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# Using Independent Medical Exams for Employees

## Federal courts offer guidance on conducting reviews

**By Peter J. Murphy**

When an employee advises an employer about physical or mental health issues, the employer must carefully respond and be aware of the employee's rights and the risks associated with asking the wrong question or taking the wrong action. Employees generally control the initial flow of information to the employer by, for example, providing return-to-work notes requesting accommodations in the workplace, or providing medical records and reports from possible expert witnesses in litigation.

Employers have the means for assessing this information and responding accordingly. Employers do not need to accept this information at face value, however, as they also have significant rights to independent reviews of an employee's medical condition both during employment and during litigation. Recent cases from the federal courts provide guidance as to how and when to conduct such an independent medical review.

The Americans with Disabilities Act (ADA), which allows an employer to order an independent evaluation of an employee when it "is shown to be job-related and consistent with business necessity." The ADA's regulations clarify that an employer may make a medical inquiry or examination "when there is a need to determine whether an employee is still able to perform the essential functions of his or her job."

One common way such a situation arises is when the employee has presented conflicting information or reports to the employer during the interactive process. In such a situation, an examination by an independent health care provider can provide the employer with clarification about the employee's condition and ability to perform the essential functions of the position. In the 2015 U.S. District Court in Oregon case of *Rider v. Lincoln County School District*, for example, a maintenance worker for a school district had provided conflicting information from his health care providers about whether he had lifting restrictions and, if so, the extent of those restrictions. Based on this conflicting information, the district sent the employee for an independent evaluation, which resolved the district's concerns and provided the opportunity to discuss with the employee how he could be accommodated. In addition, the evaluation provided the employer with a defense to the plaintiff's subsequent discrimination claims, as it demonstrated the district engaged in a thorough interactive process with the employee.

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As other recent cases demonstrate, though, in order for the independent evaluation to benefit the employer, the

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evaluation must be sought for an appropriate reason. It is an employer's burden to demonstrate that the requested examination was necessary—i.e., was job related and consistent with business necessity.

In a 2014 case from the U.S. Court of Appeals for the Sixth Circuit, *Kroll v. White Lake Ambulance Authority*, the employer ordered the employee to attend psychological counseling. According to the Sixth Circuit, there was a dispute as to whether the employer's demand was job related and consistent with business necessity, as many of the issues leading to the order happened outside of work hours or involved personal—rather than work—issues. In fact, the Sixth Circuit stating that it was "troubling, to say the very least," that the order appeared to be based on the employer's "moralistic condemnation" of her out-of-work behavior—which is an impermissible reason for the evaluation.

If an employer has a legitimate reason to order an independent evaluation, the employer must communicate that reason to the employee. In the 2015 Northern District of California case of *Ellis v. San Francisco State University*, the employee was suspended due to "disruption of the programs and/or operations of the university," and ordered to attend an independent psychological examination. According to the complaint, however, the letter informing the employee of the examination did not state any basis or justification for the psychological examination. As the district court noted in a July 2015 opinion, an employer's order of an independent evaluation must be objectively reasonable, which did not appear to be the case from the allegations in the complaint. The court noted, however, that if the employer demonstrates after completion of discovery that there was an objectively reasonable reason for the examination, then it would be justified in terminating the employee for her refusal to attend the evaluation.

That is the result that was reached by last year in a case from the Eastern District of Kentucky, where the court found that the employer ordered the independent examination for an appropriate purpose, and the plaintiff's failure to attend the examination constituted a failure to engage in the interactive process. The court upheld the decision to terminate the employee.

Former and current employees bring a substantial amount of employment-based claims in the District of Connecticut, and in almost all cases the employees assert a claim for emotional distress under either statutory or common law. In such cases, employers are not required to simply review and accept the plaintiff's evidence of emotional distress, as Federal Rule of Civil Procedure 35(a) provides that the court "may order a party whose mental or physical condition … is in controversy to submit to a physical examination by a suitably licensed or certified examiner." The evaluation is obtained by motion to the court, which must be made "for good cause," and "specify the time, place, manner, conditions, and scope of the examination, as well as the person or persons who will perform it."

To determine if there is good cause for an examination, courts generally consider things such as the possibility of obtaining desired information by other means, whether plaintiff is using expert witnesses, whether the desired materials are relevant, and whether plaintiff is claiming ongoing emotional distress or more of a "garden variety" distress claim. If on balance the claim is for "garden variety" distress, courts generally will deny a request for an evaluation under Rule 35(a).

When courts order such evaluations, however, plaintiffs must fully cooperate. In the 2015 Eastern District of New York case of *Ebo v. New York Methodist Hospital*, the plaintiff appeared for the evaluation ordered by the court, but repeatedly interjected during the examination, took frequent breaks, fell asleep, and took nearly four hours to complete various written examinations. Thus, even though the evaluation lasted eight hours, the court found in a July 2015 opinion that there was sufficient ground to compel the plaintiff to appear for an additional evaluation.

Employers have the right to independent medical evaluations of employees both in the workplace and during litigation. When conducted appropriately, such evaluations can provide significant information for responding to employee while still employed and important benefits to employers in litigation. Therefore, employers should continue to identify opportunities to utilize such evaluations under either the ADA or the Federal Rules of Civil Procedure.