



Avoiding Catastrophe Conducting Fitness-for-Duty Exams

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Fitness-for-duty (FFD) exams are an important service line that all occupational health programs should develop to better serve their client companies. Fitness-for-Duty examinations are often an under-utilized resource for employers. This specialized evaluation is one that many occupational health programs offer but neglect to provide proper education promoting the many benefits of conducting such an exam.

In addition to a physical and/or mental status exam, a FFD evaluation requires a detailed review of medical records, if applicable, as well as review of background information from multiple sources.

While it is an important service line, these types of exams have the potential to lead to catastrophe if not conducted in the right manner. Fitness-for-Duty has a variety of meanings, all of which revolve around the key question of whether or not someone has the ability to perform the essential functions of the particular job one is applying for or currently working. They are also known as “Return-to-Work Evaluations”.

The Americans with Disabilities Act Amendments Act (ADAAA) and Family Medical Leave Act (FMLA) do not preclude an employer from requiring a current employee or a new hire to submit to a Fitness-for-Duty evaluation as long as that evaluation focuses on the employee’s ability to safely perform the essential functions of the job with or without reasonable accommodations. However, the FFD examination must be specific to the job in question and must arise out of a business necessity. See 29 CFR § 825.312 FMLA Fitness-for-duty certification.

Why Conduct a FFD Exam?

Often times after an illness or any injury, a personal physician will release their patient back to work because the patient requests to return back to work, even when their illness or injury has not completely resolved and poses risk in the workplace. The driving force for a return to work request is, often, from economic or financial pressure. An employee who has been off work will urge their provider to release them without restrictions, prior to them being medically stable to perform their job requirements or duties.

For the employer, there are multiple benefits in performing post-offer physicals or fitness for duty examinations. Those benefits include:

- Hiring or bringing back those who are physically capable of performing the essential functions of the job and precluding those who are not;
- Providing the employer with information as to additional care and treatment that may allow the applicant or returning employee at a later time to perform the essential functions of the job with or without reasonable accommodation;
- Provide persuasive documentation to establish the reason for non-hire or inability to return to work should an applicant or returning employee challenge in court;
- Identifies the physical stressors and physical demands of a job, for purpose of the employer attempting to, in the future, eliminate those stressors or physical demands to avoid or lessen the possibility of workplace injuries;
- Based on the specific nature of the exam, in terms of physical stressors, allows the employer to use information in disputing injury/repetitive trauma based upon mechanism of injury or repetitive nature of job activities.

Instances Under Which Fitness-for-Duty Evaluations Can Be Performed on An Existing Employee

- When an employee returns to work from an extended leave due to illness or injuries;
- When a manager believes an employee's work performance is being adversely affected by his/her state of health;
- When the manager has reason to believe that an employee's state of health may make the employee a danger to him or herself or other staff;
- When the manager believes that medical excuses or medical clearances presented by the employee are exaggerated or false.

The FFD Exam Essentials: How to Structure the Exam

Occupational health providers performing these highly complex evaluations, must have specific knowledge regarding the physical demands of specific jobs. Obtaining, at a minimum, a written job description is essential in providing the best medical judgement in determining an employee's ability to return to work. Another, more detailed option, would be for the employer to provide video of the employee's job. The best case scenario is to allow the examiner to conduct a job site analysis (JSA) with the employee in question present to help explain the job.

It is crucial that the occupational health provider, working with the employer, understands the specific stressors and physical requirements of each job and tailors the Fitness-for-Duty/post-offer physical to those physical stressors and physical demands. Understanding these aspects of the employee's position allows for the provider to determine whether or not a reasonable accommodation can be made.

The importance of constructing the physical exam, in this fashion, is to correctly assess a person's ability to either perform the job, at time of hire, or return to and continue in that job with or without reasonable accommodations.

FFD evaluations are crucial in providing an employer a sound decision as to whether or not the person has the physical or mental ability to perform the essential functions of the job in question and should mirror the post-offer physical exam process.

Occupational Health Providers Potential Risks in Performing FFD Exam

There are several potential risks if the FFD exam is inappropriately performed or flawed. To avoid legal disaster, one must obtain the appropriate releases from an employee in order to release information to an employer. Occupational health providers must make certain that the medical information being released is provided to only those who are included on the signed medical record releases.

At SafeWorks Illinois, our initial contact with the employee is to outline the regulations followed regarding confidentiality.

We ensure the employee, being evaluated, is informed of what information is shared with the employer.

The occupational health provider performing a Fitness for Duty for purpose of hire or return to work should have the individual acknowledge that a Fitness for Duty is being performed and that no physician-patient relationship is being established.

The release also needs to state that no medical treatment will be provided, and that the examination results will be given to the employer for their consideration in hiring or bringing the employee back to work with the understanding that there may be certain recommendations made by the examining provider to allow an employee to be hired or returned to work.

That document should be signed by the hiree/employee before said exam is conducted. There is a potential risk for the occupational health provider if the FFD examination report is released to inappropriate parties.

Unless the employee signs a written release that authorizes release of the comprehensive FFD report, the only written communication an occupational health provider can release is whether the employee is fit-for-duty, conditionally fit-for-duty, or not fit-for-duty.

Since most FFD exams are for non-work-related issues the examiner must pay extra attention to HIPAA-protected health information and obtain appropriate written releases.

Failure to be very careful about exactly what information will be released to an employer brings extreme risk. Potential litigation can ensue from performing a FFD exam due to loss of job/income from employee who challenges FFD decision. Exposure from releasing an employee to work that results in harm or additional injury, e.g. concept of negligent issuance also exists, especially in the trucking industry.

When a decision is made that an employee is not fit for duty, the examiner, often times, will receive frequent telephone communication from the employee, or their treating physicians who do not understand fitness-for-duty process, making demands or questioning the determination. To help deflect these challenges, we often obtain appropriate written releases and permission to speak to treating physicians, who often are unfamiliar with the specific job demands an employee is performing or would perform, if returned to work.

Comprehensive Steps in Scheduling, Approaching and Conducting Fitness for Duty Exams

Our experience is most employers and referral sources are not entirely clear about why and when to schedule FFD exams. Typically, there is a reported issue or observed problem with an employee. Employers seek direction on how to handle this concern.

Before proceeding with a FFD exam, it is essential that the examiner identify and answer the reason(s) why the employer set up the exam. To facilitate that understanding, my office customarily requests a cover letter that outlines the concerns and goals of the employer for the FFD exam. This helps

Dr. Fletcher Appointed by Governor Pritzker to Illinois Worker's Compensation Commission Board

Governor JB Pritzker has appointed Dr. David J. Fletcher to the Illinois Workers Compensation Commission (IWCC) Medical Fee Advisory Board (MFAB).



Dr. David J. Fletcher

The MFAB consists of nine members appointed by the governor, with the advice and consent of the Illinois Senate. Three members represent employees, three represent employers, and three represent medical providers. The MFAB advises the IWCC on the establishment of fees for medical services and the accessibility of medical treatment for injured workers. In 2005, Illinois Workers' Compensation Commission (IWCC) established a Medical Fee Schedule (MFS) for services to injured workers that led to the creation of the MFAB.

Previously, Dr. Fletcher had been appointed to the MFAB Board by former Republican Governor Bruce Rauner in 2016 and served until November 2018. In addition to his reappointment to the MFAB, Dr. Fletcher has served since 2011 as the senior physician member of the Illinois Advisory Committee for the Workers' Compensation Research Institute (WCRI), a 12-person committee comprised of the major stakeholders in the Illinois Workers Compensation system, including the IWCC Chairman. Dr. Fletcher has taken care of more than 19,000 Illinois workers hurt on the job through his private occupational medicine practice, SafeWorks Illinois, located in Champaign, IL, having established himself as one of Illinois' most knowledgeable physicians on issues pertaining to all facets of the Illinois workers' compensation system – clinical, legislative, regulatory, policy, and research.



establishes the expectations of what kind of report or information is to be shared with the employer. SafeWorks often times urges an employer to consult their employment law counsel to help draft a cover letter.

Preferably before the FFD exam, all pertinent medical records should be collected and reviewed.

At the time of scheduling, SafeWorks explains the cost of the service varies on the complexity of the issue(s) the evaluating provider is asked to access. It may require several visits or testing to complete the process. In very complex cases, we provide a cost budget and timeline of completion of assignment.

We provide a preliminary report to the referral source as well as outline additional steps or testing needed to arrive at final opinion. Where appropriate we will conduct additional testing, such as functional capacity evaluation (FCE) or neuropsychological (NP) testing if the situation dictates.

If a fitness-for-duty evaluation by Dr. Fletcher concludes that an employee is not able to perform the essential functions of his or her position, he will, upon request, work with the employee and employer to determine if there is a reasonable accommodation that will allow the employee to continue working. If an appropriate accommodation cannot be made, other options may be considered (for example, Dr. Fletcher can assist the individual to apply for long term disability (LTD) or Social Security Disability benefits).

A Case Study That Outlines Value of FFD Exam

An employee health nurse at a large Illinois hospital was told by her HR manager that co-workers were concerned about the safety of an ortho-surgical floor charge nurse because she could not lift and had extreme difficulty walking. They did know what to do and they contacted their attorney Robert Maciorowski who suggested that they conducted a FFD exam. The institution had never conducted a FFD exam before and were unclear what action they could take to address these concerns.

The employee who had worked at the institution was afraid she would lose her job, where she had worked for 25 years. She was referred to Dr. Fletcher for a FFD exam who along with Mr. Maciorowski had to explain to the employer what steps the employer should take. Dr. Fletcher outlined the ground rules to this employee that he would not release my full report that would contain HIPAA sensitive information without her written permission and he was not providing treatment.

The nurse was morbidly obese and had significant osteoarthritis in her knee, back, and hands. Dr. Fletcher determined that she was not fit for duty. There was direct threat to her health and safety as well as patients and fellow staff members based on her present condition. She had a significant fall risk and limited material handling capabilities that put herself and patients at risk. Dr. Fletcher had several conference calls with HR and was able to reassure management that this employee could safely perform a triage phone position. This long-term employee did not lose her job and was able to concentrate on losing weight and getting knee replacements. The employer prevented serious injury to this employee as well as the patients that she was taking care of. The institution was also able to retain a loyal employee in a productive position.

In closing, FFD exams are an important and complex service line for OHS programs which provide tremendous value for employers but present with risks to providers who do not take steps to mitigate risks without obtaining proper releases of information. ◀