



Electronic Dispatch

Employee Benefits Law Information Memo

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CONFIDENTIALITY OF EMPLOYEE MEDICAL RECORDS

Since the finalization of the privacy regulations under the Health Insurance Portability and Accountability Act ("HIPAA"), there has been an increased focus on the confidentiality of employee medical records held by employers.

The HIPAA privacy regulations protect individually identifiable health information that an employer obtains about an employee through a group health plan. The HIPAA privacy regulations do not, however, apply to employment-related medical information, including any such information in:

- Family and Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA") and/or Occupational Safety and Health Administration ("OSHA") records;
- workers' compensation records;
- sick leave/ return to work documents;
- drug screening results; and
- records relating to an alcohol and/or drug-free workplace.

The FMLA and the ADA are the main federal statutes regarding the confidentiality of employment-related employee medical records. Both the ADA and the FMLA provide for special confidentiality requirements in the maintenance of employee medical records, including: (1) the separation of medical information into separate files; and (2) restricted access to such separate files.

Separation of Files and Restricted Access

To abide by the strict limitations in the statutes regarding the use and disclosure of employee medical records, an employer must keep all medical records of an employee, or an employee's family member, in confidential files that are separate from an employee's personnel file. In addition, an employer must maintain such separate medical files in a separate locked filing cabinet.

Some examples of medical records that must be kept in separate files include:

- medical certifications, notes or excuses;
- medical histories of an employee or an employee's family member;
- post-offer medical examinations;
- written requests for disability-related accommodations;
- drug screens that report lawful prescription drug use;
- fitness for duty examination reports; and
- information on an employer's affirmative action on a disability.

To ensure confidentiality of the separate medical files, only persons with a true "need to know" should be given access to the files. It is also recommended that a log be used to record the name of each individual who has been given access to a file, and the name of each individual who actually accesses such file.

Exceptions to the Confidentiality of Employee Medical Records

The ADA provides certain exceptions to the confidentiality of employee medical records. Such exceptions include:

- supervisors and/or managers may be given access to an employee's separate medical records file and information, to allow for any necessary accommodations or restrictions on the employee's work duties;
- first aid and/or safety personnel may be informed of an employee's medical condition if such condition may require emergency treatment;
- governmental officials investigating compliance with the ADA (or the FMLA) may be provided with information contained in an employee's separate medical records file;
- information contained in an employee's separate medical records file may be provided in accordance with state workers' compensation laws; and
- information contained in an employee's separate medical records file may be provided for insurance purposes.

Responding to Inquiries From Other Employees

In the event a co-worker, or other individual, inquires about an employee's disability and/or accommodation, an employer is prohibited from disclosing any information concerning an individual's disability. The employer must also not disclose to co-workers and/or other individuals that a particular employee is being provided a reasonable accommodation. Rather, an employer should respond that it is acting in compliance with federal law, or for a legitimate business reason.

Confidentiality of Medical Records After Termination of Employment

An employer must keep an employee's medical records confidential even after such employee's employment with the employer terminates. The exceptions to confidentiality set forth above continue to exist after termination of employment, except for the ability to share medical information with supervisors and/or managers of the former employee.

Inability to Waive Confidentiality of Medical Records as Condition of Employment

Any waiver by an employee of his or her rights under the ADA must be knowing and voluntary. Therefore, an employer may not require an employee to waive his or her right to confidentiality of medical information under the ADA as a condition of employment.

Violation of Confidentiality Protections

A violation of the confidentiality protections of the FMLA and the ADA will occur if medical records or information about an individual are disclosed to an unauthorized individual or entity. Further, the failure of an employer to have a system in place to protect the confidentiality of medical information may also be considered a violation.

Steps That Will Help Reduce the Risk of Possible Violations

To help reduce the risk of possible violations of the confidentiality protections under the FMLA and the ADA, the following steps can be taken:

- establish channels through which disclosure of medical information is made, such as the human resources department or the legal department;
- evaluate documents prior to placement in personnel files;
- establish rules regarding the maintenance of separate medical records files and access to such files;
- train employees on the importance of maintaining confidentiality, and about the limits on disclosure of confidential information;
- adhere to record retention time frames; and
- monitor state and federal laws relating to the confidentiality of medical records.

If you have any questions, please contact any of the following members of our Employee Benefits Law Practice Group:

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