

2024 Best Practices Conference on Personnel Leadership



*Sorry, I Didn't
Mean To
Pry...*

When Employers
May Ask For
Employee Medical
Information

Presented by:
Carol Kilmister, Senior HR Consultant
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Defense Secretary Austin says he didn't have news of hospitalization 'right'



By Tom Bowman

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DEFENSE

The Lloyd Austin fallout is growing: 'Someone's head has to roll'

The defense chief is facing criticism for keeping his bosses in the dark about his hospitalization.

Defense Secretary Austin's disclosure

Pentagon orders 30-day review of disclosure process over Secretary of Defense's hospitalization

The defense secretary didn't disclose the issue for days, stirring controversy.

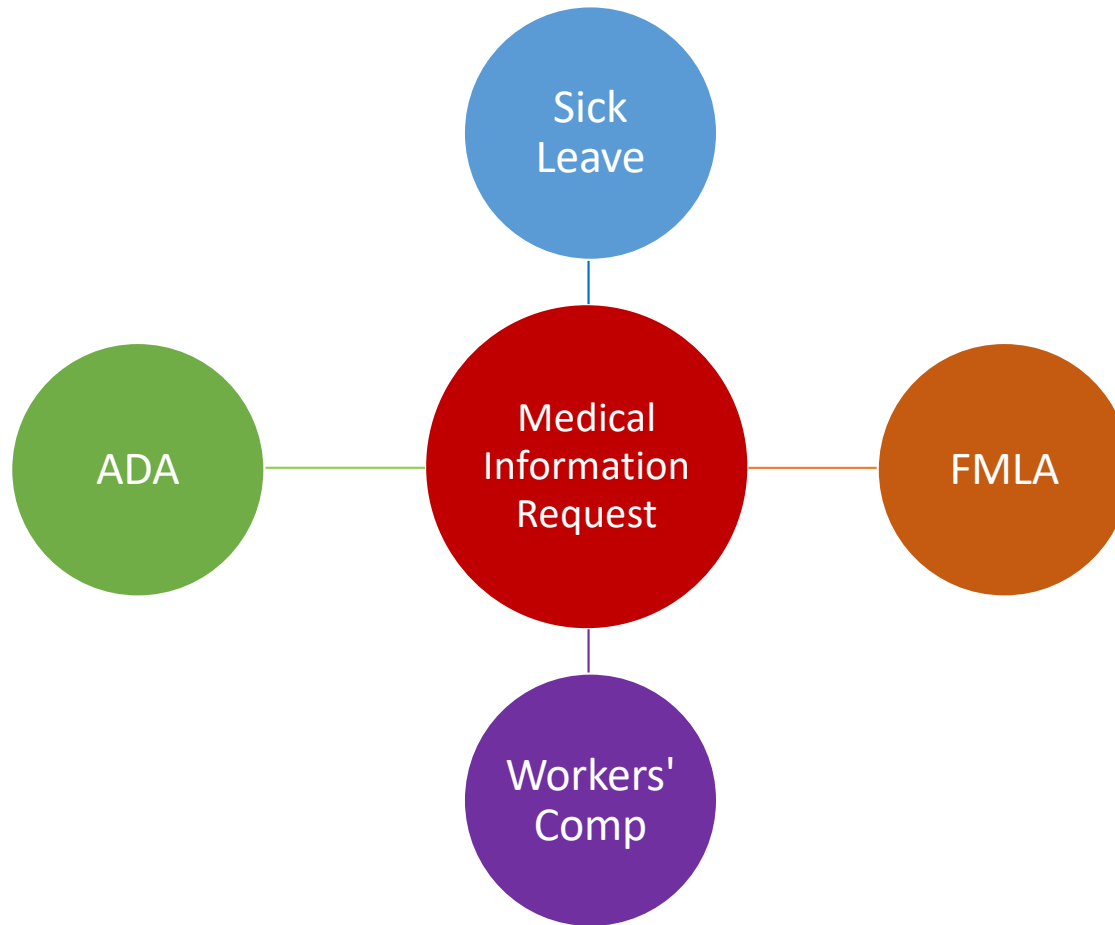
...new details about his hospital stay and the... ...telling Biden

...three days to inform White House

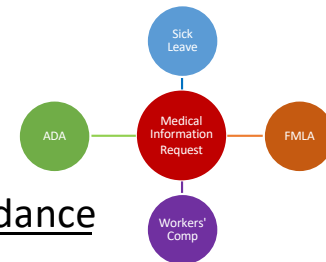
Defense Secretary Austin's hospitalization

...LLOYD AUSTIN was in the

When might you ask for medical information?



Sick Leave



Generally, employers are permitted to request a medical note as part of its sick leave or attendance policy.

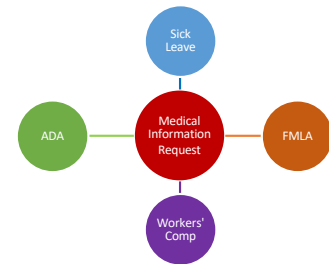
However, practice must be uniformly applied, and should not seek a diagnosis / medical condition

Your sick leave policy language should detail the number of days absent requiring a medical note.

What the note should provide:

- Verification that the employee was seen by a health care provider
- Date and time of such exam
- Details of period of incapacity and/or job-related restrictions
- Re: contagion, you may require verification that employee is not contagious before returning to work

Sick Leave



- Do not be inconsistent in your requests for medical documentation related to paid or unpaid sick leave
- Do not allow your supervisors to use this medical information as a reason to discipline or terminate an employee
- Do not allow supervisors to share employee's private medical information with others in the workplace – this includes verbally
- Be sure to maintain all information gathered re: sick leave in a separate, confidential medical file

FMLA

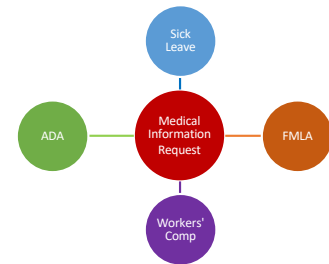
Employers are permitted to request medical certification under FMLA if the leave is for:

- The employee's own serious health condition
- The serious health condition of the employee's parent, spouse, or child
- Military family leave

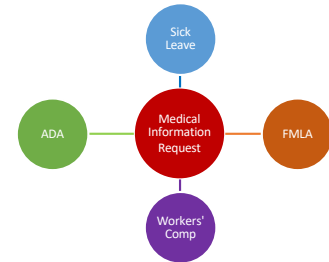
The employer must provide notice to the employee that a note is required (WH-381) and if a return-to-work note will be required (WH-382).

What the note should include:

- Provider's contact information
- Date serious health condition began, how long it is expected to last, if employee is unable to work and likely duration of inability
- Whether employee's need for leave is continuous or intermittent
- Appropriate medical facts about the condition
- Details of period of incapacity or job-related restrictions



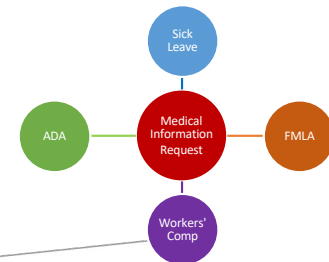
FMLA



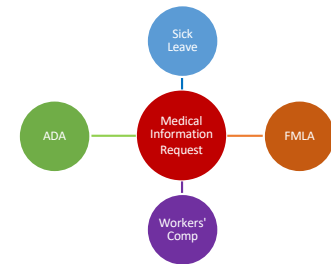
- Be mindful of the standards previously discussed under sick leave
- Do not require a medical diagnosis – this is up to the discretion of the medical provider - providing symptoms and required medical visits may be sufficient
- Do not require a specific medical form be completed. An employer cannot refuse:
 - A fax or copy of the medical certification
 - A medical certification that is not completed on the employer's standard form
 - Any other record of the medical documentation, such as a communication on the letterhead of the health care provider.

Workers' Comp

- It is generally permissible for employers to require a doctor's note or release to return to work following a work-related injury or illness
- Employers should track paid and/or unpaid leave associated with a Workers' Compensation claim per their leave policies
- Even if the employer uses a third party to process claims, all medical information gathered must be confidentially maintained



ADA

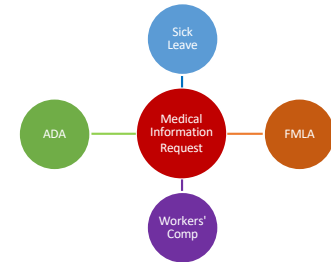


Employers are legally able to ask for medical documentation when making disability-related inquiries or requiring medical exams, but under a very limited scope.

‘A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature and severity of the disability, unless such an examination or inquiry is shown to be job-related and consistent with business necessity.’

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, 07-26-2000, EEOC

ADA

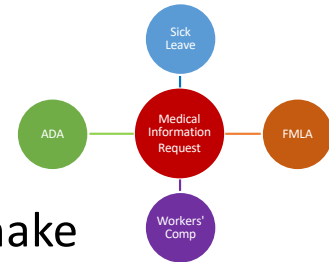


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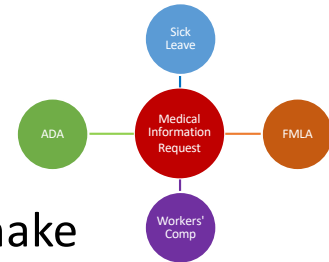
Covered entity –
employer with 15
or more
employees

Medical examination –
'procedure or test that
seeks information about
an individual's physical
or mental impairments
or health'

Medical inquiry – 'a
question or series of
questions that is
likely to elicit
information about a
disability'

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, 07-26-2000, EEOC

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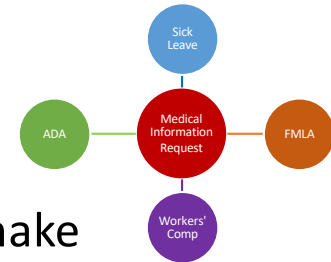
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Employee – all employees, not only those with disabilities

Per EEOC – the use of the term 'employee' reflects Congress's intent to cover a broader class of individuals and to prevent employers from asking questions and conducting medical examinations that serve no legitimate purpose.

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, 07-26-2000, EEOC

ADA

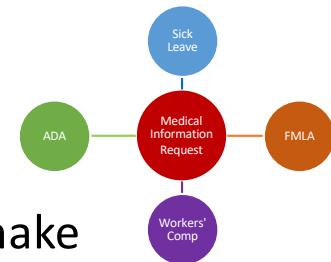


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Job-related and consistent with business necessity – 'employer has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform the essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition'

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, 07-26-2000, EEOC

ADA



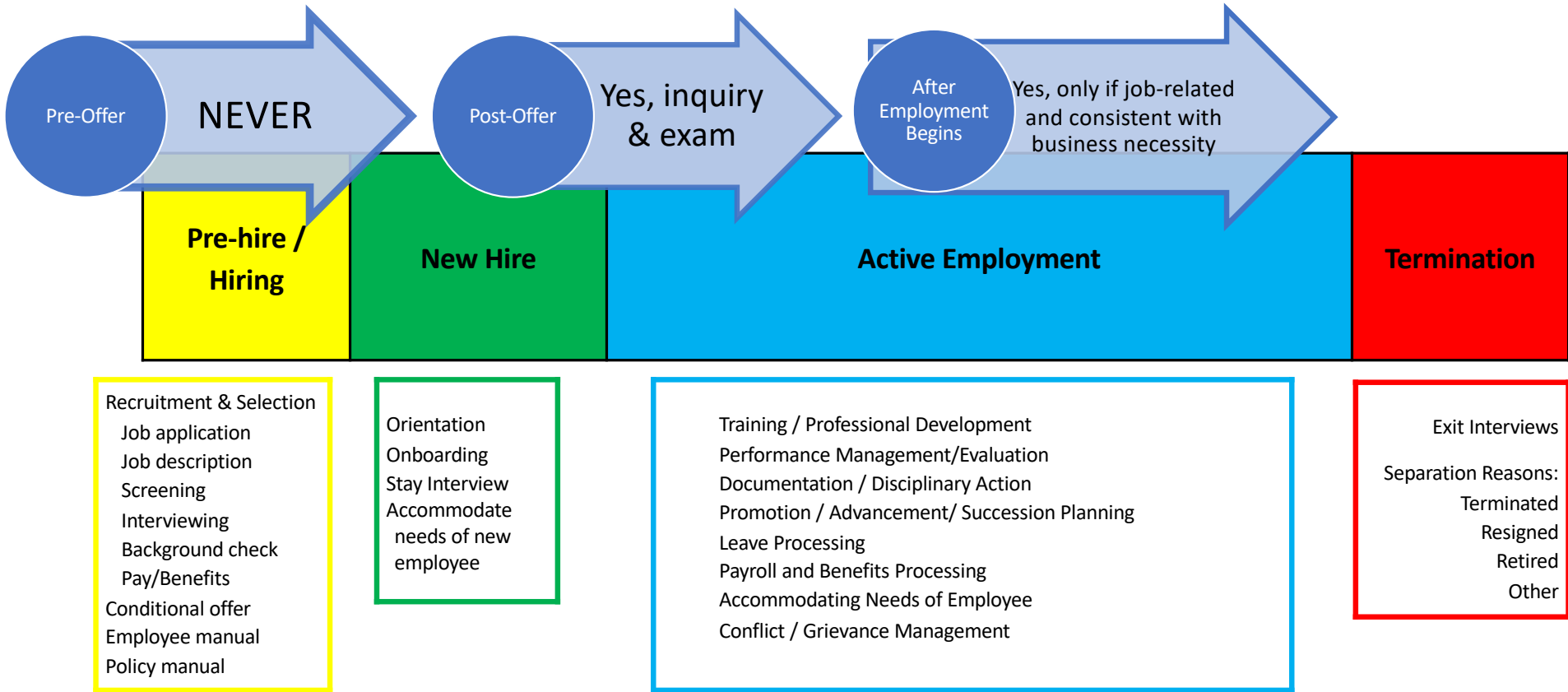
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Also job-related and consistent with business necessity:

- Follow-up on a request for accommodation when the disability or need for accommodation is not known or obvious
- Medical examination necessary for public safety jobs (e.g., police, fire)
- When acting on a performance/conduct issue reasonably attributed to a known medical condition

Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, 07-26-2000, EEOC

When might you ask for medical information?



Medical Confidentiality

ADA

Americans with Disabilities Act

FERPA

The Family Educational Rights and Privacy Act (FERPA) is a federal law enacted in 1974 that protects the privacy of student education records.

The Act serves two primary purposes:

1. Gives parents or eligible students more control of their educational records
2. Prohibits educational institutions from disclosing "personally identifiable information in education records" without written consent



Who must comply?



- Any public or private school:
 - Elementary
 - Secondary
 - Post-secondary
- Any state or local education agency

Any of the above must receive funds under an applicable program of the US Department of Education

HIPAA

The Health Insurance Portability and Accountability Act (HIPAA) is a national standard that protects sensitive patient health information from being disclosed without the patient's consent or knowledge. Via the Privacy Rule, the main goal is to

- Ensure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well-being.



Who must comply?



- Every healthcare provider who electronically transmits health information in connection with certain transactions
- Health plans
- Healthcare clearinghouses
- Business associates that act on behalf of a covered entity, including claims processing, data analysis, utilization review, and billing

Be mindful when reviewing medical insurance usage reports, as well as if you choose to contact an employee's medical provider directly

Confidentiality

Basic rule: With limited exceptions, you must keep confidential any medical information you learn about an applicant or employee. Information can be confidential even if it contains no medical diagnosis or treatment course and even if it is not generated by a health care professional.

Example: An employee's request for a reasonable accommodation would be considered medical information subject to the ADA's confidentiality requirements.

Practice tip: Do not place medical information in regular personnel files. Rather, keep medical information in a separate medical file that is accessible only to designated officials. Medical information stored electronically must be similarly protected (e.g., by storing it on a separate database).

The ADA recognizes that employers may sometimes have to disclose medical information about applicants or employees. Therefore, the law contains certain exceptions to the general rule requiring confidentiality. Information that is otherwise confidential under the ADA may be disclosed:

- to supervisors and managers where they need medical information in order to provide a reasonable accommodation or to meet an employee's work restrictions;
- to first aid and safety personnel if an employee would need emergency treatment or require some other assistance (such as help during an emergency evacuation) because of a medical condition;
- to individuals investigating compliance with the ADA and with similar state and local laws; and
- pursuant to workers' compensation laws (e.g., to a state workers' compensation office in order to evaluate a claim) or for insurance purposes.

<https://www.cdc.gov/phlp/publications/topic/healthinformationprivacy.html>

Medical Confidentiality

- Employee medical paperwork associated with leave should be segregated from employee's personnel file and kept with other medical information in a confidential file under lock and key
- This information should be accessed on a need to know basis
- Supervisors will have limited knowledge of their employee's medical condition beyond what the employee shares voluntarily, what is evident, when to expect that they will return to work, and what accommodations they may need that involve the manager
- Workers' Compensation, ADA, and state law regarding personnel files require privacy measures

Scenarios:

A school custodian is responsible for regularly lifting more than 50 pounds during the course of a typical day. During a break, the custodian appears to become light-headed, has to sit down abruptly, and seems to have some difficulty catching his breath. In response to a question from his supervisor about whether he is feeling all right, the custodian says that this has happened to him a few times during the past several months, but he does not know why.

Would it be appropriate to ask for employee medical information?

Yes, the employer has a reasonable belief, based on objective evidence, that the employee will pose a direct threat and, therefore, may require the custodian to have a medical examination to ascertain whether the symptoms he is experiencing make him unfit to perform his job. To ensure that it receives sufficient information to make this determination, the employer may want to provide the doctor who does the examination with a description of the employee's duties, including any physical qualification standards, and require that the employee provide documentation of his ability to work following the examination.

Scenarios modified from Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, 07-26-2000, EEOC

Scenarios:

Six months ago, an Assistant Principal heard a teacher tell her co-worker that she discovered a lump in her breast and is afraid that she may have breast cancer. Since that conversation, the teacher still comes to work every day and performs her duties in her normal manner. However, the Assistant Principal has her own history of breast cancer and is very concerned for the teacher's welfare.

Would it be appropriate to ask for employee medical information?

In this case, the employer does not have a reasonable belief, based on objective evidence, either that the teacher's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition. The employer, therefore, may not make any disability-related inquiries or require the employee to submit to a medical examination.

Scenarios modified from Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, 07-26-2000, EEOC

Scenarios:

For the past two months, Frances, a high school guidance assistant, has been unable to keep up with the workload and demands of the busy office. She also has made numerous mistakes in responding to requests and maintaining accurate student data. When questioned about her poor performance, Frances apologizes to her supervisor and promises to do better. Her supervisor, concerned that Frances looks pale and is quieter than normal, asks if she's okay, and Frances responds that she's fine.

Would it be appropriate to ask for employee medical information?

No, the employer does not have a reasonable belief, based on objective evidence, either that the teacher's ability to perform her essential job functions will be impaired by a medical condition or that she will pose a direct threat due to a medical condition. The employer, therefore, may not make any disability-related inquiries or require the employee to submit to a medical examination.

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Scenarios:

For the past two months, Frances, a high school guidance assistant, has been unable to keep up with the workload and demands of the busy office. She also has made numerous mistakes in responding to requests and maintaining accurate student data. When questioned about her poor performance, Frances tells her supervisor that the medication she takes for her illness makes her lethargic and unable to concentrate.

Would it be appropriate to ask for employee medical information?

Yes, based on Francis's explanation for her performance problems, the district has a reasonable belief that her ability to perform the essential functions of her job will be impaired because of a medical condition.

Francis's supervisor should connect with HR so that they may make disability-related inquiries (e.g., ask her whether she is taking a new medication and how long the medication's side effects are expected to last), or provide documentation from her health care provider explaining the effects of the medication on her ability to perform her job.

Scenarios modified from Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA, 07-26-2000, EEOC

What Can We Do to Mitigate Risk?

Train your supervisors and managers

Maintain medical information in a confidential manner

Review your policies and procedures

Consistently apply employment policies, rules, and laws

Centralize leave administration

Carol Kilmister

Senior HR Consultant, Primex³

ckilmister@nhprimex.org

1-800-698-2364 ext. 146

