

# IAFF Fitness for Duty Manual



International Association of Fire Fighters  
Legal Department  
1750 New York Ave NW  
Washington, DC 20006  
(202) 737-8484  
[www.iaff.org/legal](http://www.iaff.org/legal)

Thomas A. Woodley, General Counsel  
Douglas L. Steele, Legal Counsel  
Michael Keefe and Nicole M. Gonzalez,  
Assistant Legal Counsels  
Woodley & McGillivary LLP  
1101 Vermont Ave, NW, Suite 1000  
Washington, DC 20005  
(202) 833-8855

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## **Fitness-For-Duty Manual**

### **Introduction**

Fire fighters must respond to emergency incidents that require extreme physical output and often result in physiological and psychological outcomes. Such situations, over time, can and do affect the overall wellness of the fire fighting and emergency response system. Tomorrow's fire service requires that we face our destiny of keeping our fire fighters fit today.

Increasingly, fire departments are looking for easy solutions to their obligation to certify every member as fit for duty and able to perform the essential functions of the job, and subjecting our members to some type of fit-for-duty testing. This testing can come in many different forms, from an annual physical exam, to a certification of fitness for duty upon return from medical leave, to random drug testing.

The IAFF is committed to the wellness and fitness of our members, but any testing done to our members must comply with federal and state law, conform to appropriate safety standards, and accommodate the reasonable needs of fire fighters and their families. Legally, this area is quite complicated, as it is governed by numerous federal laws that interact with each other.

The IAFF has assisted numerous IAFF locals and members in pushing back against fitness-for-duty testing that violated legal standards. The IAFF, through formal policy, recommends that physical fitness programs emphasize the general health benefits to the fire fighter as well as benefits to the fire department, and be holistic, positive, rehabilitating and educational. We strongly encourage our locals to contact the Legal Department for assistance if you have questions about your department's testing program.

This Manual provides answers to basic questions about different types of fitness-for-duty testing, and the guidelines on such testing set forth by laws such as the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Occupational Health and Safety Act (OSHA), the Age Discrimination in Employment Act (ADEA), the Genetic Information Non-discrimination Act (GINA), and the Health Insurance Portability and Accountability Act (HIPAA), among others.

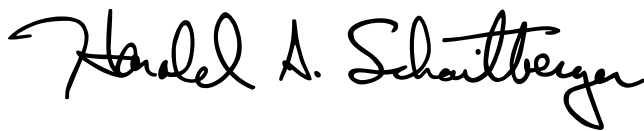
The Manual is organized into sections addressing:

- General questions regarding permissible testing
- Employer wellness/fitness programs
- Fit-for-duty exams following employee leave
- Periodic physical agility/fitness testing
- Drug testing
- Employer access to employee genetic information
- Medical testing related to worker's compensation

The guidance set forth in each chapter also includes cases that demonstrate the legal issues that each section explains in action and focuses, to the extent possible, upon cases involving fire fighters or other emergency responders.

This Manual is designed to be an evolving document. Courts issue new decisions related to the laws addressed here every day, and so we have provided this Manual in an electronic format so that it can be more easily updated to reflect the latest developments. You should feel free to assist us in this process by forwarding any relevant material – including court decisions – to our attention, care of the IAFF Legal Department. Obviously, nothing in this manual should be construed as legal advice, and because these issues are complex and fact-driven, anyone with concerns about the rights or obligations of employees or employers should consult with a qualified attorney.

It is only by fully understanding and vigilantly enforcing all of the rights that fire fighters have with regard to fitness-for-duty testing that we can ensure that its protections will be available to our members both now and in the future. We hope that you find the information contained in this Manual useful for these purposes.

A handwritten signature in black ink that reads "Harold A. Schaitberger". The signature is written in a cursive, flowing style.

Harold A. Schaitberger  
General President

## **1. Permissible Testing by Employers**

### **Are there any limitations to an employer's ability to make disability-related inquiries or to require medical or physical exams?**

In response to findings that individuals with physical or mental disabilities were being subjected to various forms of discrimination, such as exclusion from employment, Congress passed the Americans with Disabilities Act (ADA).<sup>1</sup> In addressing the issue of employment, the ADA imposed limitations on the types of inquiries and examinations that employers were permitted to impose on applicants and employees.<sup>2</sup> The extents of the limitations imposed are tied to the employment relationship between the individual and the employer and can be looked at in three different stages of employment: pre-offer, post-offer, and employment.<sup>3</sup>

It is important to note that an employer will only be bound by the ADA if it employs "15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year . . . ."<sup>4</sup> This applies to both public and private-sector employers. Most agencies of the U.S. Government are also covered by the ADA and other discrimination statutes.

#### **Pre-employment Examinations**

Job applicants are provided the greatest protection from examination of all of the three stages of employment. An employer is prohibited from making an applicant undergo a medical examination or from inquiring into the existence or extent of an applicant's disability.<sup>5</sup> An employer may, however, inquire into the applicant's ability to perform job-related functions.<sup>6</sup> This can include asking an applicant "to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions."<sup>7</sup>

#### **Conditional Offer Examinations**

Once an employer has presented an applicant with a job offer, it may condition that job offer on the applicant's ability to pass a medical examination.<sup>8</sup> In order to make a job offer conditional upon passage of a medical exam, all entering employees in the respective job category must be required to undergo the same examination, regardless of disability.<sup>9</sup> While a medical examination in these situations is not required to be job-related or consistent with

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<sup>1</sup> See 42 U.S.C. § 12101.

<sup>2</sup> See 42 U.S.C. § 12112(d).

<sup>3</sup> See 42 U.S.C. § 12112(d); 29 C.F.R. §§ 1630.13(a)–(b), 1630.14(a)–(c).

<sup>4</sup> See 42 U.S.C. § 12111(5)(A).

<sup>5</sup> 42 U.S.C. § 12112(d)(2)(A); 29 C.F.R. § 1630.13(a).

<sup>6</sup> 42 U.S.C. § 12112(d)(2)(B).

<sup>7</sup> 29 C.F.R. § 1630.14(a).

<sup>8</sup> 42 U.S.C. § 12112(d)(3); 29 C.F.R. § 1630.14(b).

<sup>9</sup> 42 U.S.C. § 12112(d)(3)(1); 29 C.F.R. § 1630.14(b).

business necessity, if the exam is used to screen out those individuals with disabilities, the criteria used to exclude the employees “must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation . . . .”<sup>10</sup>

Any information obtained through an entrance medical examination regarding an individual’s medical condition or medical history must be “collected and maintained on separate forms and in separate medical files . . . .”<sup>11</sup> This information must be treated as a confidential medical record and may only be disclosed under the following circumstances: (1) to notify a supervisor of an employee’s need for restricted work duties or necessary accommodations; (2) to notify safety personnel in the event that the individual’s disability may require emergency treatment; and (3) when government officials are investigating compliance with the ADA.<sup>12</sup>

### Employee Examinations

Once an applicant becomes an employee, the employer is permitted to inquire into whether the employee is able to perform job-related functions.<sup>13</sup> Additionally, an employer may require an employee to undergo a medical examination provided that the employer is able to demonstrate that the examination is job-related and consistent with business necessity.<sup>14</sup> However, if an employer has a voluntary employee wellness program it can conduct voluntary medical examinations which may include voluntary disclosure of medical histories without having to demonstrate that the examination is job-related and consistent with business necessity.<sup>15</sup>

Similar to those examinations conducted as part of a conditional offer discussed above, information obtained from both mandatory and voluntary medical examinations must be collected on separate forms and stored in separate medical files.<sup>16</sup> The information obtained will be considered confidential and may only be disclosed in the situations described above.<sup>17</sup>

### **What does “job-related and consistent with business necessity” mean?**

Generally, medical exams will be permitted if they are “job-related and consistent with business necessity.” An employer’s requirement that an employee submit to a medical examination fulfills this requirement when an employer has a “reasonable belief based on objective evidence that a medical condition will impair an employee’s ability to perform essential job functions or that the employee will pose a threat due to a medical condition.”<sup>18</sup> An

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<sup>10</sup> 29 C.F.R. § 1630.14(b)(3).

<sup>11</sup> 42 U.S.C. § 12112(d)(3)(B); 29 C.F.R. § 1630.14(b)(1).

<sup>12</sup> 42 U.S.C. § 12112(d)(3)(B)(i)–(iii); 29 C.F.R. § 1630.14(b)(1)(i)–(iii).

<sup>13</sup> 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(c).

<sup>14</sup> 42 U.S.C. § 12112(d)(4)(A).

<sup>15</sup> 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d).

<sup>16</sup> See 42 U.S.C. § 12112(d)(4)(C); 29 C.F.R. §§ 1630.14(c)(1), (d)(1).

<sup>17</sup> See 42 U.S.C. § 12112(d)(4)(C); 29 C.F.R. §§ 1630.14(c)(1)(i)–(iii), (d)(1)(i)–(iii).

<sup>18</sup> *Coffman v. Indianapolis Fire Dep’t*, 578 F.3d 559, 565 (7th Cir. 2009).

employee poses a direct threat if he or she is creating “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.”<sup>19</sup> An assessment that an employee poses a direct threat must be based upon “reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”<sup>20</sup> Factors employers may consider in such an analysis include: “(1) The duration of the risk; (2) The nature and severity of the potential harm; (3) The likelihood that the potential harm will occur; and (4) The imminence of the potential harm.”<sup>21</sup>

When claiming a medical examination is supported by business necessity, an employer must do more than merely demonstrate that the alleged business necessity will be “convenient or beneficial to its business[,]” it must demonstrate that the business necessity is vital to its business.<sup>22</sup> In addition to showing that the examination at issue serves the asserted business necessity, the employer must also show that “the request is no broader or more intrusive than necessary.”<sup>23</sup> The examination need not be the “only way of achieving a business necessity,” but it must be a “reasonably effective method of achieving the employer’s goal.”<sup>24</sup>

#### Court Cases Permitting Testing

- *Coffman v. Indianapolis Fire Department*<sup>25</sup>

The Seventh Circuit stated that the fire department has “an obligation to the public to ensure that its workforce is both mentally and physically capable of performing” its demanding work. Due to the special work environment fire fighters serve in, a department’s decision to require a fire fighter to undergo a psychological fitness for duty evaluation was determined to be job-related and consistent with business necessity due to the fact that multiple colleagues had expressed that the fire fighter had been acting withdrawn and defensive. The court noted that while similar evidence may be insufficient in other vocations, the court would not second guess the need for such an examination for a fire fighter.

- *Leverett v. City of Indianapolis*<sup>26</sup>

The plaintiff’s conditional offer as a fire fighter was withdrawn after he failed to pass a physical exam due to his being deaf in one ear. The court concluded that precise hearing accuracy is qualification standard that fire fighters must satisfy in order to perform their jobs at an acceptable level. A fire fighter’s inability to hear properly posed a direct threat to a fire fighter’s ability to safely perform the job. As a result, the City’s hearing tests were found to be job-related and consistent with business necessity.

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<sup>19</sup> 29 C.F.R. § 1630.3(r).

<sup>20</sup> 29 C.F.R. § 1630.3(r).

<sup>21</sup> 29 C.F.R. § 1630.3(r).

<sup>22</sup> *Conroy v. N.Y. State Dep’t of Corr. Servs.*, 333 F.3d 88, 97 (2d Cir. 2003).

<sup>23</sup> *Id.* at 98.

<sup>24</sup> *Id.*

<sup>25</sup> 578 F.3d 559 (7th Cir. 2009).

<sup>26</sup> 51 F. Supp. 2d 949 (S.D. Ind. 1999).

- *Smith v. City of Des Moines*<sup>27</sup>

The City terminated a fire captain for failing to pass a stress test that measured lung capacity and ability to use a self-contained breathing apparatus (SCBA). The court determined that it was necessary for fire fighters to be able to use a SCBA in the performance of their duties and that the City's designated stress test threshold was appropriate.

- *Brownfield v. City of Yakima*<sup>28</sup>

In this 2010 case, the Ninth Circuit affirmed the district court's ruling that the employer had established a sufficient business necessity to require Officer Brownfield to undergo a psychological evaluation prior to returning to duty as a policeman. The court noted that a business necessity may be established prior to an employee's work performance deteriorating, provided that there is significant evidence that would cause a reasonable person to question whether the employee is still capable of performing his or her job. This is particularly true where the employer is engaged in dangerous work. Here Officer Brownfield had exhibited highly emotional responses on multiple occasions including: swearing at a supervisor and failing to follow a direct order, yelling at a coworker, admitting that he felt himself losing control during a traffic stop, allegedly being engaged in a domestic altercation, and making several comments to a coworker stating "It doesn't matter how this ends."

- *Sullivan v. River Valley School District*<sup>29</sup>

In this Sixth Circuit case, the employer school board called upon a teacher to undergo a psychological evaluation following repeated incidents of strange behavior including a disruptive and abusive verbal outburst, disclosing confidential information about a student's grades, using inappropriate language to criticize a coworker, and failing to attend a meeting to discuss behavior issues. The Sixth Circuit stated that for an employer to establish that there was a business necessity for its ordering an employee to undergo a psychological evaluation "there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job." It is not enough that an employer finds its employee's behavior annoying or inefficient; there must be some genuine concern as to whether the employee can still perform the essential functions of the job. However, while an employer may reasonably question an employee's ability to perform essential job functions, any examination must be limited to determining whether the employee is able to satisfy those essential job functions that have been called into question.

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<sup>27</sup> 99 F.3d 1466 (8th Cir. 1996).

<sup>28</sup> 612 F.3d 1140 (9th Cir. 2010).

<sup>29</sup> 197 F.3d 804 (6th Cir. 1999)

- *Watson v. City of Miami Beach*<sup>30</sup>

The Eleventh Circuit found that a police department's requirement that one of its officers undergo a fitness for duty examination was job related and consistent with a business necessity where the department had information that reasonably supported that the officer had been acting paranoid, hostile, and oppositional. Due to the fact that police officers are armed and can cause significant damage if they act irrationally, it was not necessary for the department to wait until a potential threat created real injuries. Additionally, the department's requirement that officers undergo tuberculosis screenings and disclose their HIV/AIDS status were narrowly tailored to address the job related concerns of officer safety as officers duties cause them to come in contact with high risk individuals and an individual's HIV/AIDS status was necessary to properly diagnose and treat tuberculosis.

*Court Cases Finding Testing Invalid*

- *Scott v. Napolitano*<sup>31</sup>

The district court noted that an individual is not required to be a "qualified individual with a disability" to invoke ADA protections against an employer's improper order to participate in a medical examination. Even though an ordered examination may serve an employer's asserted business necessity, it still must be conducted in a way that prevents it from being any broader or more intrusive than necessary. Return to duty and periodic examinations must be limited to determining whether the "employee is currently able to perform the essential functions of his or her job." Here the court determined that the questions posed by the employer were not narrowly tailored to assessing the employee's ability to perform essential job functions as they were overly broad, not limited in time, and would have caused the employee to provide information unrelated to the employee's ability to do his job. The questions posed to the employee, if answered, would have been likely to provide information about potential disabilities.

- *Krocka v. Bransfield*<sup>32</sup>

The district court found that the police department had failed to demonstrate that its ordered blood test to determine whether an officer had Prozac in his system was job-related and consistent with business necessity. Despite the department's assertion that the test was to determine whether an officer was impaired by the drug while performing his or her duties, the department's doctor testified that the test only determined whether the officer had Prozac in his system rather than how it may have affected him. The court noted that the ADA prohibits an employer from inquiring into the severity of an employee's disability.

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<sup>30</sup> 177 F.3d 932 (11th Cir. 1999).

<sup>31</sup> 717 F. Supp. 2d 1071 (S.D. Cal. 2010).

<sup>32</sup> 969 F. Supp. 1073 (N.D. Ill. 1997).



### **What role does NFPA 1582 play?**

NFPA 1582, *Standard on Comprehensive Occupational Medical Program for Fire Departments*, provides flexible guidance for medical determinations for incumbent fire fighters based upon the specific nature of their condition and the duties and functions of their job. NFPA lists certain medical conditions that potentially interfere with an incumbent fire fighter's ability to safely perform essential job tasks.

The fire department must also document, through job analysis, the essential job functions that are performed in the local jurisdiction and must also determine if that incumbent is expected to perform those tasks, based on assignment and even rank.

Possession of one or more of the conditions listed in Chapter 9 of NFPA 1582 for incumbent fire department members *does not indicate a blanket prohibition* for such fire fighter from continuing to perform the essential job tasks, nor does it require automatic retirement or separation from the fire department. Instead it solely gives the fire department's physicians guidance for determining a member's ability to medically and physically function.

It is essential to recognize that NFPA 1582 was fundamentally developed for, and primarily intended, as guidance for physicians, to provide them with advice for an association or relationship between essential job functions of a fire fighter as an individual and his medical condition(s). Its guidance should be used for the best approach towards an individual's risk assessment and management with respect to their medical issue(s) and particular job, not as a set of medical conditions that prohibit incumbent fire fighters from performing their jobs.

NFPA 1582 does set stringent standards for candidate fire fighters (rather than incumbents), providing specific medical conditions that can affect a candidate's ability to safely perform essential job tasks. Candidates with Category A medical conditions are not to be certified as meeting the medical requirements of this standard. Candidates with Category B medical conditions can be certified as meeting the medical requirements of this standard only if they can perform the essential job tasks without posing a significant safety and health risk to themselves, members, or civilians.

### **Must federally mandated medical exams be job-related and consistent with business necessity?**

The Occupational Health and Safety Act (OSHA) requires employers comply with certain standards, which in some cases require medical exams to monitor the ongoing health and safety of employees. For example, OSHA's Rule on Hazardous Waste Operations and Emergency Response requires that members of haz-mat teams have medical exams: prior to assignment; at termination of employment or reassignment; upon developing signs and/or symptoms indicating possible over-exposure; and as soon as possible after exposure to hazards above permissible limits without necessary protective equipment being used.<sup>33</sup> The U.S.

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<sup>33</sup> 29 C.F.R. § 1910.120(f).

Environmental Protection Agency (EPA) has also adopted this standard to protect employees who work in the public sector where there is no OSHA approved State program in place.<sup>34</sup> There are similar requirements for employees who are exposed to lead<sup>35</sup> and asbestos,<sup>36</sup> among other safety requirements.

These exams often do not meet the stringent standard set forth by the ADA that all medical exams be job-related and consistent with business necessity. However, an employer may use the fact that the exam was required by federal law as a defense against a discrimination claim under the ADA.<sup>37</sup>

### **What is a medical exam?**

The Equal Employment Opportunity Commission (EEOC) has defined a medical examination as “a procedure or test that seeks information about an individual’s physical or mental impairments or health.”<sup>38</sup> The following factors may be considered to assist in determining whether a procedure or test should be classified as a medical examination:

1. Is the examination administered by a healthcare professional?
2. Will the examination results be interpreted by someone who is a healthcare professional?
3. Is the examination designed to reveal an individual’s physical or mental impairment?
4. Is the examination invasive (i.e., drawing of blood, urine, or breath)?
5. Does the examination measure an individual’s performance of a task or does it measure an individual’s physiological responses to performing the task?
6. Is the examination normally conducted in a medical setting?
7. Is medical equipment used to perform the examination?<sup>39</sup>

There is no requirement that all factors be present before an examination is determined as a medical examination. In some cases one factor may be sufficient, whereas in others, multiple factors may need to be applied in coming to a determination.<sup>40</sup>

#### *EEOC Examples of Medical Examinations:*

While not all inclusive, the EEOC has provided the following list of tests and procedures that will generally be considered medical examinations:

- vision tests conducted and analyzed by an ophthalmologist or optometrist;

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<sup>34</sup> 40 C.F.R. § 311.

<sup>35</sup> 29 C.F.R. § 1910.1025(j).

<sup>36</sup> 29 C.F.R. § 1910.1001(l).

<sup>37</sup> 29 C.F.R. § 1630.15(e).

<sup>38</sup> EEOC, ENFORCEMENT GUIDANCE: PREEMPLOYMENT DISABILITY-RELATED QUESTIONS AND MEDICAL EXAMINATIONS (1995), available at <http://www.eeoc.gov/policy/docs/preemp.html> [hereinafter EEOC, PREEMPLOYMENT QUESTIONS].

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

- blood, urine, and breath analyses to check for alcohol use;
- blood, urine, saliva, and hair analyses to detect disease or genetic markers (e.g., for conditions such as sickle cell trait, breast cancer, Huntington's disease);
- blood pressure screening and cholesterol testing;
- nerve conduction tests (i.e., tests that screen for possible nerve damage and susceptibility to injury, such as carpal tunnel syndrome);
- range-of-motion tests that measure muscle strength and motor function;
- pulmonary function tests (i.e., tests that measure the capacity of the lungs to hold air and to move air in and out);
- psychological tests that are designed to identify a mental disorder or impairment; and,
- diagnostic procedures such as x-rays, computerized axial tomography (CAT) scans, and magnetic resonance imaging (MRI).<sup>41</sup>

Court Cases Involving Medical Examinations:

- *Anderson v. City of Taylor*<sup>42</sup>

The Taylor Fire Department instituted a wellness program which required fire fighters to participate in mandatory blood draws. The blood draws were used to determine the fire fighters cholesterol levels. The court found that the blood draw was invasive and that cholesterol readings do not accurately determine a fire fighters overall level of fitness or ability to respond to an emergency.

- *Barnes v. Cochran*<sup>43</sup>

The district court ruled that an employer's mandatory pre-employment psychological examination went beyond making pre-employment inquiries into an applicant's ability to perform the job. The examination was medical in nature and allowed the employer to obtain evidence that had the potential to identify whether the applicant suffered from a mental disorder or impairment.

- *Indergard v. Georgia-Pacific Corporation*<sup>44</sup>

The Ninth Circuit determined that the employer's physical capacity examination was a medical examination and could only be required if the employer was able to show that it was job-related

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<sup>41</sup> EEOC, ENFORCEMENT GUIDANCE: DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE AMERICANS WITH DISABILITIES ACT (ADA) (2000), available at [http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N\\_29\\_](http://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_29_) [hereinafter EEOC, DISABILITY-RELATED INQUIRIES].

<sup>42</sup> Case No. 04-74345, 2005 U.S. Dist. LEXIS 44706, \*1 (E.D. Mich. Aug. 11, 2005).

<sup>43</sup> 944 F. Supp. 897 (S.D. Fla. 1996).

<sup>44</sup> 582 F.3d 1049 (9th Cir. 2009).

and consistent with a business necessity. The Court determined that the examination was a medical examination due to the presence of a number of EEOC factors. Specifically, that the examination was conducted by a licensed occupational therapist who the Court concluded qualified as a health care professional. Beyond administering the examination, the therapist also interpreted the results and submitted them to the employee's treating surgeon. The Court also concluded that the examination was overly broad, recorded physiological responses to performing tasks, and had the potential to reveal both physical and mental impairments.

*EEOC Examples of Non-Medical Examinations:*

Not every test an employer requires will be considered a medical examination. For instance, the EEOC has provided a list of some examples of tests that have been found not to constitute medical examinations:

- tests to determine the current illegal use of drugs;
- physical agility tests, which measure an employee's ability to perform actual or simulated job tasks, and physical fitness tests, which measure an employee's performance of physical tasks, such as running or lifting, as long as these tests do not include examinations that could be considered medical (*e.g.*, measuring heart rate or blood pressure);
- tests that evaluate an employee's ability to read labels or distinguish objects as part of a demonstration of the ability to perform actual job functions;
- psychological tests that measure personality traits such as honesty, preferences, and habits; and
- polygraph examinations.<sup>45</sup>

While tests like those listed above may not be considered medical examinations so long as the scope of the test is limited, additional probing by an employer may cause an otherwise permissible test to become a violation of the ADA.

For example, while an employer may test for current use of illegal drugs because such conduct is not protected under the ADA – and therefore any questions related to the current use of illegal drugs will not be found to be disability-related inquiries<sup>46</sup> – questions about past addiction and participation in rehabilitation programs are protected by the ADA.<sup>47</sup> Additionally, while many employers are prohibited by federal and state law from conducting polygraph examinations, those permitted to do so may because a polygraph examination is only meant to measure whether a person believes he or she is telling the truth.<sup>48</sup> However, if the examination begins to involve questions that are disability-related the employer may violate the ADA.<sup>49</sup>

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<sup>45</sup> EEOC, DISABILITY-RELATED INQUIRIES, *supra* note 41.

<sup>46</sup> See 42 U.S.C. § 12114(a); *see also* 29 C.F.R. § 1630.3(a).

<sup>47</sup> See 29 C.F.R. § 1630.3(b)(1)–(2).

<sup>48</sup> EEOC, PREEMPLOYMENT QUESTIONS, *supra* note 38.

<sup>49</sup> *Id.*

*Court Cases Involving Non-Medical Examinations*

- *Robert v. Carter*<sup>50</sup>

The district court found that the Sheriff Department's TASER training, which required employees to undergo a one-time, one-to-five second shock from a TASER, was permissible because employees were required to carry TASERs and it was essential for them to have an understanding of how the TASER would affect an individual when used. An employee's failure to complete the training constituted an inability to perform an essential function of the job.

**What happens if an employee refuses to take the required medical exam?**

An employee's refusal to take a medical examination may cause an employee to be subject to termination in the event that the employer is able to establish that the required examination was job-related and consistent with a business necessity.<sup>51</sup> An employee who refuses to comply with a permissible order for an examination may be found to be insubordinate.<sup>52</sup>

Additionally, an employee that refuses to undergo a medical examination may also hinder his or her potential claims against the employer resulting from the termination. For instance, without having participated in the examination, the employee would be unlikely to be able to assert that the examination was not actually job-related and was not narrowly tailored in scope.<sup>53</sup> Failure to participate in the examination may also prevent the employee from establishing that he or she has a disability allowing the employee to claim that his or her discharge was discriminatory in nature.<sup>54</sup>

*Court Cases Analyzing Employer Response to Employee's Refusal to Take Exam*

- *Thomas v. Corwin*<sup>55</sup>

The court found that the police department's request that the police employee undergo a fitness for duty examination prior to returning to work was job-related and consistent with a business necessity where the employee was out of work for an extended period of time attributed to work-related stress and anxiety, and refused to inform her supervisor as to what caused the work-related stress. The court also noted that the requested psychological examination only sought to review a limited portion of the employee's medical history and was therefore no more intrusive than necessary. Finding that the police department had established a job-related need consistent with business necessity for the employee to undergo a fitness for duty examination, in addition to

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<sup>50</sup> 819 F. Supp. 2d 832 (S.D. Ind. 2011).

<sup>51</sup> See *Thomas v. Corwin*, 483 F.3d 516 (8th Cir. 2007); *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999); *Porter v. U.S. Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997).

<sup>52</sup> See *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999).

<sup>53</sup> See *Sullivan v. River Valley Sch. Dist.*, 197 F.3d 804 (6th Cir. 1999).

<sup>54</sup> See *Porter v. U.S. Alumoweld Co.*, 125 F.3d 243 (4th Cir. 1997).

<sup>55</sup> 483 F.3d 516 (8th Cir. 2007).

the employee's refusal to release medical information necessary to complete that examination, the court upheld the department's decision to terminate the employee.

- *Sullivan v. River Valley School District*<sup>56</sup>

The school district requested that one of its teachers undergo both a mental and physical examination. The teacher had begun behaving strangely: engaging in disruptive and abusive verbal outbursts, disclosing confidential information about students to a local newspaper, criticizing colleagues, and failing to show up to meetings. After refusing to take either exam the school district terminated the teacher. The court found that the teacher's behavior had provided sufficient evidence to call into question the teacher's ability to perform the essential functions of his job and supported the school district's request for the exams. The court upheld the school district's decision to terminate the teacher for failing to submit to the exams—noting that refusal to submit to such an examination may constitute insubordination. The court also noted that by failing to submit to the examinations, the teacher prevented himself from being able to demonstrate that the examinations were not actually job-related or narrowly tailored in scope.

- *Porter v. United States Alumoweld Company*<sup>57</sup>

In this case the employee was a machine operator who injured his back and had to undergo surgery. Prior to allowing him to return to duty, the employer required that he pass a functional capacity evaluation and also required that he pay to have the test completed. The employee elected not to undergo the medical evaluation and was subsequently fired for failing to do so. The court upheld the termination, noting that “an employer's request for a fitness for duty exam after an on-the-job injury is clearly job-related and a business necessity . . . .” Additionally, by refusing to take the examination, the employee also precluded himself from showing that he was discriminatorily discharged due to a disability.

### **Is the information gathered from such a medical exam protected by HIPAA?**

The Health Insurance Portability and Accountability Act (HIPAA) restricts the use and disclosure of private health data.<sup>58</sup> However, HIPAA's restrictions are not without exception.<sup>59</sup> For instance, an employer may use and disclose information about an employee where the information was obtained by a health care provider who works for the employer—or who provides health care to employees at the employer's request—for the following purposes: “(1) To conduct an evaluation relating to medical surveillance of the workplace; or (2) To evaluate whether the [employee] has a work-related illness or injury . . . .”<sup>60</sup> The information that is disclosed must relate to the workplace-related medical surveillance or work-related illness or

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<sup>56</sup> 197 F.3d 804 (6th Cir. 1999).

<sup>57</sup> 125 F.3d 243 (4th Cir. 1997).

<sup>58</sup> See 45 C.F.R. § 164.502.

<sup>59</sup> See 45 C.F.R. § 164.512.

<sup>60</sup> 45 C.F.R. § 164.512(b)(v)(A).

injury and must be necessary in order for the employer to comply with statutory obligations such as worker's compensation.<sup>61</sup>

Protected health data may also be used and disclosed when required by law.<sup>62</sup> As discussed above, the ADA permits an employer to obtain medical information about one of its employees when it can show that a medical examination is job-related and consistent with a business necessity.<sup>63</sup> While disclosure and use of the information will not be prohibited by HIPAA, the ADA imposes its own limitations on how the employer must handle the information as well as under what circumstances and to whom the information may be disclosed.<sup>64</sup> Information about an employee's medical condition or medical history must be collected and maintained on separate forms and in separate medical files set apart from the employee's personnel files.<sup>65</sup> The information must be treated as a confidential medical record and may only be disclosed in the following circumstances: (1) to notify a supervisor of an employee's need for restricted work duties or necessary accommodations; (2) to notify safety personnel in the event that the individual's disability may require emergency treatment; and (3) when government officials are investigating compliance with the ADA.<sup>66</sup>

### **What happens if a medical exam uncovers a disability?**

If a medical examination uncovers an individual's disability—whether that medical examination was part of an entrance examination or conducted after the individual became an employee—an employer's decision to withdraw its offer of employment or terminate a current employee solely because the individual's disability may be a violation of the ADA.<sup>67</sup> However, an employer can defend against a charge of discrimination if it can demonstrate that the individual's disability prevented him or her from accomplishing a particular task which is job-related and consistent with a business necessity, and the particular task would not be able to be accomplished by providing the individual with a reasonable accommodation.<sup>68</sup>

To be entitled to a reasonable accommodation, an individual with a disability must request one. The request is not required to be formal or even mention the words "ADA" or "reasonable accommodation."<sup>69</sup> An individual who has requested, and been denied, a reasonable accommodation may succeed in bringing a claim of discrimination by demonstrating that he or

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<sup>61</sup> 45 C.F.R. § 164.512(b)(v)(B)–(C).

<sup>62</sup> 45 C.F.R. § 164.512(a)(1).

<sup>63</sup> 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c).

<sup>64</sup> See 29 C.F.R. § 1630.14(c)(1).

<sup>65</sup> 29 C.F.R. § 1630.14(c)(1).

<sup>66</sup> 29 C.F.R. § 1330.14(c)(1)(i)–(iii).

<sup>67</sup> 42 U.S.C. § 12112(a).

<sup>68</sup> 42 U.S.C. § 12113(a).

<sup>69</sup> See, e.g., *Schmidt v. Safeway Inc.*, 864 F. Supp. 991, 997 (D. Or. 1994) ("statute does not require the plaintiff to speak any magic words. . . . The employee need not mention the ADA or even the term 'accommodation.'"); see also *Hendricks-Robinson v. Excel Corp.*, 154 F.3d 685, 694 (7th Cir. 1998) ("[a] request as straightforward as asking for continued employment is a sufficient request for accommodation"); *Bultemeyer v. Ft. Wayne Cmty. Schs.*, 100 F.3d 1281, 1285 (7th Cir. 1996) (an employee with a known psychiatric disability requested reasonable accommodation by stating that he could not do a particular job and by submitting a note from his psychiatrist).

she is a person who qualifies as having a disability; the employer had notice of that disability; that he or she would be able to perform the essential functions of the job with a reasonable accommodation; and that the employer has refused to make the requested accommodation without a showing of undue hardship.<sup>70</sup>

Undue hardship is defined as a “significant difficulty or expense incurred by a covered entity . . . .”<sup>71</sup> In determining whether an undue hardship exists, multiple factors will be considered.<sup>72</sup> These factors include: (1) the net cost of the accommodation; (2) the facility’s financial resources and the accommodation’s effect on those resources; (3) the financial resources and size of the employer; (4) the nature of the employer’s operation and its composition and structure; and (5) the impact the accommodation will have on the operation of the facility and ability to conduct business.<sup>73</sup>

## **2. Employer Wellness/Fitness Programs**

### **If an employer has a wellness or fitness program, may the employer conduct medical exams in coordination with that program?**

Provided that the wellness program is voluntary, meaning the employee will not be penalized for refusing to take part in the program, an employer may conduct medical examinations on participating employees, which may include voluntary medical histories, as part of an employee health program that the employer conducts at the work site.<sup>74</sup> In the event that participation is not voluntary, the employer would be obligated to demonstrate that the required medical examination was job-related and consistent with a business necessity.<sup>75</sup> Employers are permitted to provide financial incentives to employees to induce them to participate in the wellness program.<sup>76</sup>

An employer who conducts medical examinations as part of a wellness program must place any information obtained regarding an employee’s medical condition or medical history in a separate medical file.<sup>77</sup> This information must be treated as confidential except that it may be disclosed under the same circumstances as permitted by the ADA.<sup>78</sup>

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<sup>70</sup> See 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9(a).

<sup>71</sup> 29 C.F.R. § 1630.2(p)(1).

<sup>72</sup> See 29 C.F.R. § 1630.2(p)(2).

<sup>73</sup> 29 C.F.R. § 1630.2(p)(2)(i)–(v).

<sup>74</sup> 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d).

<sup>75</sup> 42 U.S.C. § 12112(d)(4)(A); 29 C.F.R. § 1630.14(c).

<sup>76</sup> 29 C.F.R. § 1635.8(b)(2)(ii).

<sup>77</sup> 42 U.S.C. § 12112(d)(4)(C); 29 C.F.R. §§ 1630.14(c)(1), (d)(1).

<sup>78</sup> 42 U.S.C. § 12112(d)(4)(C); 29 C.F.R. §§ 1630.14(d)(1).



### **Does HIPAA protect any information that is discovered during a wellness program?**

As discussed above, HIPAA will not prevent the disclosure of health data when the disclosure is required by law.<sup>79</sup> The ADA permits an employer to obtain medical information about employees that participate in medical examinations that are part of an employer's voluntary health program.<sup>80</sup> The information obtained from these voluntary medical examinations may be disclosed by the employer without the employee's permission, but only under the limited circumstances stated by the ADA.<sup>81</sup>

### **3. Employer Use of Fit-for-duty Exams Following Employee Leave**

#### **If an employee has taken leave, under what circumstances may an employer require a fit-for-duty exam before they return to work?**

An employer may require an employee returning from leave to undergo a fit-for-duty examination before returning to work when the employer can demonstrate that it has a reasonable belief that the employee's current condition may prevent him or her from performing an essential job function.<sup>82</sup> Even when it can be demonstrated that an employer has a reasonable belief that the employee may not be able to perform an essential job function, the fit-for-duty examination that will be used to determine the accuracy of that belief must be limited in scope.<sup>83</sup> An examination that sought information in excess of whether or not the employee could perform an essential job function could constitute a violation of the ADA.<sup>84</sup>

An employer may also require a fit-for-duty examination from an employee returning to work after taking leave under the Family and Medical Leave Act (FMLA), provided that the requirement is a uniformly applied practice or policy.<sup>85</sup> However, the FMLA contains specific requirements and limitations on the type of information an employer may obtain from the employee prior to permitting him or her from returning to work.<sup>86</sup>

#### **Court Cases Permitting Fit-For-Duty Exams**

- *Watson v. City of Miami Beach*<sup>87</sup>

The Eleventh Circuit found that it was not a violation of the ADA for a police department to require an officer to undergo a fitness for duty examination where it had evidence that the officer

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<sup>79</sup> 45 C.F.R. § 164.512(a)(1).

<sup>80</sup> 42 U.S.C. § 12112(d)(4)(B); 29 C.F.R. § 1630.14(d).

<sup>81</sup> 42 U.S.C. § 12112(d)(4)(C); 29 C.F.R. §§ 1630.14(d)(1).

<sup>82</sup> See EEOC, *Disability-Related Inquiries*, supra note 41; see also 42 U.S.C. § 12112(d)(4)(B).

<sup>83</sup> EEOC, *Disability-Related Inquiries*, supra note 41.

<sup>84</sup> See *id.*

<sup>85</sup> See 29 U.S.C. § 2614(a)(4).

<sup>86</sup> See 29 U.S.C. § 2613.

<sup>87</sup> 177 F.3d 932 (11th Cir. 1999).

had overreacted on a number of occasions and that his colleagues had expressed concern about his mental state.

- *Porter v. United States Alumoweld Company*<sup>88</sup>

An employer's requirement that an employee who had suffered a back injury, and who was out on leave, undergo a fitness for duty examination prior to returning to work was not in violation of the ADA. The purpose of the required examination was to assess the employee's ability to perform the heavy lifting and pulling that was associated with his job.

*Court Cases Denying Use of Fit-For-Duty Exams*

- *Indergard v. Georgia-Pacific Corporation*<sup>89</sup>

The Ninth Circuit found that an employer's requirement that employees pass a physical capacity evaluation prior to returning to work from medical leave was a violation of the ADA because of the broad reach of the of the evaluation. Rather than just determine whether employees were able to perform the duties of their jobs, the evaluation was also capable of revealing both physical and mental health impairments.

**What kinds of information can an employer require from an employee returning from FMLA leave?**

The FMLA only applies to certain kinds of leave.<sup>90</sup> An employer may require an employee who has been out on FMLA leave due to a serious health condition to obtain a

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<sup>88</sup> 125 F.3d 243 (4th Cir. 1997).

<sup>89</sup> 582 F.3d 1049 (9th Cir. 2009).

<sup>90</sup> The FMLA does not apply to all employers or employees. Unless an employer is a public agency, to be covered by the FMLA, the employer must be engaged in commerce or an industry affecting commerce and employ at least 50 employees each day for a minimum of 20 calendar workweeks. 29 U.S.C. 2611(4)(A). Even if an employer is covered by the FMLA, an employee will not be considered to be covered unless he or she has been employed by the employer for a minimum of 12 months, and who within the previous 12 months has worked a minimum of 1,250 hours. 29 U.S.C. § 2911(2)(A).

When all parties are covered, the FMLA enables employees to take up to 12 weeks of leave during a 12 month period when one or more of the following circumstances have occurred:

- (A) Because of the birth of a son or daughter of the employee and in order to care for such son or daughter.
- (B) Because of the placement of a son or daughter with the employee for adoption or foster care.
- (C) In order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition.
- (D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

certification from his or her health care provider stating that the employee is able to resume work.<sup>91</sup> In order to require an employee to obtain a certification stating that he or she is fit to resume work, the employer must have a uniform policy requiring all similarly-situated employees who take FMLA leave due to a serious health condition to provide a certification prior to returning to work.<sup>92</sup>

An employer may only seek a certification related to the health condition that caused the employee to need FMLA leave.<sup>93</sup> While the employer cannot use the certification to obtain assessments about other potential medical conditions (other than the one that formed the basis of the FMLA leave) the employer may require that the certification address the employee's ability to perform the essential functions of his or her job.<sup>94</sup> If a collective bargaining agreement requires a more detailed fitness-for-duty certification, above and beyond the requirements of the FMLA certification, the provisions of the agreement will apply.<sup>95</sup>

In order to be entitled to such a certification, the employer must provide the employee with a list of the essential job functions when it provides the employee with notice that the leave requested has been designated as FMLA leave.<sup>96</sup> That notice must also inform the employee that the certification must address the employee's ability to perform the list of essential functions provided.<sup>97</sup>

The certification an employee may be obligated to supply before being permitted to return to duty is only required to state that the employee is able to resume work, and if requested at the time that the employee received notice from the employer whether the employee is able to perform the essential functions of his or her job.<sup>98</sup> The employee is under no obligation to provide the employer with any additional information.<sup>99</sup>

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(E) Because of any qualifying exigency (as the Secretary shall, by regulation, determine) arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty (or has been notified of an impending call or order to covered active duty) in the Armed Forces.

29 U.S.C. § 2612(a)(1).

<sup>91</sup> 29 U.S.C. § 2614(a)(4); 29 C.F.R. § 825.312(a).

<sup>92</sup> 29 U.S.C. § 2614(a)(4); 20 C.F.R. § 825.312(a).

<sup>93</sup> 29 C.F.R. § 825.312(b).

<sup>94</sup> 29 C.F.R. § 825.312(b).

<sup>95</sup> 29 C.F.R. § 825.312(g); WH Admin. Op. (Sept. 11, 2000).

<sup>96</sup> 29 C.F.R. § 825.312(b).

<sup>97</sup> 29 C.F.R. § 825.312(b).

<sup>98</sup> 29 C.F.R. § 825.312(b).

<sup>99</sup> See 29 C.F.R. § 825.312(b).

*Court Cases Limiting Employer to Fit-For-Duty Certification*

- *Albert v. Runyon*<sup>100</sup>

The district court noted that the FMLA requires an employer to rely on the certification provided by an employee's health care provider regarding. The certification provided need not be more than a simple statement assessing the employee's ability to return to work. In the event that an employer questions the certification, it may obtain clarification from the health care provider, but may not put the employee through its own fitness for duty examination. A fitness for duty examination may only be required of an employee returning from FMLA leave if the employee's behavior following his or her return warrants it.

**Can an employer contact a health care provider regarding an employee returning from FMLA leave?**

With an employee's permission, an employer may contact the employee's health care provider only for the purposes of seeking clarification or authentication of the fit-for-duty certification.<sup>101</sup> In seeking clarification, an employer's contact is limited to "understand[ing] the handwriting on the medical certification or to understand the meaning of a response."<sup>102</sup> An employer seeking authentication is limited to "requesting verification that the information contained on the certification form was completed and/or authorized by the health care provided who signed the document . . ."<sup>103</sup> An employer is not permitted to request any additional medical information from the employee's health care provider.<sup>104</sup>

When the employer contacts the employee's health care provider, it must use "a health care provider, a human resources professional, a leave administrator, or a management official."<sup>105</sup> The employer is prohibited from having the employee's direct supervisor contact the employee's health care provider.<sup>106</sup> Even when an employer elects to seek clarification or authentication, it may not delay the employee's return to work after it has received a fit-for-duty certification.<sup>107</sup>

**Is an employer obligated to pay for an employee to obtain an FMLA certification prior to returning to work?**

When an employee is required to present a fit-for-duty certification prior to returning from FMLA leave, the employee must bear the cost of the certification.<sup>108</sup> Additionally, the

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<sup>100</sup> 6 F. Supp. 2d 57 (D. Mass. 1998) (interpreting previous C.F.R. provision governing return to work certification).

<sup>101</sup> 29 C.F.R. §§ 825.307(a), .312(b).

<sup>102</sup> 29 C.F.R. § 825.307(a).

<sup>103</sup> 29 C.F.R. § 825.307(a).

<sup>104</sup> 29 C.F.R. § 825.307(a).

<sup>105</sup> 29 C.F.R. § 825.307(a).

<sup>106</sup> 29 C.F.R. § 825.307(a).

<sup>107</sup> 29 C.F.R. § 825.312(b).

<sup>108</sup> 29 C.F.R. § 825.312(b).

employee is not entitled to any compensation for the time or travel that is required to obtain the certification.<sup>109</sup>

### **Can an employer require a second opinion regarding FMLA certification?**

An employer's ability to obtain a second opinion regarding a FMLA certification depends upon the type of certification at issue.<sup>110</sup> If the certification at issue is the initial certification to request FMLA leave, the employer may obtain a second opinion.<sup>111</sup> However, if the certification at issue is a fit-for-duty certification, the employer is prohibited from requesting a second opinion.<sup>112</sup>

On an initial certification, an employer may require a second opinion if it has reason to doubt the validity of the initial certification.<sup>113</sup> The employer may choose the health care provider that will conduct the second opinion; however, the health care provider may not be an individual who the employer regularly contracts with unless the area in which the employer is located has an extremely limited number of health care providers.<sup>114</sup> Any second opinion will be conducted at the employer's expense.<sup>115</sup>

In the event that there is a conflict between the first and second opinions, the employer may require the employee to obtain a certification from a third health care provider.<sup>116</sup> The third opinion will once again be conducted at the employer's expense.<sup>117</sup> The health care provider will be selected and approved by both parties, a party's failure to participate in good faith may cause it to be bound by the opinion that is in the opposing party's favor.<sup>118</sup> The third opinion will be final the final determination on the whether the employee is certified for FMLA leave.<sup>119</sup> Again, second and third opinions are not permitted for return-to-work certifications.<sup>120</sup>

#### *Court Cases Regarding Employer's Requests for Second Opinions*

- *Langlois v. City of Deerfield Beach*<sup>121</sup>

In this case the City sought to obtain a second opinion on whether a firefighter was fit to return duty. The court found that the City was obligated to reinstate the fire fighter following receipt of

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<sup>109</sup> 29 C.F.R. § 825.312(b).

<sup>110</sup> See 29 C.F.R. §§ 825.307(b), .212(b).

<sup>111</sup> 29 C.F.R. § 825.307(b).

<sup>112</sup> 29 C.F.R. § 825.312(b).

<sup>113</sup> 29 C.F.R. § 825.307(b)(1).

<sup>114</sup> 29 C.F.R. § 825.307(b)(2).

<sup>115</sup> 29 C.F.R. § 825.307(b)(1).

<sup>116</sup> 29 C.F.R. § 825.307(c).

<sup>117</sup> 29 C.F.R. § 825.307(c).

<sup>118</sup> 29 C.F.R. § 825.307(c).

<sup>119</sup> 29 C.F.R. § 825.307(c).

<sup>120</sup> 29 C.F.R. § 825.312(b).

<sup>121</sup> 370 F. Supp. 2d 1233 (S.D. Fla. 2005) (applying previous C.F.R. provision governing return to work certification).

a fit-for-duty certification from his health care provider which stated that he was fit to return to duty. While state and local laws may provide greater benefits than those provided by the FMLA, they may not diminish FMLA benefits.

### **What happens if an employee does not provide the proper certification?**

The FMLA has different requirements for initial certification and return-to-duty certification.<sup>122</sup> At the initial stage, the question is whether the leave was foreseeable or unforeseeable.<sup>123</sup> An employee who fails to provide certification for foreseeable leave in a timely manner (typically at the time notice of the leave request is given or within five days of giving notice)<sup>124</sup> may be denied FMLA coverage until providing the necessary certification.<sup>125</sup> When the leave is unforeseeable, an employer may deny FMLA coverage if certification is not received within fifteen days after the employee has received the employer's request for certification.<sup>126</sup> The exception to this time frame is when it is not practicable for the employee to provide the certification, such as in the case of a medical emergency.<sup>127</sup>

In regards to a fit-for-duty certification, when the employer has provided the employee with sufficient notice to require a certification prior to the employee returning to work, the employer may delay the employee's reinstatement until it receives the certification.<sup>128</sup> If the employee fails to provide the certification, or fails to submit a new certification related to a serious health condition by the time his or her FMLA leave concludes, the employee may be subject to termination.<sup>129</sup>

### **Is the information gathered from FMLA certification protected by HIPAA?**

As the medical information contained on a FMLA certification is provided by the employee's health care provider, it is information covered by HIPAA.<sup>130</sup> As a result, an employer may not contact the health care provider directly and obtain the information without the employee's consent.<sup>131</sup> As an employee is always entitled to receive his or her personal medical information, employers are able to avoid obtaining employee consent by having the employee obtain the certification from his or her doctor and providing it to the employer.<sup>132</sup> An employee is under no obligation to disclose this information; however, if the employer requests a certification and the employee fails to provide it, he or she will not be entitled to the protections of the FMLA.<sup>133</sup>

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<sup>122</sup> See 29 C.F.R. § 825.313.

<sup>123</sup> 29 C.F.R. § 825.313.

<sup>124</sup> 29 C.F.R. § 825.305(b).

<sup>125</sup> 29 C.F.R. § 825.313(a).

<sup>126</sup> 29 C.F.R. § 825.313(b).

<sup>127</sup> 29 C.F.R. § 825.313(b).

<sup>128</sup> 29 C.F.R. § 825.313(d).

<sup>129</sup> 29 C.F.R. § 825.313(d).

<sup>130</sup> 45 C.F.R. § 164.104.

<sup>131</sup> 45 C.F.R. § 164.508(a)(1).

<sup>132</sup> See 45 C.F.R. § 164.502(a)(1)(i).

<sup>133</sup> 29 C.F.R. § 825.313(a), (b), (d).

Once an employer has received a FMLA certification, it must maintain the certification or any related documents as a confidential medical record which must be kept separate from the employee's personnel file.<sup>134</sup> Furthermore, if the information obtained also causes the ADA to apply, the employer must conform with the confidentiality requirements set forth in the ADA.<sup>135</sup> Similar to the ADA, information obtained for the purposes of the FMLA may be disclosed to the following individuals:

- (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations;
- (2) First aid and safety personnel may be informed (when appropriate) if the employee's physical or medical condition might require emergency treatment; and
- (3) Government officials investigating compliance with FMLA (or other pertinent law) shall be provided relevant information upon request.<sup>136</sup>

#### **4. Periodic Physical Agility of Fitness Tests**

##### **May public safety employers require periodic physical agility or fitness tests?**

Under the ADA, physical agility tests are not considered medical examinations, meaning an employer may conduct them at any time, provided that they are "given to all similarly situated applicants or employees regardless of disability."<sup>137</sup> In addition, OSHA has stated that employers shall assure that employees who perform "interior structural fire fighting are physically capable of performing duties which may be assigned to them during emergencies."<sup>138</sup>

##### **If an employer sets a specific standard for a physical agility test, are employees protected by Title VII or the ADEA?**

Title VII prohibits an employer from discriminating against an individual in regards to conditions of employment based on that individual's "race, color, religion, sex, or national origin . . . ."<sup>139</sup> Generally, Title VII protections against discrimination on the basis of sex are the relevant portions with regard to fitness for duty exams. Employers are also prohibited from establishing employment practices that create a disparate impact on certain employees based on their "race, color, religion, sex, or national origin" unless the employer can demonstrate that the employment practice is related to the job in question and "consistent with a business necessity . . . ."<sup>140</sup> Title VII's prohibition on discrimination also extends to employment related tests, preventing an employer from adjusting or altering scores on the basis of any protected classes.<sup>141</sup>

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<sup>134</sup> 29 C.F.R. § 825.500(g).

<sup>135</sup> 29 C.F.R. § 825.500(g).

<sup>136</sup> 29 C.F.R. § 825.500(g)(1)–(3).

<sup>137</sup> 29 C.F.R. app. § 1630.14(c).

<sup>138</sup> 29 C.F.R. § 1910.156(b)(2).

<sup>139</sup> 42 U.S.C. § 2000e-2(a)(1).

<sup>140</sup> 42 U.S.C. § 2000e-2(k).

<sup>141</sup> 42 U.S.C. § 2000e-2(l).

Similar to Title VII, the Age Discrimination in Employment Act (ADEA) prohibits an employer from discriminating against an individual because of age.<sup>142</sup> However, there will be no finding of discrimination based upon age where “age is a bona fide occupational qualification reasonable necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age . . . .”<sup>143</sup>

With respect to fire fighters, the ADEA explicitly states that it shall not be a violation to discharge an individual based upon his or her age if that individual has reached an applicable retirement age.<sup>144</sup> The ADEA authorizes state and local governments to establish mandatory retirement ages of no lower than 55 for fire fighters (and jurisdictions that had lower retirement ages prior to the passage of the law were grandfathered in).<sup>145</sup>

If the standards set by an employer for a physical agility test discriminate against an individual based upon membership in one of the protected classes listed in Title VII, or based upon the individual’s age, the employer’s use of the test may be a prohibited employment practice in violation of either Title VII or the ADEA. An employee can ask a court to make the employer stop using the test<sup>146</sup> Additionally, if an employee was discharged as a result of a discriminatory test, he or she may be entitled to reinstatement as well as back pay.<sup>147</sup>

The EEOC uses a rule of thumb that if the protected class is selected at a rate of less than four-fifths (80 percent) of the selection rate of the group with the highest selection rate, that is a substantially different rate of selection, supporting an inference of disparate impact against the protected class.<sup>148</sup>

#### Cases Finding Tests Permissible

- *Pietras v. Board of Fire Commissioners of the Farmingville Fire District*<sup>149</sup>

The Second Circuit affirmed a decision finding that the Farmingville Fire District’s physical agility test created a disparate impact on women and therefore should be enjoined. The Court determined that the time limit for completion of the test had a disparate impact on women, evidenced by the fact that male pass rate for the test was 95% whereas the female pass rate was only 57%. This difference satisfied the EEOC 80 percent “rule of thumb”. Furthermore, Farmingville failed to demonstrate that the selected time standard was job related.

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<sup>142</sup> 29 U.S.C. § 623(a).

<sup>143</sup> 29 U.S.C. § 623(f).

<sup>144</sup> 29 U.S.C. § 623(j).

<sup>145</sup> 29 U.S.C. § 623(j).

<sup>146</sup> See 29 U.S.C. § 626(b); 42 U.S.C. § 2000e-5(g).

<sup>147</sup> 29 U.S.C. § 626(b); 42 U.S.C. § 2000e-5(g).

<sup>148</sup> NEED CITE

<sup>149</sup> 180 F.3d 468 (2d 1999).



- *Smith v. City of Des Moines*<sup>150</sup>

The Court rejected a fire captain's claims that he was discharged as a result of test standards that created a disparate impact on older employees in violation of the ADEA. The Court found that the City terminated the fire captain due to his inability to pass a stress test that measured lung capacity and ability to use a self-contained breathing apparatus (SCBA). As the use of SCBA was determined to be a necessary function for a fire fighter in the performance of his or her duties, the standard of the test was appropriate and found to be job-related and consistent with a business necessity.

Cases Finding Tests Impermissible

- *Legault v. aRusso*<sup>151</sup>

The Court found that the agility test that was part of the fire department's selection process disproportionately excluded women. The agility test used by the department, which included hose drags and other requirements focused on upper body strength, resulted in 30 of the 35 male candidates who took the test passing and none of the 11 female candidates passing. The Court found that these results supported the existence of a gender-based discrepancy in the test. The department's attempts to justify the test as job-related and consistent with a business necessity failed because the department's job analysis was based on an outdated job description that only discussed general duties. By basing the tasks in the agility test on the general description, there is no adequate means to determine if tests accurately represented duties of a fire fighter.

- *Merritt v. Old Dominion Freight Line, Inc.*<sup>152</sup>

The Court acknowledged that a neutral policy requiring drivers to participate in physical ability tests in certain situations could serve the employer's legitimate business interests in public and employee safety. However, the court found the selective use of the physical ability test by the employer in this case meant that the employer improperly treated its male and female employees differently. The Court noted that while the employer ordered its female driver to undergo a physical ability test, two similarly situated male drivers had been excused from doing so.

- *Arizona v. City of Cottonwood*<sup>153</sup>

The Court found that the physical fitness test that officers were required to pass in order to be considered for promotion created a disparate impact on female officers. As passing the test was only required for promotion, a use which was not recommended by the test creators, the Court concluded that using the test as a promotional tool was actually a pretext for gender

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<sup>150</sup> 99 F.3d 1466 (8th Cir. 1996).

<sup>151</sup> 842 F. Supp. 1479 (D.N.H. 1994).

<sup>152</sup> 601 F.3d 289 (4th Cir. 2010).

<sup>153</sup> No. CV-11-1576-PHX-GMS, 2012 U.S. Dist. LEXIS 101256 (D. Ariz. July 20, 2012).

discrimination. As the employer was unable to provide any evidence that the physical fitness test was job-related, the court enjoined its use.

### **Are there any other protections from specific standards set in physical or agility tests?**

The Equal Protection Clause of the Fourteenth Amendment and the Due Process Clause of the Fifth Amendment to the United States Constitution prevent the States and the Federal Government, respectively, from denying individuals equal treatment under the law.<sup>154</sup> In determining whether an act denies an employee equal protection under the law, a court must review the government action and evaluate the interest it serves.<sup>155</sup> There are different levels of review based on whether an individual is a member of a protected class, such as race or gender.

When individuals are being treated differently based on their race, the government action will be found to violate the equal protection clause unless it satisfies a strict scrutiny analysis which requires that the government action be narrowly tailored to serve a compelling government interest.<sup>156</sup> Government action that treats individuals differently based on their gender will violate the equal protection clause unless it satisfies an intermediate scrutiny analysis which requires a showing that the action is substantially related to achieving an important government objective.<sup>157</sup> Age is not a protected class, so government action that involves age classifications will only violate the equal protection clause if it is determined that the action has no rational relation to a legitimate state interest.<sup>158</sup>

- *Petzak v. Nevada*<sup>159</sup>

The District Court found that while the Department of Corrections could require correctional officers to undergo an EKG as part of their yearly physical examinations, that there was no rational basis for why only officers over the age of 40 had to take a stress EKG. While the Court acknowledged that EKGs and physical examinations in general served a legitimate state interest, there was no showing that the different test for those individuals 40 and older was relevant to any legitimate state interest. The Court found that the requirement of a stress EKG violated the officers' constitutional right to equal protection and entitled the officers to injunctive relief.

## **5. Drug Testing as Part of a Fit-for-duty Exam**

### **Is a drug test a fit-for-duty test?**

Employers may prohibit employees from engaging in illegal drug use in the workplace.<sup>160</sup> As a result, an employer-required test to determine whether employees are engaging in illegal

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<sup>154</sup> See U.S. Const. amend. V; *id.* at amend. XIV, § 1.

<sup>155</sup> See *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 83 (2000).

<sup>156</sup> See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995).

<sup>157</sup> See *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982).

<sup>158</sup> See *Kimel*, 528 U.S. at 83.

<sup>159</sup> 579 F. Supp. 2d 1330 (D. Nev. 2008).

<sup>160</sup> 42 U.S.C. § 12114(c)(2).

drug use is not considered a medical examination and is thus not covered by the ADA.<sup>161</sup> Additionally, there is nothing in the FMLA that would prevent an employer from requiring an employee to submit to a drug test upon the employee's return to work.<sup>162</sup> However, an employer test that seeks to determine an employee's legal drug use or participation in a drug rehabilitation program will still constitute a violation of the ADA unless the employer is able to demonstrate that the test is job-related and consistent with a business necessity.<sup>163</sup>

### **What protections does a public sector employee have if an employer requires a drug test?**

Many state and local governments have statutes or ordinances that limit a public employer's ability to drug test its employees.<sup>164</sup> Aside from a specific statute or ordinance that may apply in the employee's respective jurisdiction, the greatest protection a public employee will typically have is the Fourth Amendment,<sup>165</sup> which protects people from unreasonable searches and seizures of "their persons, houses, papers, and effects" committed by the government or its agents.<sup>166</sup> In order to satisfy the protections afforded by the Fourth Amendment, a public employer must establish a reasonable basis for requiring its employees to undergo drug testing.<sup>167</sup> A determination of reasonableness is made by balancing the public interest in the testing against the privacy interests of the individuals being tested.<sup>168</sup>

In balancing these interests, the Supreme Court has stated that in certain situations where a public employer can establish a special need, the employer can order a search without individualized suspicion of the specific person.<sup>169</sup> Courts have found public safety to be a special need and have supported a public employer requiring its employees to undergo drug tests without the employer having to demonstrate any individualized suspicion.<sup>170</sup>

Depending upon the jurisdiction, unionized public employees may also be able to collectively bargain with their public employer over the implementation of employer required drug testing.

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<sup>161</sup> 29 C.F.R. § 1630.16(c).

<sup>162</sup> W.H. Admin. Op. (Oct. 25, 2004).

<sup>163</sup> See 42 U.S.C. § 12112(d)(4)(A).

<sup>164</sup> See U.S. DEP'T OF LABOR, DRUG-FREE WORKPLACE POLICY BUILDER SECTION 7: DRUG TESTING, *available at* <http://www.dol.gov/elaws/asp/drugfree/drugs/screen92.asp> (last visited September 7, 2012).

<sup>165</sup> See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (noting that the Fourth Amendment applies to searches conducted by the government or by an individual acting as its agent).

<sup>166</sup> U.S. CONST. AMEND. IV.

<sup>167</sup> See U.S. CONST. AMEND. IV.

<sup>168</sup> *Nat'l Treasury Union Employees v. Von Raab*, 489 U.S. 656 (1989) (finding that it was reasonable for the government to require employees who would be trusted with firearms and working around illegal drugs to undergo drug tests).

<sup>169</sup> *Von Raab*, 489 U.S. at 668.

<sup>170</sup> See, e.g., *Von Raab*, 489 U.S. at 668–69 (finding that since the Customs Service is the Nation's first line of defense against the import of illegal drugs, drug tests were reasonable to protect the health and welfare of the population even though the employer lacked a warrant or individualized suspicion); *Skinner*, 489 U.S. at 633–34 (holding that government regulations requiring railway workers to undergo drug testing following an accident was reasonable even with the absence of any individualized suspicion due in part to the safety interests at stake).

Court Cases Denying Drug Testing – Public Sector

- *Petersen v. City of Mesa*<sup>171</sup>

The Arizona Supreme Court concluded that the random suspicionless drug testing component of the Mesa Fire Department's testing program violated the privacy interest provided to fire fighters by both the United States and Arizona Constitutions. While the City claimed that random testing was necessary to deter drug use among safety-sensitive employees, the record demonstrated that there was not even a single instance of drug use among the fire fighters or evidence that drug use has been the cause of accidents, injuries, or property damage. As a result the court concluded that the City failed to articulate how suspicionless testing would address a real and substantial risk that would outweigh even the limited privacy rights fire fighters were entitled to.

- *Beattie v. City of St. Petersburg Beach*<sup>172</sup>

The district court determined that the City's suspicionless drug test was a violation of the fire fighter's Four Amendment rights. The court noted that fire fighters privacy expectations were lessened due to the fact that they regularly submitted to annual physical to assess their ability to perform their jobs. While the City had a legitimate interest in protecting the public and ensuring that its fire fighters are able to perform their duties, it was unable to demonstrate any evidence of drug use amongst its fire fighters. Additionally, there is no history of accidents, injuries, or property damage that can be attributed to drug use. The court concluded that as the suspicionless testing was only directed at deterring future problems, it failed to establish a compelling interest that outweighed even the limited privacy interests of its fire fighters.

Court Cases Permitting Drug Testing – Public Sector

- *Nocera v. New York City Fire Commissioner*<sup>173</sup>

The district court found that a fire fighter's constitutional rights were not violated when he was made to undergo a drug test. The court concluded that the employer had demonstrated a reasonable suspicion to warrant its ordering the fire fighter to undergo a drug test due to the fact that he was arrested for trespassing in a known drug area, his failure to report the arrest, multiple absences during his probationary period, and his failure to complete multiple required medical tests. In determining that the ordered drug test was reasonable, the court noted that where drug tests are part of a uniformly applied program they may satisfy a reasonableness requirement without showing reasonable suspicion, when an employee in a safety-sensitive job is singled out by the public employer to undergo a drug test reasonable suspicion is required.

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<sup>171</sup> 83 P.3d 35 (Ariz. 2004).

<sup>172</sup> 733 F. Supp. 1455 (M.D. Fla. 1990).

<sup>173</sup> 921 F. Supp. 192 (S.D.N.Y. 1996).

- *Saavedra v. City of Albuquerque*<sup>174</sup>

The Tenth Circuit found that a district court was not obligated to undertake a special needs analysis when the City could establish a reasonable suspicion to warrant its ordering a fire fighter to undergo a drug test. The Court concluded that there was uncontested evidence that the fire fighter referred himself to a health evaluation at the City's Employee Health Center, that he had warned his supervisor's that he may become violent, that he lost his temper while in uniform, and that he had a public altercation with his girlfriend. As a result, the fire fighter's Fourth Amendment rights were not violated by the City ordering him to undergo a drug test.

- *Pennington v. Metropolitan Government of Nashville and Davidson County*<sup>175</sup>

The Sixth Circuit found that an off-duty police officer's Fourth Amendment rights had not been violated when he agreed to take a breathalyzer following an altercation at a bar after being told that if he failed to do so he may be subject to discipline including termination. The Court noted that a person is not considered seized out of fear that he or she might lose his or her job.

- *Kreig v. Seybold*<sup>176</sup>

The Seventh Circuit found that the City's drug testing policy did not violate an employee's Fourth Amendment rights because the employee's duties of operating large vehicles and equipment presented a substantial risk to others if he were to operate them under the influence of drugs or alcohol. Additionally, the Court found that the City's interests outweighed the employee's because the employee's expectation of privacy was diminished due to the fact that he had previously submitted to drug testing, the drug test was random, and the City had a compelling interest in not having its employees who drive large vehicles and equipment doing so while under the influence.

- *New Jersey Transit PBA Local 304 v. New Jersey Transit Corporation*<sup>177</sup>

The New Jersey Supreme Court found that a warrantless drug testing program for New Jersey police officers satisfied the reasonableness requirements of both the Federal and State Constitutions. The Court concluded that the public's safety depended upon the health and fitness of the officers and that the nature of their positions created a diminished expectation of privacy. Furthermore, "[t]he government's interest in conducting random drug testing of employees who carry firearms for security purposes is substantial."

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<sup>174</sup> 73 F.3d 1525 (10th Cir. 1996).

<sup>175</sup> 511 F.3d 647 (6th Cir. 2008).

<sup>176</sup> 481 F.3d 512 (7th Cir. 2007).

<sup>177</sup> 701 A.2d 1243 (N.J. 1997).

- *Law Enforcement Labor Services, Inc. v. Sherburne County*<sup>178</sup>

The Minnesota Court of Appeals found that the County's decision to implement a random drug-testing policy in accordance with the Minnesota Workplace Testing Act was an inherent management right and was not subject to negotiation with the union. However, the Court also found that the implementation of the policy was subject to collective bargaining.

### **What protections does a private sector employee have if an employer requires a drug test?**

Private-sector employees typically have fewer protections than public-sector employees from employer required drug tests. This is due to the fact that they are not entitled to the protections of the Fourth Amendment, as any required test is not being ordered by the government or its agents.<sup>179</sup> The protections available to a private-sector employee will largely depend upon the employee's jurisdiction. Some states and local jurisdictions have enacted statutes or ordinances that limit which employees may be tested and under what circumstances a test will be warranted. Additionally, a state's status as a "right-to-work" state may also limit an employee's claims. A private-sector employee wishing to challenge his or her employer's drug testing policy is advised to consult with counsel to determine what protections employees are afforded in the respective jurisdiction.

#### *Court Cases Denying Drug Testing – Private Sector*

- *Eaton v. Iowa Employment Appeal Board*<sup>180</sup>

The Iowa Supreme Court found that the employer's required random drug test violated Iowa law that prohibited employers from requiring or requesting employees to submit to drug tests as a condition of employment. Additionally, the employee's legitimate absences and lack of evidence that the employer believed the employee was impaired on the job prevented the application of the exception to the prohibition on drug tests where the employer can establish probable cause for conducting the test.

#### *Court Cases Permitting Drug Testing – Private Sector*

- *Baggs v. Eagle-Picher Industries, Inc.*<sup>181</sup>

The Sixth Circuit concluded that even though Michigan has long recognized the common-law right to privacy that right did not apply to the employer's mandatory drug tests. The Court found that the information being sought by the employer was related to the individuals' employment, and therefore the employer had a right to investigate even though the urine testing used in the drug test may have been intrusive or objectionable to a reasonable person.

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<sup>178</sup> 695 N.W.2d 630 (Minn. Ct. App. 2005).

<sup>179</sup> See U.S. Const. amend. IV.

<sup>180</sup> 602 N.W.2d 553 (Iowa 1999).

<sup>181</sup> 957 F.2d 268 (6th Cir. 1992).

- *Luedtke v. Nabors Alaska Drilling, Inc.*<sup>182</sup>

In this case, the Supreme Court of Alaska concluded that the Alaska Constitution's right to privacy was not intended to apply to private action. The Court went on to conclude that public policy did support protection of an employee's privacy, and violation of that policy may rise to the level of a breach of the covenant of good faith and fair dealing that is a part of at-will employment contracts. However, when it comes to drug tests, the employee's privacy interests must be balanced against the public concern for employee safety. Here the Court found that the privacy interests were not outweighed by the safety concerns created by drug use. While approving the employer's use of drug tests, the Court noted that the tests must be conducted at times that correspond with the employee's work times. Additionally, the employee must receive notice of the employer's adoption of a drug testing program.

- *Jennings v. Minco Technology Labs, Inc.*<sup>183</sup>

The Texas Court of Appeals found that an employer's drug testing program did not violate the Texas common-law right of privacy because the employer's program would only cause an employee's urine to be tested if he or she consents to the test. The Court was not persuaded that any consent given would be illusory because if the employee's consent was withheld she would be terminated. The Court reasoned that the drug testing program was a modified term of the existing at-will employment contract which the employee was free to accept or reject.

### **May an employer subject an employee to periodic drug or alcohol testing? Under what circumstances?**

Limitations on an employer's ability to test its employees vary based upon the jurisdiction. However, in its analysis of the reasonableness of warrantless drug testing for public employees, the Supreme Court has noted that when employees are notified in advance that they will be subject to testing it minimizes the intrusion on their privacy.<sup>184</sup> In addition, the EEOC has stated that an employer may subject an employee to periodic alcohol testing if he or she has been off work for a rehabilitation program only if the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat in the absence of testing.<sup>185</sup>

The position of the IAFF is that any fire department initiating drug testing must ensure that workers have available avenues of treatment and rehabilitation as well as educational efforts to prevent substance abuse. The program must have a written policy prior to testing which clearly states the objective of the program and contains language which addresses the safety and health of all parties, due process, and concern for the dignity of the worker.

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<sup>182</sup> 768 P.2d 1123 (Alaska 1989).

<sup>183</sup> 765 S.W.2d 497 (Tex. App. 1989).

<sup>184</sup> See *Nat'l Treasury Union Employees v. Von Raab*, 489 U.S. 656, 672 n.2 (1989)

<sup>185</sup> NEED CITE – EEOC GUIDELINES

The policy must introduce drug testing as part of a comprehensive program for eradication of drug use in workplace. Prevention, evaluation, and rehabilitation must be equally important as testing. The policy statement should be accompanied by a fully developed procedures manual PRIOR to the onset of testing, an acceptable manual must describe the WHO will be tested, WHAT drugs will be tested for, HOW testing will be done, and WHAT will happen if results are positive for drug use.

## **6. Employer Access to Employee Genetic Information**

### **May an employer ask an employee for genetic information?**

Except in limited situations, the Genetic Information Non-discrimination Act (GINA) prohibits employers from requesting, requiring, or purchasing genetic information<sup>186</sup> regarding their employees or the family members of their employees.<sup>187</sup> Genetic information includes an request for an individual's family medical history.<sup>188</sup>

An employer will be considered as having made a request by engaging in any of the following conduct: conducting an internet search on an individual that is likely to reveal genetic information; "actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information"; and making inquiries into an individual's health status in a manner that will likely lead to a disclosure of genetic information.<sup>189</sup>

Employers will not be found to have violated GINA where an employee voluntarily provides genetic information as part of an employer's wellness program.<sup>190</sup> There shall also be no violation when an employer inadvertently requests genetic information about an employee or

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<sup>186</sup> Genetic information includes:

- (i) An individual's genetic tests;
- (ii) The genetic tests of that individual's family members;
- (iii) The manifestation of disease or disorder in family members of the individual (family medical history);
- (iv) An individual's request for, or receipt of, genetic services, or the participation in clinical research that includes genetic services by the individual or a family member; or
- (v) The genetic information of a fetus carried by an individual or by a pregnant woman who is a family member of the individual ....

29 C.F.R. § 1635.3(c)(2).

A genetic test involves the "analysis of human DNA, RNA, chromosomes, proteins, or metabolites, that detects genotypes, mutations, or chromosomal changes." 42 U.S.C. § 2000ff(7). Genetic services includes genetic tests, genetic counseling (*i.e.*, obtaining interpretations and assessments of genetic information), as well as genetic education. 42 U.S.C. § 2000ff(6).

Genetic information does not include "information about the sex or age of the individual, the sex or age of family members, or information about the race or ethnicity of the individual or family members that is not derived from a genetic test." 29 C.F.R. § 1635.3(c)(2).

<sup>187</sup> 42 U.S.C. § 2000ff-1(b); 29 C.F.R. § 1635.8(a).

<sup>188</sup> 29 C.F.R. § 1635,3(c)(2)(iii).

<sup>189</sup> 29 C.F.R. § 1635.8(a).

<sup>190</sup> 42 U.S.C. § 2000ff-1(b)(2).



an employee's family member.<sup>191</sup> An employer's inadvertent request of genetic information may be supported when its lawful request for medical information contains a clear statement that in responding to the request, no genetic information about the employee or a member of the employee's family be provided.<sup>192</sup> Additional exceptions include: when an employer requests family medical information in order to comply with the FMLA or other State or local family and medical leave laws;<sup>193</sup> when genetic information is obtained through the purchase of commercially and publicly available documents excluding medical databases and court records;<sup>194</sup> and where the information is requested as part of the genetic monitoring of the biological impact of toxic substances in the workplace.<sup>195</sup>

In the event that an employer acquires genetic information about an employee, similar to the protections provided by the ADA,<sup>196</sup> the information must be maintained on separate forms in separate files and treated as a confidential medical record.<sup>197</sup> Any genetic information obtained may only be disclosed under the following circumstances: (1) to the employee upon written request from the employee; (2) to an occupational or health researcher; (3) in response to a court order; (4) to government officials investigating an employer's compliance with GINA; (5) to the extent necessary to comply with certification requirements for Federal and State leave laws; and (6) to public health agencies for the purpose of combating a life-threatening contagious disease.<sup>198</sup>

## **7. Medical Testing Related to Worker's Compensation**

### **What kinds of medical tests or certification may an employer require if an employee needs workers' compensation?**

The ADA does not alter or limit the eligibility standards for workers' compensation benefits under State or Federal law.<sup>199</sup> Workers' compensation laws vary from state to state. A state or local employee is advised to consult the laws applicable in his or her jurisdiction to determine what limits may be placed upon an employer's ability to order the employee to undergo medical testing. Some workers' compensation laws permit medical evaluations of employees. The following link provided on the Department of Labor's website contains

<sup>191</sup> 42 U.S.C. § 2000ff-1(b)(1); 29 C.F.R. § 1635.8(b)(1).

<sup>192</sup> 42 U.S.C. § 2000ff-1(b)(1); 29 C.F.R. § 1635.8(b)(1).

<sup>193</sup> 42 U.S.C. § 2000ff-1(b)(3)–(5); 29 C.F.R. § 1635.8(b)(3)–(5).

<sup>194</sup> 42 U.S.C. § 2000ff-1(b)(4); 29 C.F.R. § 1635.8(b)(4).

<sup>195</sup> 42 U.S.C. § 2000ff-1(b)(5); 29 C.F.R. § 1635.8(b)(5). Genetic monitoring may only be conducted where the employer has provided notice to the individual that such monitoring will take place, the monitoring is required by law and complies with all monitoring regulations, the individuals being monitored have voluntarily agreed to participate, the individuals receives individual monitoring results, and the employer only receives results that provide no disclosure of the identity of any of the individuals monitored. 42 U.S.C. § 2000ff-1(b)(5); 29 C.F.R. § 1635.8(b)(5).

<sup>196</sup> See 42 U.S.C. § 12112(d)(4)(C); 29 C.F.R. §§ 1630.14(c)(1)(i)–(iii), (d)(1)(i)–(iii); see also Section 1 *supra* notes 11–12 and accompanying text.

<sup>197</sup> 42 U.S.C. § 2000ff-5(a); 29 C.F.R. § 1635.9(a).

<sup>198</sup> 42 U.S.C. § 2000ff-5(b)(1)–(6); 29 C.F.R. § 1635.9(b)(1)–(6).

<sup>199</sup> 42 U.S.C. § 12201(e).

hyperlinks to each state's workers' compensation website:  
<http://www.dol.gov/owcp/dfec/regs/compliance/wc.htm>.

Workers' compensation for federal employees is governed by the Federal Employees' Compensation Act (FECA). FECA requires the United States to pay an employee for any disabling injury the employee has sustained in the performance of his or her duties<sup>200</sup> An employee seeking compensation for a work injury must submit to "examination by a medical officer of the United States, or by a physician designated or approved by the Secretary of Labor, after the injury and as frequently and at the times and places as may be reasonably required."<sup>201</sup> An employee's refusal to submit to an exam will result in this suspension of his or her right to compensation until such time as the refusal stops.<sup>202</sup>

**Is the information that is shared with regard to worker's compensation claims protected in any way?**

All records of claims related to benefits under FECA, "including copies of such records maintained by an employer, are considered confidential and may not be released, inspected, copied or otherwise disclosed except as provided in the Freedom of Information Act and the Privacy Act of 1974."<sup>203</sup>

The protections afforded to information shared for a state workers' compensation claim will depend upon the laws of the respective state. In those situations where the state law provides protections greater than or equal to those provided by the ADA or HIPAA, the state law protections will apply.<sup>204</sup> However, if the state law is silent or provides lesser protections, the information will still be protected by the provisions of both the ADA and HIPAA.<sup>205</sup>

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<sup>200</sup> 5 U.S.C. § 8102(a).

<sup>201</sup> 5 U.S.C. § 8123(a).

<sup>202</sup> 5 U.S.C. § 8123(d).

<sup>203</sup> 20 C.F.R. § 10.10.

<sup>204</sup> See 42 U.S.C. § 12201(b); 45 C.F.R. § 164.502.

<sup>205</sup> See 42 U.S.C. § 12201(b); 45 C.F.R. § 164.502.