Medical Documentation – An Agency Perspective

One of the most difficult issues that can arise when managers are dealing with employee problems involves the evidence an employee must provide to justify an absence. Included in the issue of medical evidence are questions such as:

1. When can a supervisor require medical information?
2. What kind of information can a supervisor require?
3. What form must a requirement to provide information take?
4. Who is qualified to certify that a medical reason for a certain condition or behavior exists?
5. How does a supervisor go about analyzing a medical statement to determine whether it's responsive to the request or otherwise acceptable?
6. What does a supervisor do if the submitted information is unresponsive or unacceptable in form or otherwise?
7. Once the information is received, how should it be treated? Is the provided information confidential and if so, who may see it?
8. When can a supervisor require or offer a medical examination? Who pays? Who picks the physician?
9. What do third parties such as the Merit Systems Protection Board or the Equal Employment Opportunity Commission have to say about all this?
10. Where is help available for supervisors facing these problems?

When can a supervisor require medical information?

By far, the most common circumstance involves the use of sick leave. When an employee advises that he/she will be absent for a period of time due to a legitimate illness or injury and when sick leave abuse is suspected, a supervisor has cause to ask for medical information to support granting sick leave. Keep in mind that supervisors are required to sign to certify the accuracy of time and attendance records. I, for one, wouldn't sign such a record if I was unsure of its accuracy. Would you? Most agencies (at least those having some common sense) utilize the OPM 71 or a similar form to require employees certify their use of leave and its basis.

Most agency policies and negotiated agreements recognize a grace period of three days of absence before an employee can be required to provide medical justification of an absence. Most of these provisions use qualifiers such as normally, usually and the like. Where cause exists to believe that as little as an hour of sick leave has been improperly requested or used, a manager can require medical justification for the absence regardless of the above language. I have seen a few union contracts that prevented this and management should be ashamed of having signed them.

Other circumstances when medical information may be required include situations in which:

- An employee claims that he/she is physically unable to perform some or all of the duties of the job
- An employee claims to have a disabling condition
- An employee alleges working conditions interfere with his or her ability to perform duties of the position (e.g., irritants, dust, toxins, etc.);
- An employee requests, for medical reasons, special consideration such as assignment to another position or to another duty station, to be excused from night shift work, to be assigned light duty work, to be excused from travel, etc.
- A manager is deciding what can be done to accommodate an employee's disabling

condition
• There may be light duty work an employee is physically capable of performing while recovering from an injury
• An employee claims to be fully recovered from an injury and wants to return to work
• A legitimate question exists whether an employee meets the physical requirements or physical qualifications for a position regardless of the employee's belief to the contrary
• Evidence exists (police report or other) that the employee has a medical condition that could result in harm to that individual or others

What kind of information can a supervisor require?

Believe it or not the answer to this is quite simple. A supervisor may require an employee provide sufficient information to satisfy a reasonable person that the employee was incapacitated from performing the duties and responsibilities of their position or was undergoing professional examination or treatment during the period of an absence to justify sick leave usage.

An initial letter requesting medical information in the case of suspected leave abuse should require the following:

• A finding that the employee was incapacitated from duty for each and every day of the period for which any type of leave is requested
• Statement of the beginning and ending dates of incapacitation
• It must be on the physician or practitioner's letterhead or personal prescription pad and signed with an original signature by a physician or practitioner--a stamp is not acceptable
• If the medical certificate is for a medical appointment, it must give the date, time, and location of the appointment.

For the other purposes discussed above, the answer is still simple. The employee may be required to provide sufficient medical information to support their claim or justify a management action. The information required should be tailored to the condition claimed. For example an employee requesting four work weeks of sick leave due to a diagnosis of Angina (chest pain) would likely be asked to provide a physician's certification that the absence is necessary to the treatment of the illness and whether, at the end of the requested period, the employee is expected to return to full performance.

What form must a requirement to provide information take?

Regarding suspected sick leave abuse, letters should be customized to each situation. I have used letters similar to this.

Regarding other issues, a tailored approach is necessary that addresses the specific nature of the medical condition involved.

The most important principles to remember are:

1. The employee is responsible to provide the medical information.
2. Physicians only know the employees' take on their job requirements unless you include information about the job for their use.
3. The more specific your request, the more specific information you'll receive.
4. Get help writing your request. If your agency has a physician available or can make one available to help with drafting such requests, it deserves an A+. If not it deserves an F for failing to support its managers.

5. You know the requirements of a subordinate's job. Make sure any medical information request is accompanied by a position description and any other information (travel, stress, overtime, conflict, etc., etc.) that the PD may not mention.

Who is qualified to certify that a medical reason for certain condition or behavior exists?

To quote from the Family and Medical Leave Act:

(a) The Act defines ``health care provider'' as:
(1) A doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices; or
(2) Any other person determined by the Secretary (OF LABOR) to be capable of providing health care services.
(b) Others ``capable of providing health care services'' include only:
(1) Podiatrists, dentists, clinical psychologists, optometrists, and chiropractors (limited to treatment consisting of manual manipulation of the spine to correct a subluxation as demonstrated by X-ray to exist) authorized to practice in the State and performing within the scope of their practice as defined under State law;
(2) Nurse practitioners, nurse-midwives and clinical social workers who are authorized to practice under State law and who are performing within the scope of their practice as defined under State law;
(3) Christian Science practitioners listed with the First Church of Christ, Scientist in Boston, Massachusetts. Where an employee or family member is receiving treatment from a Christian Science practitioner, an employee may not object to any requirement from an employer that the employee or family member submit to examination (though not treatment) to obtain a second or third certification from a health care provider other than a Christian Science practitioner except as otherwise provided under applicable State or local law or collective bargaining agreement.
(4) Any health care provider from whom an employer or the employer's group health plan's benefits manager will accept certification of the existence of a serious health condition to substantiate a claim for benefits; and
(5) A health care provider listed above who practices in a country other than the United States, who is authorized to practice in accordance with the law of that country, and who is performing within the scope of his or her practice as defined under such law.
(c) The phrase ``authorized to practice in the State'' as used in this section means that the provider must be authorized to diagnose and treat physical or mental health conditions without supervision by a doctor or other health care provider.

Now you know. Most agencies would likely adopt the above standard since the Congress and President have, since the one enacted it and the other signed it into law.

The reality is that agencies will generally question diagnoses coming from someone in an unrelated field. For example, a clinical psychologist diagnoses a gastric condition or a family practitioner decides a patient is bipolar. State Board certification and acceptance by a health care insurer (e.g., Blue Cross/Blue Shield) will generally satisfy an Agency. I once was involved in a case in which the individual claimed a psychiatric condition that was diagnosed by a non board-certified graduate of a religious medical school that was not state accredited. Fortunately, this "doctor" dropped out of the game when he found out the employee had misrepresented a number of substantial facts about his background not only to the Agency but to the "doctor" as well.

How does a supervisor go about analyzing a medical statement to determine whether it's responsive to the request or otherwise acceptable?

Common sense helps. Does the response answer the questions presented? If the claimed illness or injury is relatively straightforward such as a broken leg, a heart attack, an ulcer, etc., and there's no reason to doubt the employee or doctor, move on. In any event, seek the assistance of staff having experience in such matters. Frequently, people with titles such as employee relations specialist or medical officer can help.

A piece of advice that should not go unheeded: NEVER contact the doctor directly except for the purpose of determining whether the information provided was actually provided by the person who signed it and get your friendly employee relations advisor to do this for you. Usually, the only time an agency will contact a physician on a substantive matter is with the employee's permission. Most agencies wisely limit these contacts to the Agency's physician contacting the employee's physician.

Does this stuff sound complicated? It can be.

6. What does a supervisor do if the submitted information is unresponsive or unacceptable in form or otherwise?

7. Once the information is received, how should it be treated? Is the provided information confidential and if so, who may see it?

8. When can a supervisor require or offer a medical examination? Who pays? Who picks the physician?

9. What do third parties such as the Merit Systems Protection Board or the Equal Employment Opportunity Commission have to say about all this?

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What does a supervisor do if the submitted information is unresponsive or unacceptable in form or otherwise?

It depends. If it's a leave abuse issue and a letter of requirement or restriction has been issued, then we're talking about taking a disciplinary action or letters leading to discipline (warning, counseling, etc.) for the employee's failure to follow the instructions given. If there is a discipline or performance related problem and the employee is claiming a disabling condition is causing the problem, it is the employee's responsibility to produce medical evidence to support the claim. If the employee refuses or is unable to provide medical documentation you are free to act on the basis of the information available to you.

OPM's regulations at 5 C.F.R. 339 severely limit agency authority to demand medical information from employees while recognizing the need of Agencies to manage. If the employee does not come forward with medical evidence specifically supporting the claim, take the disciplinary or performance action as appropriate.

Once the information is received, how should it be treated? Is the provided information confidential and if so, who may see it?

The Privacy Act of 1974, 5 U.S.C. Sect. 552a provides guidelines for the disclosure of information by limiting access to personal information contained in record systems and mandating certain management safeguards for such records. Any Federal employee may be

found guilty of a misdemeanor and fined up to $5,000 for willfully disclosing information protected by the Privacy Act to any unauthorized person or agency.

Whether files supervisors keep on employees are systems of record and covered by the Act is meat for a legal treatise, but most agencies strongly encourage supervisors and managers take steps to ensure the confidentiality of employee medical information. As you'll see later on in the article, OPM weighs in on this under certain circumstances.

One of the comments to Part One of this article claimed that a supervisor was joking with other supervisors about an individual's medical condition. That kind of behavior, if true, would certainly create a basis for a corrective or disciplinary action against the supervisor.

Medical information provided by an employee is generally considered accessible only to those with a "need to know". This might include higher levels of management, human resources advisors, agency medical staff and perhaps, at some point, legal staff. It would be very rare for medical information to be made available to coworkers. Examples might include the presence of infectious disease or situations in which the affected person may present a danger to coworkers.

In short, medical information should be treated as confidential, locked up and seen only by those who have an official reason to see it.

When can a supervisor require or offer a medical examination? Who pays? Who picks the physician?

OPM strictly regulates the ordering and offering of medical examinations. Medical examinations may only be ordered, with a couple of rare exceptions that supervisors don't generally play in, if a position has medical standards. OPM lists 30 or so such positions on its website. When you look them over, it's fairly obvious why.

Most Federal positions don't have medical standards. Some should and a diatribe could be composed about some agencies' laziness or worse in not developing such standards. Regardless, most Feds cannot be ordered to a physical examination.

Examinations may be offered as OPM's regs say "…in any situation where the agency needs additional medical documentation to make an informed management decision." OPM also says that offered examinations will be paid by the agency unless the purpose is to get a benefit for the employee. In that case, the employee must pay. Examinations offered or ordered are also subject to additional specific confidentiality requirements. (5 CFR 293 Subpart F)

Offered examinations are discretionary on the part of the agency. Occasionally an offer is made to test the seriousness or accuracy of an employee claim but most offers are made because the Agency needs information and the employee may be having doctor troubles. Getting medical information out of a physician is no easy task for the employee. People don't generally attend medical school so they can complete lengthy forms or answer agency questions about one of their future patient's employment problems. Employees may also lack the resources to pay for required information. Agencies should be careful here not to create a past practice, a basis for a claim of disparate treatment or another equally troublesome result of an otherwise good intention.

Document the offer and why it was made. Remember the burden is the employee's so think carefully before you commit your agency to shouldering it.

What do third parties such as the Merit Systems Protection Board or the Equal Employment Opportunity Commission have to say about all this?

EEOC publishes "Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)" to explain when it is permissible for employers to make disability-related inquiries or require medical examinations of employees. I strongly recommend that you read this if you are involved in soliciting medical information from employees.

EEOC makes it clear that it considers this guidance applicable to the Federal sector. This guidance says, in essence, that if an agency is acting on a job-related need and consistent with business necessity, it can ask for "reliable" information "sufficient" to determine whether a disability subject to reasonable accommodation exists.

On a side note, the guidance says something very interesting in answer to a straw man question: "May an employer require that an employee, who it reasonably believes will pose a direct threat, be examined by an appropriate health care professional of the employer's choice?" Answer "Yes". I don't know how OPM views this piece of guidance based on 5 CFR 339 but at least you won't get in trouble with EEOC if you do it.

MSPB generally supports agency requirements on employees to provide medical information and sustains actions where the employee claimed the existence of a medical excuse for bad performance or conduct but refused to back it up with evidence. The Board's lead case appears to be Patterson v. Department of the Air Force, 74 M.S.P.R. 648 (1997).

Where is help available for supervisors facing these problems?

Some agencies are fortunate to have physicians either on staff or available under contract to help managers make medical decisions. That's right, the decisions are yours. Ask what medical advisory resources are directly available to you as a supervisor. If the answer is none, suggest your HR staff contact Federal Occupational Health. FOH offers advisory service contracts to Federal agencies in need of medical advice.

All agencies at some level have employee relations staff who are trained and/or experienced in advising managers on dealing with leave and medical problems. Increasingly, EEO staffs are developing expertise in reasonable accommodation. My advice is to involve an experienced employee relations advisor to help you coordinate with the other advisors or to get you help if it's not easily available.

Medical issues and the requirement on employees to supply medical information when reasonably needed can get very complicated. As the workforce becomes more familiar with reasonable accommodation and agency responsibilities under the Rehabilitation Act, medical issues will achieve a much higher visibility within management. Get ready now.