

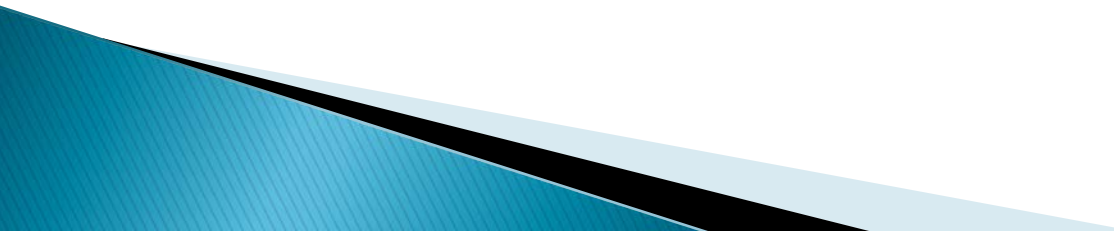


# Medical Documentation

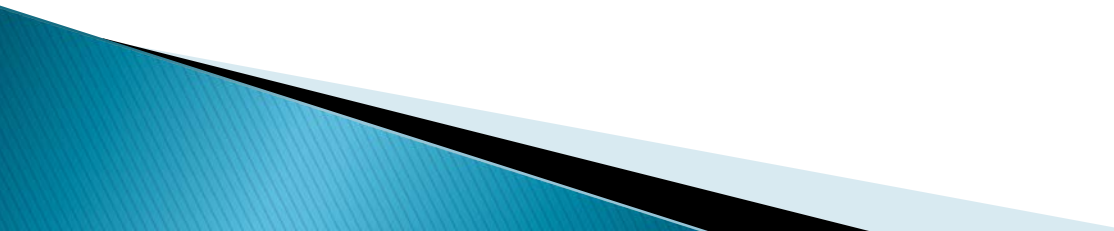
## EMPLOYEE RELATIONS

*Employee and Labor Relations Network  
Roundtable*

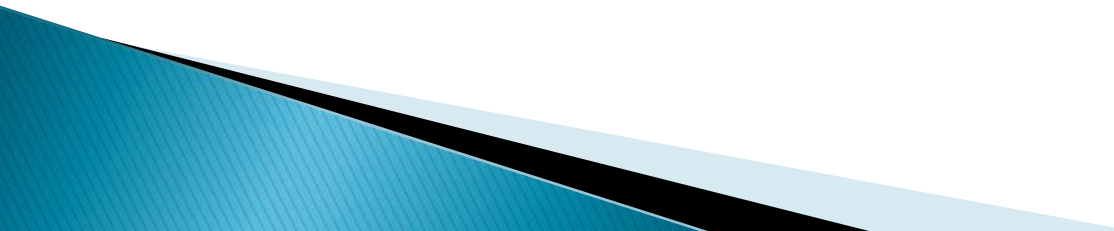
# Module Objectives

- ▶ Recognize the sensitivity of medical documentation
  - ▶ Identify when medical documentation may be requested by management
  - ▶ Know what information should be requested
  - ▶ Understand when medical examination can be ordered or offered by management
  - ▶ Know how to address employee failure to take medical examination
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# Module Overview

- ▶ Requesting Medical Documentation
  - ▶ Authority to Require/Order Medical Examinations
  - ▶ Authority to Offer Medical Examinations and Establish Medical Requirements for a Position
  - ▶ Insufficient/Inconclusive Medical Examinations
  - ▶ Employee Failure to Take Medical Examination
- 

# Requesting Medical Documentation

- ▶ Under certain circumstances, management may request medical documentation
  - ▶ The Employee Relations practitioner frequently advises management on how to make requests that comply with legal requirements
- 



# Requesting Medical Documentation

## ▶ Helpful Definitions

“Medical documentation” – 5 CFR part 339 describes as “a statement from a licensed physician or other appropriate practitioner which provides information the agency considers necessary to enable it to make an employment decision”

“Qualified Individual with a Disability” – persons with a physical or mental impairment which substantially limits one or more major life activities.



# Requesting Medical Documentation

- ▶ Handling Medical Documentation
  - Must be kept confidential – to be shared only with those who have a need to know
  - Employers may not give supervisors and managers unlimited access. May give them information concerning necessary work restrictions and accommodations.



# Requesting Medical Documentation

- ▶ Handling Medical Documentation, cont.
  - 5 CFR part 293, Subpart E, Requirements
    - Physician treatment records generally not appropriate for non-medical officials
    - Such records should be distinguished from other medical reports made available to management
    - Disclose to agency officials only when needed for performance of official duties



# Requesting Medical Documentation

- ▶ Maintaining Medical Documentation
  - Agencies are solely and totally responsible for processing Privacy Act requests for agency records
  - Contact agency Privacy Act Officer to discuss internal rules regarding storage and maintenance of medical records
  - The Privacy Act, 5 U.S.C. 552(a)–(b)
  - 5 CFR part 297





# Requesting Medical Documentation

## ▶ Maintaining Medical Documentation

- 5 CFR part 293, Personnel Records
  - Subpart E provides requirements that can be used for non-work medical records (required for occupation-related medical records)
  - Subpart E, Requirements, states what is needed to maintain Employee Medical Folder



# Requesting Medical Documentation

- ▶ Maintaining Medical Documentation, cont.
  - 5 CFR part 293, Subpart E, Requirements
    - Employee Medical Folder must be established for long-term and short-term records
    - Agencies must issue written internal instructions for Employee Medical File System
    - Official Personnel Folder and medical records must be maintained separately



# Requesting Medical Documentation

- ▶ When Medical Documentation Can Be Requested
  - To support sick leave or FMLA leave request
  - The employee raises medical condition in relation to performance or conduct problem
  - The employee requests reasonable accommodation of medical condition
  - The agency has reasonable belief that employee poses direct threat due to a medical condition or is unable to perform the essential job functions due to a medical condition
  - In connection with a medical exam when position is covered by 5 CFR part 339

# Requesting Medical Documentation

- ▶ Types of Medical Documentation – That Can Not Be Requested
  - Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits obtaining genetic information after job offer
- ▶ *GINA Defined:* Under Title II of GINA, it is illegal to discriminate against employees or applicants because of genetic information. Title II of GINA prohibits the use of genetic information in making employment decisions, restricts employers and other entities covered by Title II from requesting, requiring or purchasing genetic information, and strictly limits the disclosure of genetic information.

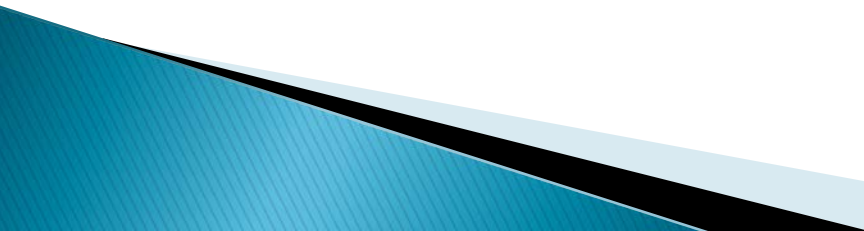


# Requesting Medical Documentation

- ▶ Exceptions that do not violate GINA:
  - Genetic Information, such as Family History, may be obtained as part of health or genetic services, i.e. wellness programs when offered voluntarily by employee
  - Certification for FMLA Leave for care of family member with serious health condition
  - Publically available documents– employer cannot search with intent
  - Employers who engage in DNA testing for Law Enforcement purposes i.e. human remains

# Requesting Medical Documentation

When a Leave Request Combines More Than One Leave Program

- ▶ Employee must provide documentation to support request
  - ▶ Medical documentation must be sufficient to meet the documentation requirements for each program (e.g., Voluntary Leave Transfer Program, Family and Medical Leave Act leave)
- 

# Requesting Medical Documentation

- ▶ Information to Include in Request – Some General Guidelines
  - Provide straightforward explanation of why documentation is needed at this time
  - Identify who will review the medical information
  - State the key aspects of the job and what the agency needs to know to make a determination (consider sending Position Description)
  - Avoid confusing language



# Requesting Medical Documentation

- ▶ Information to Include in Request, cont.
  - For positions covered by 5 CFR 339, select the applicable information listed in 5 CFR 339.104
  - Diagnosis, including current clinical status
    - Must be justified according to established diagnostic criteria
    - Conclusions and recommendations must not be inconsistent with generally accepted professional standards
    - Physician or, if appropriate, practitioner of same discipline, must determine diagnosis meets criteria



# Requesting Medical Documentation

- Information to Include in Request, cont.
  - As necessary and relevant, Diagnosis must include
    - The history of the medical condition includes references to findings from previous examinations, treatment and responses to treatment
    - Clinical findings from most recent medical evaluation, including any test results or findings of a mental status examination
    - Diagnosis, including the current clinical status



# Requesting Medical Documentation

- Information to Include in Request, cont.
  - As necessary and relevant, Diagnosis must include
    - Prognosis, including plans for future treatment and estimated date of full or partial recovery
    - Explanation of impact of the medical condition on overall health and activities, including basis for restrictions or accommodations and therapeutic or risk avoiding value



# Requesting Medical Documentation

- Information to Include in Request, cont.
  - As necessary and relevant, Diagnosis must include
    - Explanation of medical basis for any conclusion regarding sudden or subtle incapacitation by carrying out, with or without accommodation, duties of a specific position
    - Narrative explanation of medical basis for conclusion regarding whether medical condition is static or well-stabilized and likelihood of sudden or subtle incapacitation

# Requesting Medical Documentation

- ▶ Information to Include in Request, cont.
  - The U.S. Department of Labor provides forms for obtaining medical documentation for Family and Medical Leave Act (FMLA) leave, including the following forms:
    - WH-380-E-Certification of Health Care Provider for Employee's Serious Health Condition
    - WH-380-F-Certification of Health Care Provider for Family Member's Serious Health Condition
    - Forms located at: <http://www.opm.gov/oca/leave/>



# Requesting Medical Documentation

- ▶ Ask for the physician's contact information in the event there are questions
- ▶ A doctor's pre-printed note that is stamped by nurse or staff may not be sufficient medical documentation when there has been sick leave abuse

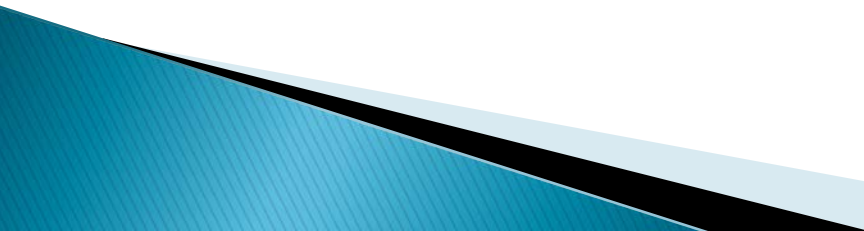
# Requesting Medical Documentation

- ▶ Be consistent in applying requirements for medical documentation
- ▶ The Board reversed agency's removal, finding discrimination, when
  - Agency allowed male employee to return to work (light duty) for indefinite time without medical documentation
  - Removed female employee when she did not provide medical documentation
  - Both physically incapable of performing some of the essential functions of aircraft mechanic position  
*Durden v. Department of Homeland Security*, 108 M.S.P.R. 539 (2008)



# Authority to Require/Order Medical Examination: 5 CFR 339

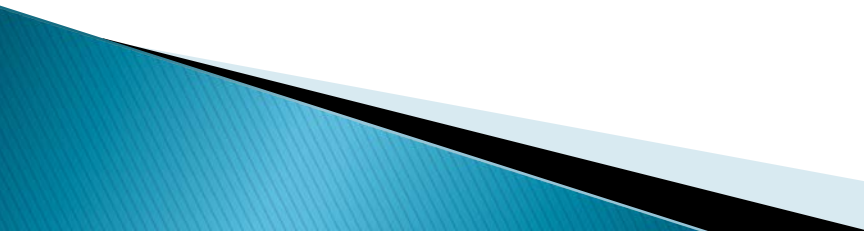
Employee in positions covered by 5 CFR 339 may be ordered to take a medical examination in these instances

- Prior to reemployment on the basis of full or partial recovery from a medical condition
  - On a regularly recurring, periodic basis
  - Whenever there is a direct question about the employee's ability to meet the physical or medical requirements of the position
  - Clark v. DoD, 109 FEOR 316 (EEOC, 2009)
- 



# Authority to Require/Order Medical Examination: 5 CFR 339

## Confirm Medical Exam Meets Requirements of 5 CFR 339.301

- There may be no basis for agency to order medical exam
  - An agency may offer—not order— a medical examination(including a psychiatric eval.)
  - *Doe v. Benefit Guaranty Corporation*, 117 M.S.P.R. 579 (2012)
- 





# Authority to Establish Physical Requirements for a Position

Agency may establish physical requirements without OPM approval when

- Considered essential for successful job performance
- Clearly supported by the actual duties of the position
- Documented in the position description



# Authority to Establish Physical Requirements for a Position

OPM or agency can establish medical standards

- OPM – for a government wide occupation (i.e., an occupation common to more than one agency)
- Agency – for positions that predominate in that agency (50 percent or more of the positions in a particular occupation)
- Must be established by written directive and uniformly applied
- Must be directly related to the actual requirements of the position



# Authority to Establish Physical Requirements for a Position

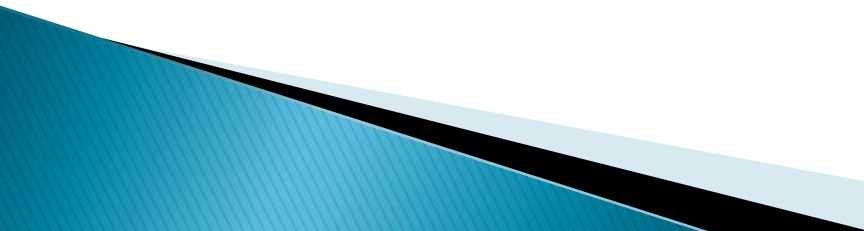
## Requirements for Medical Evaluation Programs

- Agency may establish periodic examination or immunization programs by written policies or directives
- Purpose is to safeguard the health of the employees whose work may subject them to health or safety risks



# Authority to Require/Order Medical Examination: 5 CFR 339

Agencies may order medical examination only in limited circumstances

- Applicant prior to appointment or selection
  - Individual who is being reemployed on basis of full or partial recovery from a medical condition
  - Employee released from competitive level during RIF if position with reassignment rights has medical standards or physical requirements different from those required in current position
  - Physical requirements, medical standards, or a medical evaluation program necessary for the position
- 



# Authority to Require/Order Medical Examination: 5 CFR 339

History of Medical Condition Considered Disqualifying in Certain Situations

- Only if condition is normally disqualifying
- Recurrence cannot medically be ruled out and
- Duties of the position are such that recurrence would pose reasonable probability of substantial harm, not “high probability of hazard”

*Slater v. Dept. of Homeland Security*, 108 M.S.P.R. 419 (2008)



# Authority to Require/Order Medical Examination: 5 CFR 339

- ▶ Requirements for Ordering Psychiatric Medical Examination
  - Conducted
    - In accordance with accepted professional standards
    - By licensed practitioner or physician
  - Used for legitimate inquiry into mental fitness to perform duties without undue hazard to employee or others



# Authority to Require/Order Medical Examination: 5 CFR 339

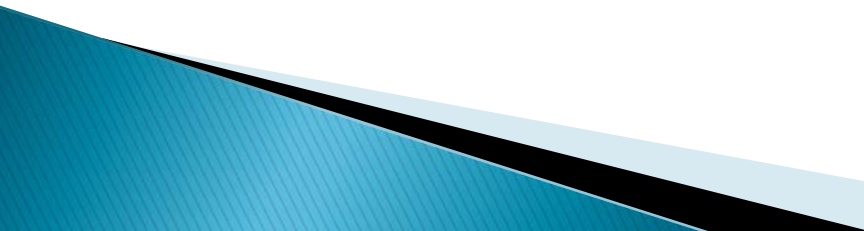
- Requirements for Ordering Psychiatric Medical Examination, cont.
  - Results of general exam ordered by agency indicates no physical explanation for behavior or actions
  - Psychiatric exam specifically called for in position with medical standards or subject to medical evaluation program



# Authority to Require/Order Medical Examination: 5 CFR 339

## ▶ Requirements for Ordering Psychiatric Medical Examination, cont.

Agency can not discipline employee for disobeying order to take psychiatric exam if no evidence that

- Employee's behavior affected safe and efficient performance of self or others
  - A Psychiatric examination is specifically called for in a position having medical standards or subject to a medical evaluation program
  - L'Bert v. Dept. of Veterans Affairs, 88 M.S.P.R. 513 (2001)
- 





# Authority to Require/Order Medical Examination

- ▶ Agency must show link between order for medical examination and legitimate business concern
  - Business concern must relate to the requirements of the job
- ▶ Must offer opportunity for physician of employee's own choice
- ▶ Agency pays for ordered examinations



# Authority to Require/Order Medical Examination

- ▶ Direct Threat – 29 CFR 1630.2
  - A significant risk or substantial harm to the health and safety of the employee or others
  - That cannot be eliminated or reduced by reasonable accommodation
  - Individualized assessment of employee's ability to safely perform essential functions of job



# Authority to Require/Order Medical Examination

- ▶ Direct Threat – 29 CFR 1630.2
  - Assessment must be based on reasonable medical judgment
  - Medical judgment must rely on
    - the most current medical knowledge and/or
    - the best objective evidence
  - Agencies should consider
    - Duration of the risk
    - Nature and severity of the potential harm
    - Likelihood that potential harm will occur
    - Imminence of potential harm

# Authority to Require/Order Medical Examination

- ▶ Direct Threat – 29 CFR 1630.2, cont.
  - Agency can consider advisability of using enforced leave or indefinite suspension to remove employee from workplace if it has adequate medical justification
  - “Indefinite suspension” means “the placing of employee in a temporary status without duty and pay pending investigation, inquiry, or further agency action” 5 CFR 752.404(d)
  - Employee must be restored to duty once agency learns employee is fit for duty

# Authority to Offer Medical Examination

- ▶ When Medical Exam May be Offered
  - Most employees can not be ordered to take fitness-for-duty exam because not covered by 5 CFR part 339
  - Can offer exam when employee:
    - Requests, for medical reasons, a benefit or special treatment (e.g., change in duty status, working conditions, or reasonable accommodation)
    - Has performance or conduct problem that may require agency action



# Authority to Offer Medical Examination

- ▶ Considerations in Offering Medical Exam
  - State reason for the offer
  - State consequences of failure to cooperate, such as
    - Denial of employee request for benefit/privilege
    - Initiation of disciplinary or performance-based actions without reference to medical condition
  - Agency designates and pays for examining medical professional



# Authority to Offer Medical Examination

- ▶ Insufficient/Inconclusive Medical Documentation
  - Agency may request additional medical information or offer agency examination
  - Enforced leave or indefinite suspension to remove employee from workplace can be considered if agency has adequate medical justification



# Authority to Offer Medical Exam

- ▶ Insufficient/Inconclusive Medical Documentation, contd.
  - Agency may act on information currently before it
  - Agency may take disciplinary action
  - MSPB will not accept physician's "expert" testimony if it is
    - Unsupported by medical documentation or tests
    - Drawn from the employee's self-reports
    - *Avant v. Dept. of the Navy*, 60 MSPR 467 (1994)

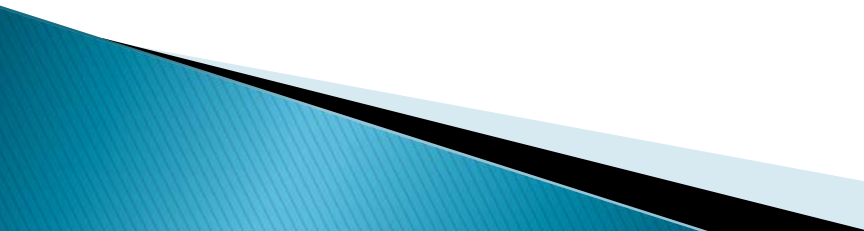




# Authority to Offer Medical Exam

- ▶ Insufficient/Inconclusive Medical Documentation, contd.
  - MSPB found unsworn, undocumented doctor's statement was insufficient when agency physician presented examination results *Johnson v. Dept. of the Navy*, 58 M.S.P.R. 386 (1993)
  - In instance of employee's conflicting medical documentation, MSPB gave deference to testimony of agency's medical officer due to his extensive review of medical history and facts *Lassiter v. Dept. of Justice*, 60 M.S.P.R. 138 (1993)

# Authority to Offer Medical Exam

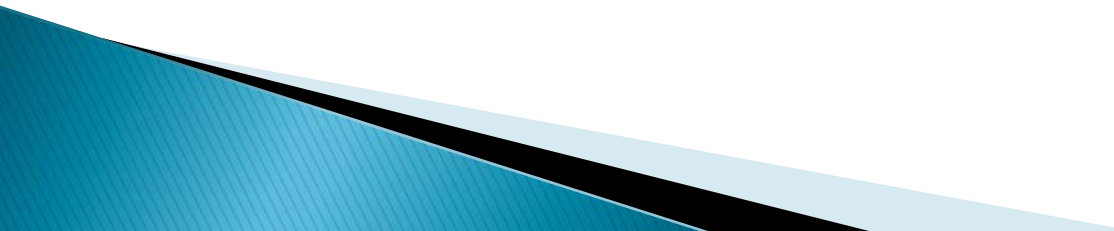
- ▶ Insufficient/Inconclusive Medical Documentation, contd.
    - Agency finding that medical information is insufficient/inconclusive usually requires opinion of agency/contract physician
    - Agency action must be based on management decision, not just a medical opinion
- 



# In Conclusion

- ▶ If the agency has a reason to believe a medical problem is affecting performance or conduct
  - Ask the supervisor to observe closely
  - Talk to advisors (e.g., medical professionals)
  - Discuss the situation with the employee, including any concerns about safety
  - Refer the employee to the Employee Assistance Program
  - Ask for medical documentation

# In Conclusion

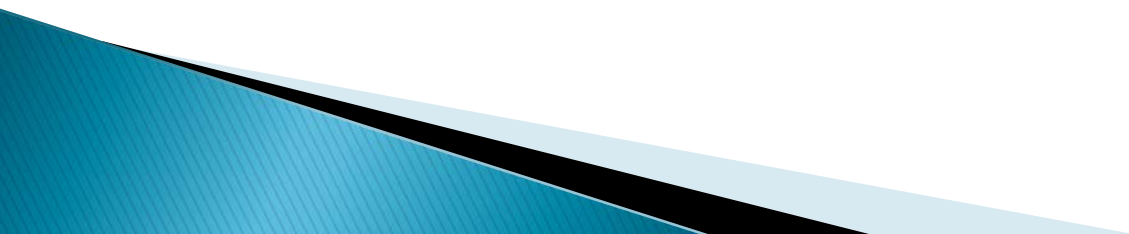
- ▶ The agency must consider all medical documentation received from employee
  - ▶ For positions covered by 5 CFR part 339, employee is obligated to submit to a properly ordered medical examination
- 



# In Conclusion

- ▶ Requesting medical documentation requires careful consideration
  - Is there objective basis for requesting medical documentation?
  - What documentation will be requested?
  - Who will receive and review it
  - Is there authority to order medical examination?
  - Is there basis to offer medical examination?
- ▶ Take performance-based or disciplinary action when appropriate

# QUESTIONS



# Contact Info

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# Other Pertinent Information

## Federal Occupational Health

### Contact

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