

7. Legal Considerations

Any medical standards program for railroad workers must comply with the Americans with Disabilities Act (ADA), the Railway Labor Act, the recently implemented Health Insurance Portability and Accountability Act of 1996 (HIPAA), and in so far as possible, existing labor agreements. This chapter describes the laws and summarizes how to best accommodate them in a medical standards program. In addition, this chapter presents the benefit programs provided by law for railroad workers and administered by the Railroad Retirement Board (RRB).

7.1 Provisions of Current Labor Agreements

A review of labor agreements on file with the National Mediation Board provides an indication of the extent to which existing railroad agreements address medical disqualification. While all labor agreements are supposed to be on file with the National Mediation Board, their files are not complete because it is the responsibility of the negotiating parties to submit a copy of their agreement. There are 35 agreements available for labor organizations that represent safety-sensitive railroad employees. The types of provisions in these agreements are the following:

- An employee may be removed from service if his/her medical fitness is considered deficient.
- Seven agreements provide for a tripartite medical panel to arbitrate. This panel consists of three physicians: one selected by the employee, one selected by the railroad and a neutral physician selected by both the employee and the railroad. The majority opinion determines whether or not the employee is medically fit to work.
- Some agreements require a medical specialist for the neutral physician.
- Some agreements require that the neutral physician be familiar with the nature of the employee's job.
- Two agreements reference corporate policy setting forth detailed medical standards.
- None of the agreements establish when medical examinations could be required although each indicates they are normally given upon an employee's return-to-work from a medical leave of absence.

7.2 Americans with Disabilities Act of 1992

The ADA prohibits discrimination against "qualified individuals with a disability." One aspect of this complex statute governs medical examinations of employees and as such, is relevant to a medical standards program. According to ADA Guidelines an employer may conduct post-offer medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category. After employment begins, an employer may require medical examinations only if they are *job-related* and *consistent with business necessity*. This means that the employer must have a reasonable belief that the employee will be unable to perform the essential functions of the job because of a medical condition or the employee will pose a direct safety threat because of the condition. The Guidelines also permit periodic medical examinations for employees who work in positions affecting public safety. Even in this

circumstance, the examination must address specific job-related concerns. The Guidelines also permit an employer to ask employees in positions affecting public safety about their use of medications that may affect their ability to perform essential functions and thereby result in a direct safety threat.

The ADA also addresses how medical information must be stored. The ADA strictly prohibits an employer from keeping medical information with the employee's regular personnel files. This information must be filed separately and kept confidential.

References

U.S. Equal Employment Opportunity Commission. *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act*. Retrieved February 12, 2004 from <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>.

7.3 Health Insurance Portability and Accountability Act of 1996

As part of the Health Insurance Portability and Accountability Act of 1996 new safeguards were put in place to protect the security and confidentiality of patient health information. Most health insurers, pharmacies, doctors and other health care providers were required to comply with these federal standards beginning April 14, 2003. The regulations protect medical records and other individually identifiable health information, whether it is on paper, in computers or communicated orally.

According to the U.S. Department of Health and Human Services *Questions and Answers*, "The public health provision permits covered health care providers to disclose an individual's protected health information to the individual's employer without authorization in very limited circumstances. The following three conditions must be met: 1) the covered health care provider must provide the health care service to the individual at the request of the individual's employer or as a member of the employer's workforce, 2) the health care service provided must relate to the medical surveillance of the workplace or an evaluation to determine whether the individual has a work-related illness or injury, 3) the employer must have a duty under the Occupational Safety and Health Administration (OSHA), the Mine Safety and Health Administration (MSHA), or the requirements of a similar State law, to keep records on or act on such information..."

If the above conditions are met, then the health care provider may share the protected health information with the employer without authorization from the employee. Covered health care providers who make such disclosures must provide the individual with written notice that the information is to be disclosed to his or her employer. When a health care service does not meet the above requirements, covered entities may not disclose an individual's protected health information to the individual's employer without an authorization. However, nothing prohibits an employer from conditioning employment on an individual providing an authorization for the disclosure of such information.

HIPAA should not be an impediment to new medical standards in the railroad industry. If an FRA regulation requires periodic medical examinations, then HIPAA would permit the medical examiner to provide the results of the examination to the railroad and/or the FRA.

References

United States Department of Health and Human Services. (2003). *Fact Sheet: Protecting the Privacy of Patients' Health Information*. Retrieved July 19, 2004 from <http://www.hhs.gov/news/facts/privacy.html>.

United States Department of Health and Human Services. *Questions and Answers: Can I disclose the findings of employee fitness-for-duty exams, and the like, to the employer?* Retrieved December 9, 2003 from <http://answers.hhs.gov>.

7.4 Implications for Railroad Medical Standards Program

The FRA should be able to promulgate medical standards related to safety without running afoul of the Railway Labor Act (45 U.S.C.151 et seq.). The Railway Labor Act requires that wages, hours and conditions of employment be collectively bargained between management and the various unions representing railroad employees. However, the obligation to collectively bargain is subject to the moratoriums, if any, on serving section 6 notices. Thus, when the government passes regulations, railroad management is required to collectively bargain with the unions on the manner in which the regulations will affect the employees' conditions of employment. Needless to say, any newly promulgated regulations will have an impact on and will be impacted by existing collective bargaining agreements. Because the promulgation of new regulations will have a broad effect on existing working conditions and on existing collective bargaining agreements, it is important that the unions participate in whatever committee is charged with developing the medical standards program. Union participation in program development will comply with any obligations under the Railway Labor Act and will facilitate acceptance in future negotiations.

It is imperative that the medical standards program bears a rational relationship to the statutory mandate of railroad safety, specifically, that it be drafted with an eye to addressing a direct or significant threat of substantial harm to the health and safety of others. Not only must the regulations address the FRA's statutory mandate, but they must also be drafted so that they do not run afoul of the Americans with Disabilities Act.²² The regulations cannot, therefore, address general employee health concerns, but must only disqualify those employees whose continued employment will pose a direct or significant threat of substantial harm to the safety of others. Similarly, the regulations should bear a rational relationship to the job duties of specific classes of safety-sensitive employees. For example, medical requirements that are necessary for the safe operation of a freight locomotive may be overly restrictive when applied to a different class of safety-sensitive employee, for example, a conductor on a passenger train.

Following the promulgation of the regulations, the likely disputes that will arise will occur following the decertification of an employee due to his or her failure to meet the required medical standards or guidelines. An employee might attempt to bring a claim pursuant to the ADA, although the likelihood of success is probably low. As noted by the Supreme Court in the

²² In *Albertson's Inc. v. Kirkingburg*, 527 U.S. 555, 573-574 (1999), the Supreme Court noted that Congress had requested that the Secretary of Transportation review its rules with respect to truck drivers to ensure they were not more demanding than safety required, thus frustrating the purposes of the ADA. (See Appendix D for a summary of this case.)

Albertson’s case, cited above, “[w]hen Congress enacted the ADA, it recognized that federal safety rules would limit application of the ADA as a matter of law.” Other Supreme Court cases in the transportation industry have further limited the applicability of ADA claims.²³ Even apart from properly promulgated regulations, employees face an uphill battle when bringing claims pursuant to the ADA. The ADA prohibits discrimination against “qualified individuals with a disability.” A disability is a physical or mental impairment or disorder that substantially limits the person’s ability to perform a “major life activity” such as seeing, working, hearing, etc. Many courts, including the Supreme Court, have taken a restrictive view of what qualifies as a “major life activity,” resulting in findings of no disability.²⁴ Additionally, the employee must show he or she is “qualified,” that is, is able to perform the essential functions of the job with or without reasonable accommodations. To date railroad employees have had little success in bringing cases under the ADA. (Appendix D contains a summary of lower court cases referencing the ADA in the context of the railroad industry.)

A decertified employee might be expected to seek redress through the arbitration or other existing dispute resolution processes, such as those under the collective bargaining agreement. Currently, many carriers have in place a procedure for a tripartite medical panel for the resolution of disputes arising out of medical diagnoses. Based upon matters that have previously been arbitrated under the vision and hearing standards, it can be anticipated that employees will not only challenge the correctness of medical diagnoses, but will also challenge the application of those diagnoses to their actual job functions. For example, an employee may argue that, while his medical condition would disqualify him for his position as described in the official job description, in reality, the employee only performs a subset of the described functions, including the essential jobs functions, and has been safely doing so for a number of years. Such an employee should be provided with a mechanism for challenging his decertification. It is possible that the grievance/arbitration process now in place could address this type of issue.

It is inevitable that employees will be decertified pursuant to the new medical standards, and that many, if not most, of those employees will challenge the decision through tripartite medical panel and established grievance/arbitration procedure. The legal administration of the medical standards by the carriers will be enhanced through the avoidance of decertification disputes based on questionable job descriptions or medical examinations. Based on the kinds of issues that have arisen in the past, it is likely that disputes will arise where the employee has learned to adapt to and compensate for his impairment to such a degree that it poses no safety hazard beyond that of an unimpaired individual. Providing the medical examiner with a copy of the employee’s job description minimizes the grounds for subsequent dispute if the employee is decertified.

7.5 Railroad Retirement Board

The Railroad Retirement Board administers three programs for railroad workers. These are sickness benefits, unemployment benefits and disability annuity. The RRB has a detailed set of standards for determining medical disability. Railroad workers who become medically

²³ For example, see *Sutton v. United Airlines*, 527 U.S. 471, (1999) and *U.S. Airways v. Barnett*, 535 U.S. 391, (1999) which are summarized in Appendix D.

²⁴ For example, see *Toyota Motor Manufacturing, Ky., Inc. v. Williams*, 534 U.S. 184, (2002) and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, (1999) which are summarized in Appendix D.

disqualified from their positions may be eligible for these benefits. The provisions of the RRB programs are the following:

- *Sickness Benefits*

If a current employee is found unfit to work, s/he may be eligible for sickness benefits after a 7 day waiting period. Employees can receive up to 130 days of benefits annually. Employees with 10 or more years of service qualify for an additional 65 days. In cases where the RRB did not grant sickness benefits, the employee would generally be eligible for unemployment benefits.

- *Unemployment Benefits*

Unemployment benefits can be received for as many as 130 days a year. If an individual has 10 or more years of service and exhausts their normal unemployment benefits, they may be eligible to receive extended benefits up to 65 days. The waiting period for eligible compensation for unemployment benefits is 7 days.

- *Disability Annuity*

A disability annuity can be paid after a five-month waiting period for:

- a) *Total disability*, at any age, if an employee is permanently disabled for all regular work and has at least 10 years of creditable railroad service. A reduced disability annuity is provided to employees with 5-9 years of creditable railroad service, if at least 5 years were performed after 1995.
- b) *Occupational disability*, at age 60, if an employee has at least 10 years of railroad *service* or at any age if the employee has at least 20 years of service, when the employee is permanently disabled for his or her regular railroad occupation.

Regulations governing the RRB (20 C.F.R. § 220.10) provide for the establishment of an Occupational Disability Advisory Committee made up of two physicians, one from recommendations from rail labor, and one from recommendations of rail management. This committee reviews, from time to time, the disability standards developed by this regulation and the Occupational Disability Claims Manual which supports this regulation.

References

Determining Disability, 20 C.F.R. § 220 (1998).

Retirement and Spouse Annuities. Retrieved July 19, 2004 from http://www.rrb.gov/opa/ib2/ib2_ret.html.

Sickness Benefits for Railroad Employees. Retrieved July 19, 2004 from <http://www.rrb.gov/PandS/forms/ub11/ub11-1.html>.

Unemployment Benefits for Railroad Employees. Retrieved July 19, 2004 from <http://www.rrb.gov/PandS/forms/ub10-1.html>.

