

DISCLAIMER

This document is intended to be used as a reference guide. The general information contained herein should not be construed to supersede any law, rule, or policy. In the case of any inconsistencies, the statutory and regulatory provisions shall prevail. This version supersedes all previous versions.

This guidance is written with the understanding that the West Virginia Division of Personnel (DOP) is not engaged in rendering legal services. If legal advice or assistance is required, the services of an attorney should be sought. Supervisors should also refer to policies, rules, and regulations as well as consult with the human resources office within their respective agencies.

For technical assistance concerning specific situations, employees and employers may contact the DOP Employee Relations Section at (304) 414-1853.

Introduction

A functional capacity evaluation (FCE) is a comprehensive, objective medical evaluation of an individual's abilities when an agency wishes to ensure an employee can safely perform work-related functional tasks. FCEs may be used for a variety of reasons, including:

- evaluating whether an injured or ill employee can safely perform the duties of the position he or she occupies due to an observed impairment
- determining if the employee may return to less than full duty or if an accommodation is appropriate
- supporting an employee's request for reasonable accommodation under the Americans with Disabilities Act (ADA) when the disability or need for accommodation is not known or obvious.

The agency's ability to make disability-related inquiries or require medical examinations are limited by Title I of the ADA, to those which are "job-related and consistent with business necessity." Generally, a disability-related inquiry or medical examination of an employee may be "job-related and consistent with business necessity" when an agency has a reasonable belief, based on objective evidence, that: (1) an employee's ability to perform essential job functions may be impaired by a medical condition, (2) an employee may pose a direct threat to themselves or others due to a medical condition, or (3) determining an effective, reasonable accommodation under ADA.

Sometimes, this standard may be met when an agency has knowledge of an employee's medical condition, has observed performance problems, and reasonably can attribute the issues to the medical condition. An agency also may be given reliable information by a credible third party that an employee has a medical condition, or the agency may observe symptoms indicating that an employee may have a medical condition that will impair his or her ability to perform essential job functions or will pose a direct threat. In these situations, it may be job-related and consistent with business necessity for an agency to make disability-related inquiries or require a medical evaluation.



What can be considered impairment at work?

We often think of impairment as a result of substance use or in terms of addiction or dependence on alcohol or drugs (used legally or illegally). However, impairment can be the result of various circumstances, including many that are temporary or short-term. In this document, we will focus on other issues that may impact an employee's performance. Some examples include:

- medical conditions, illness, or injury
- medication(s) or treatments with side effects (such as radiotherapy causing tiredness or antibiotics causing nausea)
- fatigue (mental or physical)
- distractedness due to family obligations such as acting as a primary caregiver

What can impairment look like?

Sometimes there are immediate signs and symptoms present. Other times, it is a pattern of behavior that may be a concern. The following characteristics are examples of what impairments may look like as they relate to changes in an employee's attendance, performance, or behavior:

- working in an unsafe manner or involvement in a workplace incident/accident
- consistent tardiness or absenteeism, resulting in reduced productivity or dependability
- changes in performance or quality of work
- uncharacteristic behavior or personality changes (e.g., increased irritability, increased interpersonal conflicts; overreaction to criticism)
- lapse of concentration, attention, or judgment
- the appearance of impairment at work (e.g., unsteady gait, poor coordination, unresponsiveness)

Supervisors should document any concerning behavior or impairment observed using the Supervisor Work Function Observation Form (DOP WFOF-1) or equivalent agency form. Documented observations should be used for determining if a request for an FCE is warranted and supported under the U.S. Equal Employment Opportunity Commission (EEOC) standards.

When should an agency respond to impairment?

When the agency has reasonable belief to question the ability of an employee to perform the work-related requirements, essential and ancillary functions of his or her job, whether the employee may pose a direct threat to the safety of themselves or others, the supervisor, human resources (HR) representative, or another agency designee should initiate a discussion with the employee about the issue(s) as related to work and discuss possible solutions. It is important to refrain from making assumptions concerning the cause of the impairment, medical condition, or perceived disability.

How can concerns about impairment and safety be stated?

The supervisor, HR representative, or another agency designee should meet with the employee privately to discuss the concerns. Concerns should be shared in an unbiased and factual manner. Refrain from placing blame or making assumptions. Express the concerns by using statements/questions such as:

- We would like to talk to you as we have noticed the following actions or behaviors lately. We are concerned for your safety and that you or someone else may get hurt.
- It was reported that you were almost involved in a workplace incident. Can we discuss what happened to lead to this event?
- You seem distracted/preoccupied/upset lately. Is everything ok?
- You seem to be having difficulty meeting deadlines/productivity standards recently. Is there anything I can do to help?

Be prepared to listen to the employee and take notes. Provide support and practice empathy but be clear that the intent is to maintain a productive and safe working environment. Focus on solutions and document what each party will do to correct the issue(s). The Supervisor Observation Discussion and Documentation Form (DOP WFOF-2) provides guidance for meeting with the employee and documenting the discussion. The discussion may need to occur more than once. If necessary, determine a time to meet again.

Based on the employee's response, agencies may need to consider any obligations under federal and state laws such as the Family and Medical Leave Act (FMLA), the Pregnant Workers Fairness Act (PWFA), the West Virginia Parental Leave Act (PLA), and the ADA. It is important for supervisors and HR representatives to be able to recognize when an employee is requesting or eligible for a reasonable accommodation or protected leave under federal and State provisions. The ADA and FMLA provisions do not require an employee to specifically use the terms "reasonable accommodation" or "FMLA" when making a request for a reasonable accommodation under ADA or job-protected leave under FMLA. Therefore, any time an employee indicates to their supervisor that he or she is having difficulty related to a medical condition or disability, the supervisor should contact HR or other agency representative to consider whether it is necessary to engage in dialogue to clarify the employee's needs and determine the appropriate agency response. Any medical information disclosed by the employee should be kept strictly confidential. Medical information should not be disclosed to the employee's immediate supervisor. Information concerning the type of accommodation, duration, or frequency of leave may be shared with the employee's immediate supervisor.

How is a determination and request for an FCE made?

Agencies should review the documented observations and discussions held with the employee to determine if a request for an FCE is warranted and supported under the EEOC [Disability-Related Inquiries and Medical Examinations](#) standards. For technical assistance concerning specific situations, employees and agencies may contact the DOP Employee Relations section at (304) 414-1853. Agencies are encouraged to contact their legal counsel prior to requesting an employee submit to an FCE.



If it is determined the employee will be required to obtain an FCE, the agency's human resources office or leave coordinator is responsible for facilitating the request by working with the employee, supervisor, and medical provider to determine if the employee is able to perform the duties of the position they occupy safely and/or the appropriateness of available accommodations or modified duty.

What steps are necessary to request an FCE?

The agency must obtain written authorization from the employee to request medical information from the medical provider. Agencies may use the Employee Authorization for the Release of Medical Information Form (DOP FCE-1), and the Employee Authorization for the Release of Medical Information section of the Functional Capacity Evaluation (Form FCE-2), or equivalent forms to obtain the required employee authorization and medical information.

A letter to the medical provider requesting completion of the FCE should be provided with the Functional Capacity Evaluation (Form FCE-2). The agency should request the medical provider return the FCE to the agency HR representative directly, within fifteen days (15), whenever possible. Medical inquiries are limited to those permitted under applicable federal and state law and must include a medical release signed by the employee. The agency is entitled only to the information necessary to determine whether the employee can perform the functions of the position they currently occupy. A sample employee authorization for the release of medical information template is available with the FCE Forms and Letters. The letter should include:

- a summary of the behavior/performance observations that lead to the agency's concerns
- job description or list of work-related requirements, essential and ancillary job duties
- describe the demands of the employee's job duties, including any relevant environmental factors (cold, hot, noise levels, etc.)

An agency human resources representative or another designee should meet with the employee privately to:

- discuss the concerns and explain the purpose of the FCE
- obtain authorization for the release of medical information from the employee
- If the employee requests or is required to take leave until the completed FCE is returned to the agency, notify the employee of the requirement for a physician's/practitioner's statement prescribed in the DOP *Administrative Rule*, W. Va. Code R. §143-1-1 *et seq.*, apply.

Generally, the initial FCE may be performed by the medical provider of the employee's choice. However, if the agency suspects the employee poses an imminent threat to themselves or others, agencies may require the FCE to be performed by the medical provider of the agency's choice. The agency is responsible for the cost of the evaluation when an employee is required to obtain an FCE.

The employee may be permitted to provide the medical provider with the agency's FCE request letter and the FCE form directly, or the employee may permit the agency HR representative to contact the medical provider to



remit the request and required documents. However, the agency should request the medical provider return the FCE to the agency HR representative directly, within fifteen days (15), if possible.

The agency received the results of the FCE. What are the next steps?

All employee medical information is held in strict confidence in accordance with applicable federal and state laws. Medical information should not be disclosed to the employee's immediate supervisor. If it is determined the employee needs an accommodation or leave, information such as the type of restriction, accommodation, and duration of leave may be shared with the immediate supervisor for planning purposes. Based on the results of the FCE, the agency will need to determine whether:

- the employee may return to regular duties with no restrictions or modifications
- the employee may return to work at less than full duty in accordance with 14.4.h. of the [Administrative Rule](#)
- the employee may be temporarily transitioned into a different position in accordance with the [DOP Temporary Transition Policy \(DOP-P26\)](#)
- it is necessary to initiate the interactive process under the provisions of the ADA. For more information, please visit [Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA EEOC Disability-Related Publications](#) and [Job Accommodation Network \(JAN\) Interactive Process](#) or contact the [West Virginia Office of Equal Opportunity](#)
- the condition permanently prevents the employee from performing the essential duties of the position, and no reasonable accommodation exists; and if the employee is eligible for leave under the FMLA, PWFA, PLA, or MLOA. For more information, please visit the DOP's website for the DOP [Guide to Family and Medical Leave Act and Parental Leave Act](#), and [DOP Family and Medical Leave Act/Parental Leave Act Policy DOP-P23](#). Information from the U.S. Department of Labor is available under the [Family and Medical Leave Act](#).

An agency may require the employee to obtain a second or third opinion by a health care professional of the agency's choice when the medical opinion from the employee's own treating physician/practitioner contradicts information known to or observed by the agency.