceptable risk and if accommodations are required
- Keeps information confidential, disclosing only that which is essential to report
Sharing Confidential Medical Information

Exploring the Lines of Communication
Types of Confidential Information

- Most sensitive
- Quasi-medical info known to employer legitimately
- Personal data
- Legal
EMPLOYEE → MANAGEMENT → MEDICAL
EMPLOYEE

MANAGEMENT

MEDICAL
Sharing an Employee’s Confidential Medical Information

Note: need for job restrictions is not confidential medical information!

* Except per explicit instructions from employee
Case Studies
Case Study Overview

- Morbidly obese crane operator
- Accommodated ortho problem becomes delusional
- Somnolent employee in safety-sensitive position
- Diabetic factor worker with poor attendance
- Liver or lung disease and toxic exposure
Case #1

Plant Service Operator, JH

- 500+ lbs.
- Fell while climbing a ladder
- FFD assessed during recovery
- Gastric bypass
- Weight loss
- RTW – transitional duties
Case #2

J.W.

- RTW – FFD to delineate ortho restrictions in accommodation position
- Bizarre workplace complaints of ray-gun
- Safety-sensitive (public) job
- Refusal to submit to examination
- Psychiatrist reports – says delusional but not dangerous
Case #3

Supervisor, behaving sedated, sleeping on the job
- MD evaluated
- Probable sleep apnea:
  - The criteria for FFD are **NOT** met:
    - If the person has established sleep apnea until treatment is effective
  - Approval may be recommended (with periodic review):
    - If the person has a combination of daytime sleepiness and a BMI in excess of 30 and a reddened, edematous narrow oropharynx; or
    - If the person has a history of snoring and witnessed apneas
  - Unless sleep apnea can be reasonably excluded. The certifying practitioner should arrange investigation
Case #3
The Epworth Sleepiness Scale

- Test to determine if sleep disorder exists
- Employee ranks likelihood of dozing per particular task, based upon scale
- Score of 10 or higher may indicate and increased risk of dozing
Case #4

Diabetic factory worker with poor attendance

- 38 y.o. male in heavy manufacturing facility
- Supervisor noted frequent absences, asked Occ Health to evaluate
- Absence analysis: twice as likely at start and end of work week
- Employee made FMLA application; a trial fibrillation
- Medical director discusses with employee
- Restricted until note from personal physician

RESULTS
Case #4

Medical Director discussion:
- Diabetic; epileptic
- Poor compliance with medication?
- Alcohol?
Results

- RTFW
- HEALTHY
- FEHA claim
- Victory?
Legal Risks

Risk of Harm
Audience Discussion
Q/A
Contact Information

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