LBAEE

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Navigating "Fitness for Duty" Exams

Most public employees in California are familiar with the phrase "fitness for duty," even if it is something they have never had to undergo personally. A fitness for duty exam is where your employer directs you to undergo a medical exam to evaluate your ability to perform your job duties or, much less common, if they believe you pose a direct threat in the workplace due to your medical condition. For most California public employees, it is not unusual to be directed to undergo a fitness for duty exam at some point in your career. This month, we take an in-depth look into this practice, including when and how it may be used, as well as what to look out for if this does ever happen to you.

Is a Fitness for Duty Exam Legal? Under the Federal Americans with Disabilities Act (ADA) and State Fair Employment & Housing Act (FEHA), your employer can require that you undergo a medical examination and/or inquiry if it is *job-related and consistent with business necessity*. The justification for this limitation is that non-job-related medical examinations serve only to stigmatize employees with a disability. Consistent with this standard, you may be directed to undergo a fitness for duty exam if your employer has *a reasonable belief based on objective evidence* that your medical condition will (1) impair your ability to perform the essential job functions, or (2) pose a direct threat at work.

Under some circumstances, the law may mandate fitness for duty exams. The Federal Equal Employment Opportunity Commission (EEOC's) Interpretive Guidance recognizes that the ADA permits periodic physicals to determine fitness for duty or other medical monitoring if such physicals or monitoring are required by medical standards established by federal, state, or local law. (*Interpretive Guidance on Title I of the ADA, 29 CFR Pt 1630*). For example, the Federal Occupational Safety and Health Act (OSHA) requires that employees exposed to certain hazardous substances be periodically monitored. (29 CFR

§ 1910.1001(d), (e)). OSHA also requires that employees who wear respirators undergo a medical examination to ensure that the employee may safely wear a respirator. (29 CFR § 1910.134(e)). In addition, California law requires that peace officers be found free from any physical, mental, or emotional condition that might adversely affect their exercise of peace officer powers. (*Gov't Code § 1031(f)*). This includes evaluation and diagnosis by a licensed physician or psychologist, as appropriate. (*Id.*)

Speaking of peace officers, in *Brownfield v. City of Yakima* (2010) 612 F.3d 1140, a Federal Appeals Court upheld the termination of a police officer who refused to undergo a fitness for duty exam directed by his employer, the City of Yakima. Years after he had returned to work following a head injury, the City ordered that he undergo a fitness for duty exam. He refused. The City fired him. He filed a lawsuit under the ADA. The City felt the exam was justified because he used an expletive and walked out of a meeting with colleagues and said he felt "himself losing control" after being taunted by a child during a traffic stop. He also engaged in a disruptive argument with a colleague, allegedly struck his estranged wife during an argument, and made comments such as "[i]t doesn't matter how this ends." A doctor diagnosed him with a mood disorder that rendered him unfit for duty. That is when the City directed that he undergoes a fitness for duty exam. The court said, "[p]rophylactic psychological examinations can sometimes satisfy the business necessity standard, particularly when the employee is engaged in dangerous work." Although this standard "is quite high and is not to be confused with mere expediency," the court said the City met that standard here based on their objective and legitimate doubt as to whether he could safely perform his duties as a police officer.

What about When Returning from Medical Leave? Yes, a fitness for duty exam is common when employees return from a lengthy medical leave of absence *if* that leave was due to the employee's own serious medical condition. If you left work because of your own serious health condition, the Federal Family & Medical Leave Act (FMLA) allows your employer to require that you obtain a medical certification regarding your health condition before returning to work. This ensures that you can perform the essential job functions of your position. Your employer can only ask for information found on the Department of Labor (DOL's) "Certification of Health Care Provider" form. But the FMLA's requirements are independent of the ADA – the FMLA neither requires nor prevents your employer from administering a fitness for duty exam in accordance with the ADA if you are returning to work from your own medical absence.

In *White v. County of Los Angeles* (2014) 225 Cal. App. 4th 690, 705, the California Court of Appeal clarified that the employer must immediately restore the employee to work

once certified to return to work by the employee's health care provider. Although the health care provider's certification is conclusive as to the employee's right to return to work, the employer may still request a fitness for duty exam if the employer has a basis to question the health care provider's opinion. (*Id.*) If your employer directs you to remain off work during the fitness for duty process, despite your doctor's note, they should provide you with paid leave and not charge your leave accruals.

What Does A Fitness for Duty Exam Entail? A fitness for duty exam is usually considered a medical examination under the ADA and the FEHA. According to the EEOC, a "medical examination" is "a procedure or test that seeks information about an individual's physical or mental impairments or health." The EEOC considers factors such as whether the test is administered or interpreted by a health care professional in a medical setting, the test's designed purpose, the invasiveness of the examination, and the use of medical equipment. Medical examinations may include vision tests; blood pressure screenings; cholesterol tests; blood urine, saliva, and hair analyses; and psychological tests that are designed to identify a mental disorder or impairment. Tests to determine physical fitness and agility, polygraphs, and psychological tests designed to measure honesty are not medical exams. Testing for illegal drugs is not considered a medical exam under the ADA but testing for alcohol and legal drugs (*i.e.,* medication) is. Testing for alcohol may also be regarded as a medical examination under the FEHA. In short, medical exams involve procedures or tests seeking information about your physical or mental impairments or health, whereas a drug test is designed to detect substances.

Fitness for duty exams typically involve your employer sending you to a doctor of *their* choice at *their* cost and on *their* time. This may be a general occupational health specialist or someone with expertise in a particular specialty. You may be asked to sign forms that allow the examiner to review your medical history, but these forms should only be used for the evaluation. They should not be shared with or identified in the report to your employer. You should also provide the examiner a copy of your job description that identifies the job's essential functions. If you do not believe the job description is accurate – for example, you do not regularly perform functions that are listed – you might consider raising this issue. The examiner will then evaluate how your physical or mental condition might affect your ability to perform your job functions, including whether you have any limitations. Those limitations are then identified in the report to your employer.

What is a "Reasonable Belief"? A "reasonable belief" that you cannot perform essential job functions or that you pose a safety threat requires an assessment of you and your position and cannot be based on general assumptions. Your employer may meet this

objective standard if it is aware of your medical condition and has observed performance issues that can be reasonably attributed to the condition. Your employer may also meet this standard if it receives reliable information that you (1) have a medical condition that affects your ability to perform essential job functions or (2) you pose a direct threat in the workplace. This is situation specific. For example, if you have trouble seeing, a medical examination may be warranted. But if you have cancer and your job performance is not affected, then requiring a medical exam might violate the ADA.

What about Impairment from Medications or Alcohol? Suspected impairment is another common situation in which your employer might order a fitness for duty exam. But your employer must have a reasonable belief that you are under the influence *at work*. That means objective evidence that your ability to perform essential job functions is impaired (for example, by a medication you use for treatment) or that you pose a direct safety threat (for example, by being under the influence of alcohol at work). Your employer must also satisfy this standard to make disability-related inquiries. This includes how long a medication's side effects are expected to last or requesting documentation from your health care provider explaining the effects of the medication on your ability to perform the job. Disability related inquiries may be appropriate if your performance has declined severely over a short period, you have made numerous mistakes, or you disclose that your medication makes you lethargic or unable to concentrate. It is not appropriate based on mere gossip, especially if there is no evidence that you are unable to safely perform your job duties. But the nature of the work performed is important. For example, if you report being lightheaded, it might matter if you operate heavy equipment versus performing mostly administrative tasks in an office.

Prohibiting the use of lawfully prescribed medications that may hypothetically present safety concerns may violate the ADA and the FEHA. To prove that using prescriptions poses a threat to the health or safety of others, your employer must establish, based on reasonable medical judgment, that there is a significant risk of you causing imminent and substantial harm to yourself or others. Your employer cannot substitute their judgment in place of a medical determination. The mere potential for poor performance or a threat to safety is not enough to prohibit the use of legally prescribed medications or to impose reporting requirements or other restrictions.

Will My Medical Information Be Shared? The State Confidentiality of Medical Information Act (CMIA) limits the information that a health care provider may disclose to your employer without your specific authorization. The law permits disclosure of your "functional limitations" but not your medical history or diagnosis. Both your employer

and the doctor who performs the exam may be held legally liable if too much information is disclosed. In addition to the CMIA, California employees have a constitutional right to privacy in their medical information. Your employer must have a sufficient interest in obtaining private information to justify any intrusion. It cannot be a fishing expedition.

What Can My Employer Do with the Report? The examiner may make job-related recommendations based on their findings. But this does not mean your employer can immediately act on those findings without your involvement, especially if doing so would impact your pay, job class, or your current or future employment.

If your employer wants to take a personnel action against you based on what they learn from the fitness for duty report, you may be entitled to a "Skelly" meeting before they do so. This includes a pre-disciplinary meeting with the person proposing the action and a subsequent right to appeal (in the case of serious discipline) to a full evidentiary hearing before a reasonably impartial third party.

Your employer may also have to engage with you in an interactive process (under the ADA and the FEHA) to identify any reasonable accommodations that will allow you to perform the position's essential functions. In other words, both you and your employer should try to figure out if you can reconcile your return to work with your employer's concern about how your functional limitations impact your ability to perform the job safely. The goal is to help, if possible, not to be punitive. If that is the case, it is generally best to cooperate.

But there is a big difference between your employer referring you to work-related counseling (such as an Employee Assistance Program) and/or offering a reasonable accommodation, versus demoting, reclassifying, or separating your employment.

Conclusion: A fitness for duty exam is not always justified simply because your employer directs you to undergo one. If this happens, contact your Association or CEA for help. They can help you evaluate if one is appropriate in your case and discuss what you can do to protect your rights. Each situation is fact specific. You do not have to navigate it alone.

President Joseph R. Biden

Nominates Marty Walsh as New Secretary of Labor

President Biden nominated Marty Walsh for Secretary of Labor on January 7, 2021. If confirmed, Walsh will replace Eugene Scalia, son of the late Supreme Court Justice Antonin Scalia, who had been appointed by the prior administration.

Scalia left office on January 20, 2021, when President Biden was sworn in. Scalia, a former corporate lawyer, had argued against worker's rights in private practice. As Secretary, Scalia was largely seen as someone who oversaw the weakening of employee protections.

Walsh is the mayor of Boston and former head of the Boston Building Trades Council, a union group. He also previously served in the state house of representatives. He has a pro-union record, including standing with Biden to support grocery workers who were on strike in 2019. Walsh would be the first union member to serve as Labor Secretary in nearly half a century. According to the new administration, "Mayor Walsh has the necessary experience, relationships, and the trust of the President-elect to help workers recover from this historic economic downturn and usher in a new era of worker power."

Although some were critical that this selection did not bring more diversity to the cabinet, the two Senators from Massachusetts applauded the pick. For example, Senator Elizabeth Warren wrote on Twitter that Walsh "is a champion for America's labor unions and a fierce fighter for working families." Walsh is poised to step into the job at one of the most critical points in history for American labor, with millions of people out of work or underemployed, and a narrowly divided Congress that is expected to challenge President Biden's labor initiatives.

The issues that Walsh can expect to tackle include more protections for workers in the gig economy, supporting state unemployment insurance systems and retraining initiatives, offering new paid leave programs, an emergency OSHA standard on COVID-19, reversing various rules adopted during the prior administration, and making it easier for workers employed by Federal contractors to form and join unions. Walsh is expected to appoint union lawyers and leaders to key staff and enforcement positions.

News Release - CPI Increases!

The U.S. Department of Labor, Bureau of Labor Statistics, publishes monthly consumer price index figures that look back over a rolling 12-month period to measure inflation.

1.4% - CPI for All Urban Consumers (CPI-U) Nationally

1.4% - CPI-U for the West Region

0.9% - CPI-U for the Los Angeles Area

2.0% - CPI-U for San Francisco Bay Area (from December)

2.2% - CPI-U for the Riverside Area

1.7% - CPI-U for San Diego Area

Questions & Answers about Your Job

Each month we receive dozens of questions about your rights on the job. The following are some GENERAL answers. If you have a specific problem, talk to your professional staff.

Question: We agreed to a December holiday furlough to help save the Agency money, in lieu of their proposed pay cut. This includes three furlough days the week of Christmas and three the week of New Years. A couple managers in Public Works and Utilities had to work during those six days. Does the Agency have to pay them for hours worked on those days since they are "non-exempt," even if they are ordinarily considered an exempt salaried worker? What effect does Federal regulation 29 C.F.R. Sec 541.5d (b) – have on this situation?

Answer: If the managers were required to work during those six days, yes, the Agency must pay them for those hours worked. Federal regulation 29 C.F.R Sec 541.5d(b) states: "Deductions from the pay of an employee of a public agency for absences due to a budget-required furlough shall not disqualify the employee from being paid 'on a salary basis' *except in the workweek in which the furlough occurs and for which the employee's pay is accordingly reduced.*"

Under the Fair Labor Standards Act (FLSA), this means, at a minimum, they must be paid for all hours worked at their regular rate of pay during those FLSA workweeks that include the furlough deductions. In other words, even if the

managers would ordinarily be considered salary-exempt, they are considered hourly employees during the FLSA workweek that includes any of those furlough days. The managers may even be entitled to overtime – 1 ½ times their regular pay rate – for all hours worked above 40 in those FLSA workweeks that include the furlough deductions. It does not seem like these managers worked over 40 hours, but if they did, they might be entitled to the overtime rate during this time, not just their regular rate of pay. Once the furlough ends, the regulation allows the Agency to maintain their salary-exempt status thereafter.

Question: I am being investigated. HR gave me a notice saying I cannot discuss it with anyone except my union representative "who must not be a City employee." The HR Director is asking that I sign this notice. Do I have to sign it? Can they exclude me from discussing this with my own union representative? I thought the law said I get to choose, not the Agency, who my representative can be? I do not want to sign saying I agree not to talk to my own co-worker about this. Please advise.

Answer: The Agency can require that you sign the investigation notice if the signature is needed to acknowledge that you received it. If that is the case, signing does not admit any fault or agreement with the allegations; it just means you received the notice. Whether or not you sign the notice, it will be put in your file.

The notice is poorly worded. They can prohibit you from speaking to coworkers about the investigation. Investigations may involve facts about other City employees. Disclosing details about the investigation to those people or having them present during the interview may compromise the investigation. But they cannot prohibit you from bringing a representative from your employee organization if that person is not connected to the investigation.

You should contact your professional staff at CEA as soon as possible. If you are the subject of the investigation, it is best that they represent you in the meeting. They can also contact the City to see if the co-worker you want to bring is someone unrelated to the investigation.

If you are concerned about signing the document, you can write "signing as indication of receipt, not agreement with contents" next to your signature. Then give your professional staff a call so they can help you navigate the situation.

Question: The City recently began using a consultant to perform the work of a position in our employee organization. This is a job class with many positions. The workload is heavy and the need for extra help is clear. They use consultants for other projects, but they are now having some of the existing consultants

do our work too. We have concerns about allowing this practice to go on without speaking up. The Department said they requested that the City and Civil Service open a recruitment. But it is not clear how long it will take, or if anyone will make it through the selection process. Our fear is the City will continue to use the consultants rather than fill the position with a full-time permanent bargaining unit member. What can we do about this?

Answer: Contracting out work can lead to the permanent erosion of the bargaining unit. This makes it even harder to fight for better wages and to protect good union benefits and jobs. So, it is a good idea to try to prevent this.

The City cannot transfer bargaining unit work outside the unit without providing your employee organization with notice and an opportunity to meet and confer.

The first thing to consider is whether your employee organization should request to meet and confer with the City. It is important to know (1) if the City is a Charter City or a general law city, (2) if the work being transferred is considered "special" services, and (3) if the entity taking on the work is private or public. A general law city can outsource special services – *e.g.,* financial, economic, accounting, engineering, legal, or administrative matters. Gov't Code Sections 37103 & 53060. But general law cities cannot transfer core public services to private entities. *Costa Mesa City Employees Association v. City of Costa Mesa* (2012) 209 Cal.App.4th 298.

If your Association decides to meet and confer, it should request that the consultants stop performing the work immediately. Next, identify a specific timeline for filling the vacant position. If the need is great, your Association might consider allowing the City to temporarily use the consultants, but only for a reasonable time to fill the position. Try to reduce this agreement to writing so you can hold management accountable if those terms are ultimately not met.

Negotiating is the quickest way to resolve the situation. The other option to consider is a grievance or unfair practice charge for the erosion of the bargaining unit. There are short timeframes to file, so contact your Association and your professional staff immediately.

Question: Due to the nature of our job, the Agency is directing – but not requiring – that we get vaccinated from COVID 19. I heard from a lot of people who already got sick from taking it. I am concerned about taking it, too. I am also concerned about being exposed at work. If I get sick from the vaccine, can I use my CARES Act COVID sick time to cover my absence until I am well enough to return? If not, what if I cannot work due to illness from taking the vaccine?

Answer: The Families First Coronavirus Response Act (FFRCA), which provided 80 hours of paid sick time for COVID-19, expired December 31, 2020. This means your Agency is not required to provide you with this leave to cover your absence. Your Agency may have established their own COVID-19 leave, which might apply in a situation like this. Check the terms of that program or ask HR to be sure.

You might also request that management – (1) provide paid administrative leave or (2) allow you to telework (assuming you are well enough to and can do so remotely) – if you get sick from the vaccine. If you ask in advance, they may agree to this. After all, the risk of illness to you from taking the vaccine is small, but the benefit in protecting both you and your coworkers is significant.

If you do not take it and are exposed to COVID-19 at work and develop serious symptoms, you might apply for workers' compensation benefits. If your claim is accepted, any personal leave time you used to cover your absence during the waiting period should be restored. Workers compensation benefits would also cover medical costs for treatment of the disease, as well as temporary wage replacement benefits while you are off work recovering.

Question: The Agency just paid out unused floating holiday time from last calendar year. I work eight-hour shifts and receive sixteen hours of floating holiday per year. I recently learned that employees who work ten-hour shifts receive twenty hours of floating holiday per year. This is unfair to those of us who work an eight-hour schedule. Is this common for public agencies? If not, how can this be remedied?

Answer: I get your frustration. Floating holiday time is a negotiable benefit. It is common for employee organizations to propose that floating holidays be calculated based on the employee's regularly assigned work schedule. Many public sector workers have a 9/80, 4/10, or even 3/12 schedules. Calculating the time based on the regular work shift means that someone on an alternate schedule does not have to use vacation or other paid leave to cover the remaining time on that shift above eight hours. If not for this benefit, people on 10-hour shifts would lose two hours of vacation every holiday. Thanks to the work of your Association, however, everyone gets two workdays off as floating holiday, even if the number of hours in those workdays varies from member to member based on their assigned work schedules.

Rather than change the floating holiday hours, for the next MOU, you might ask your Association to revisit the work schedule language so that you have the right to work a 4/10 schedule too.