

## FITNESS FOR DUTY EXAMINATIONS:

When to do them and how to do them right!



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### General Information on Session

- I have not read your Personnel Rules or Collective Bargaining Agreements and best practices may conflict with your organization's rules or policies, so
- Before changing any practices, you are encouraged to consult with your legal counsel to determine if there are any meet and confer obligations and/or regulations that must be taken into consideration before changes are made.
- I am not an attorney.
- I knowingly violate every PowerPoint rule – so you have a tool and resource you can reference in the future.

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### Topics

- BRIEF General Overview: FEHA/ADA
- Fitness for Duty Evaluations:
  - When to use them, and
  - How to do them right
- Samples, Samples and More Samples
- Q&A



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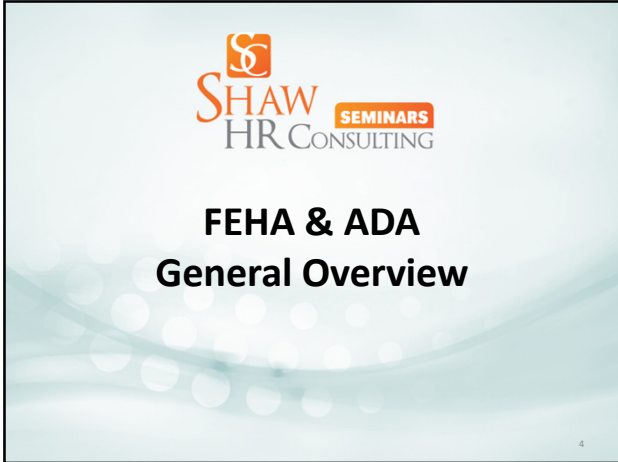
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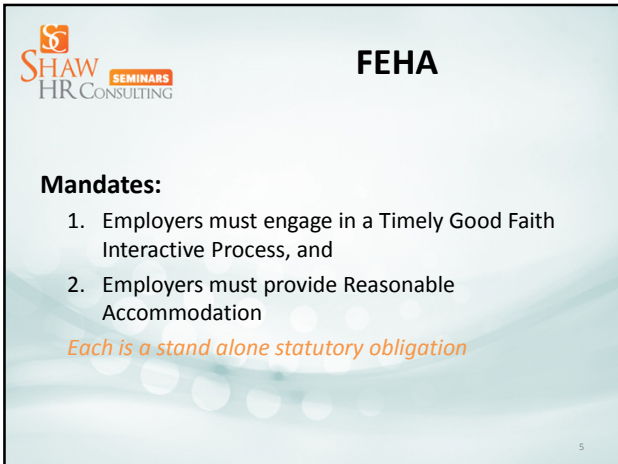
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 **Interactive Process Hallway**

- Door #1** • Obtain Necessary Documentation /Information
- Door #2** • Engage, Interact and Explore Together
- Door #3** • Schedule Accommodations Meeting / Have the Right People Involved in Decisions
- Door #4** • Post-Meeting Activities / Close Process Correctly

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 **Fitness for Duty Examinations**  
A REASONABLE ACCOMMODATION TOOL

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 **Fitness for Duty Examinations:**

- They are seen as more aggressive by employees and labor organizations
- Rarely welcome
- Can be very expensive
- Results are not guaranteed
- You are stuck with your doctor
- I rarely recommend an FFD exam for ACCEPTED workers' compensation claims
- Regardless, an important tool



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 **Fitness for Duty Examinations:**

Fitness for Duty Processes / Examinations are an **Interactive Process** tool and assist employers in complying with the **Fair Employment and Housing Act (FEHA)** and **Americans with Disabilities Act (ADA)**

- Known medical condition impacting work
- Perception of a medical condition impacting work

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 **Reasons for a Fitness For Duty Examination**

**FFD Examinations are an Interactive Process Tool to...**

1. Determine if someone has a **serious medical condition** which may be impacting their ability to perform one or more of the Essential Functions of their job, thereby creating FEHA/ADA Interactive Process obligations
2. Ensure employees can **safely** perform all of the essential functions of their job
3. Understand if there are reasonable accommodations, that if implemented, would support the employee to be **successful** in their job

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 **Fitness for Duty Examinations**

**EMPLOYMENT RELATED MEDICAL EXAMINATIONS:**

- Guidance on Medical Examinations:
  - Multiple sources, best is:
    - EEOC / ADA
    - See Handout:
      - <http://www.eeoc.gov/policy/docs/qanda-inquiries.html> \*
- EEOC allows:
  - "an employer may make disability-related inquiries and require medical examinations only if they are **job-related and consistent with business necessity**"

\*EEOC Guidelines Provided 12

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## Fitness for Duty Examinations

### What is an FFD Examination?

Employer can coordinate a Fitness for Duty examination with a qualified Occupational Medicine Physician, Psychologist or Psychiatrist in the event that they determine that the need to do so is job related and consistent with business necessity (42 USC § 12112(d)(4)(A); Gov. Code § 12940(f)(2) (FEHA) and there are objective facts that:

- **Safety:** The employee may have a medical or psychological condition that could result in a direct physical threat or other liability to themselves, a co-worker or the public
- **Job Performance:** The employee may have a physical condition or injury that impacts their ability to perform the essential functions of their classification and it is unclear as to what type of reasonable accommodation is necessary

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## Fitness for Duty Examinations

Unless negotiated out, FFD examinations are an important and useful tool, as long as used appropriately:

- "when health problems have had a substantial and injurious impact on an employee's job performance, the employer can require the employee to undergo a physical examination designed to determine his or her ability to work, even if the examination might disclose whether the employee is disabled or the extent of any disability." Yin v. State of California (Ninth Circuit Court of Appeals)
- "for an employer's request for an exam to be upheld, there must be significant evidence that could cause a reasonable person to inquire as to whether an employee is still capable of performing his job." Sullivan v. River Valley School District (Sixth Circuit Court of Appeals)

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## Fitness for Duty Examinations:

### FFD is used, primarily:

- When employee's physician is unable to provide information needed
- When employee is unwilling to provide information needed
- When employee's physician provides information that is not sufficiently clear
- When employee's physician provides information that is unreliable, inconsistent, or not logical base on past information (judgment call carries more risk.)
- When there are multiple doctor's involved, *may* be helpful
- To address an immediate and serious safety concern

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 **Fitness for Duty Examinations:**

**Medical Examinations / Releases:**

- Can the doctor have an employee's prior medical records?
  - California Confidentiality of Medical Information Act (CMIA)
    - Health care provider cannot have the records unless the employee authorizes the release except under certain limited conditions
    - Civil Code 56020(b): "No employee shall be discriminated against in terms or conditions of employment due to that employee's refusal to sign an authorization under this part. **However, nothing in this section shall prohibit an employer from taking such action as is necessary in the absence of medical information due to an employee's refusal to sign an authorization under this part.**"

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 **Fitness for Duty Examinations:**

**Medical Releases:**

- If employee refuses to sign a release, when indicated as needed by the FFD physician, the employer need not provide leave, accommodations, or other benefits
- Only physician needs medical information to form a medical opinion, employers DO NOT need this information
  - Suggest physician have the employee sign a release, when needed
  - Ensure your FFD provider is examining the employee and NOT JUST reviewing records

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 **Fitness for Duty Examinations:**

**To Obtain Clear Work Restrictions / Restrictions to Rely Upon:**

- Request Assistance from Employee to obtain clarification from their provider first\*
- Recommend two attempts before an FFD exam is scheduled, except in special circumstances, including:
  - Some disciplinary /disability matters
  - Employee is not treating for any condition
  - Parties all agree an FFD is best and most expeditious process
  - Other

\* Sample Provided 18

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**SHAW SEMINARS HR CONSULTING**

## Fitness for Duty Examinations:

### The FFD Hierarchy

- FFD Doctor's opinion is used to make decisions
- Overrides personal doctor\*\*
- Must have observable reason to believe additional information is needed and/or can not rely on personal doctor's opinion

\*\* CBA or Personnel Rules may modify this

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## Fitness for Duty Examinations:

### Notes on statement "Overrides personal doctor"

- Past practice
- What happens when doctor's opinions differs significantly, and you are concerned about it:
  - Have Employee's doctor talk with the Fitness for Duty doctor
  - Third doctor?

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## Fitness for Duty Examinations:

### Notes on: "Must have observable reason to believe additional information is needed and/or can not rely on personal doctor's opinion."

- Returning from FMLA leave - all or none
  - Return from FMLA, then test
- Working
- Rumor observed

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## Fitness for Duty Examinations:

- Talk with Employee and inform of examination being scheduled and why
  - Be honest with employee
- Notice to Employee\*
- Notice to FFD Medical Provider\*

\*Sample Forms Provided




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## Fitness for Duty Examinations:

### Selecting a doctor:

- Start with your primary physician, have them refer to specialty
- Ensure the provider is qualified to override employee's provider
  - **Known Specialty** such as Psychological or Orthopedic:
    - May consider a direct referral to specialty, however little cost and hard to fall back on primary physician
  - **Dependency Issues:**
    - Start with your primary physician, refer to specialty/program
    - Marijuana / Compassionate Use Act

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## Fitness for Duty Examinations:



Once clear work restrictions are provided by the Fitness for Duty Examination, you are through door # 1 and you can proceed down the interactive process hallway

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 **Fitness for Duty Examinations:**

**Rachel's Opinion Corner**

- Why I rarely recommend an FFD exam for ACCEPTED workers' compensation claims
  - PTP, QME, AME, FFD... Imnop
  - Can impact claim unintentionally
  - WC doctors are often very helpful in getting clear work restrictions – albeit slow
- Exceptions:
  - Old claims
  - Denied claims
  - Issues not related to accepted claims

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 **Fitness for Duty Examinations:**

- Questions about FFD Examinations



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 **Questions & Answers**



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