



# Health and Safety Santé et sécurité



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## Health Evaluations and Independent Medical Examinations

During their career in the federal public service, employees may be asked by their employer to undergo a health evaluation. It is important for our members to be aware under which conditions or circumstances an employer can require health evaluations.

Employers within the federal public service (TBS and CFIA) have their own *Occupational Health Evaluation Standard (OHES) or Directive (OHED)*. These documents outline the categories and types of health evaluations that exist, as well as the conditions under which the employer may request a fitness to work evaluation or regular systematic health evaluations. Locals and members should familiarize themselves with their respective OHES or OHED when a request for a health evaluation is made to an employee. TBS employees can find the *OHES* on the TBS website and CFIA employees can find the *OHED* on Merlin, CFIA's intranet. Employees can also request these documents from the employer.

There are instances where an employer can require medical information from an employee. These instances are detailed in the respective OHES or OHED, and include: when an employee returns to work following a lengthy absence due to illness, when an employee requests accommodation and, when an employee appears to be having difficulty in performing the duties of their position or their actions appear to be affected by health related factors.

Although the employer's OHES/OHED are key reference documents, the Agriculture Union has some issues as it relates to content. One key area of concern is whether the employer has the right to require an employee to undergo an independent medical examination (IME) by a doctor of the employer's choosing.

Where there is a legitimate reason for medical information, it is Agriculture Union's position, as supported by case law, that medical information should be provided from the employee's own treating physician and not a doctor chosen by the employer.

An employer cannot automatically demand that an employee undergo an IME. The employer's obligation to ensure an employee is able to work safely, and poses no hazard

to others must be exercised in a manner that does not infringe on an employee's right to privacy. Accordingly, medical information from an employee's treating medical professional, such as an employee's own doctor, is always the first and preferred source of information.

Employers have an important obligation to ensure a safe work place. Accordingly, they have a right to know about an employee's medical information and fitness to work only when they have **reasonable** and **probable grounds** to believe the employee presents a health or safety risk to themselves or others in the work place. This would necessarily exclude speculation or conjecture as the basis for a request for medical information. An employer cannot refuse to allow an employee to return to work or continue to work on the "mere possibility" that an employee may be ill, presents a safety risk or may have medical problems in the future.

Where **reasonable** and **probable grounds** exist, it is the employee's initial responsibility to present relevant medical information from their treating medical practitioner declaring their fitness for work. Employees should provide their treating physician with a copy of their work description. TBS employees should also provide the job hazard analysis (JHA) and CFIA employees should provide the job demands analysis (JDA). A JHA/JDA must be approved by the Work Place Occupational Health and Safety Committee in order to be valid. The employee's medical practitioner should review and consider this information in their medical assessment. Where employees do not have a valid JHA or JDA, they should advise their employer for immediate action as well as contact their Occupational Health and Safety Committee Member or Representative for assistance.

The medical note must include the following information:

- A statement declaring the employee's fitness to work – a diagnosis is **NOT** to be included.
- If the employee is not fit for work, what is the prognosis for recovery with an estimated time for return to work?
- If fit for work, is the employee able to perform the full duties and responsibilities of their substantive position? If not, can they partially perform the duties of their substantive position? If not, can they fully or partially perform the duties of other positions?
- The employee's functional limitations and/or restrictions, if any exist, should be clearly identified in detail. It should also be clearly stated whether these limitations and/or restrictions are permanent or temporary. If temporary, an estimation of the duration should be indicated.
- Recommend parameters for a gradual return to work, where applicable.
- Any and all other information relevant to the employee's fitness for work and/or accommodation measures recommended.

For those situations where an employee is fit for work with limitations and will require accommodation, our separate "KeyInfoClé" entitled *Duty to Accommodate* provides useful information on the accommodation process.

If the employer is dissatisfied with a medical certificate presented by the employee, it has the duty to clearly explain to the employee the reasons why the information is insufficient, and to clearly indicate what specific further information the employer requires. Employees should insist on receiving this information in writing from the employer. This allows the employee to get the additional information from their own medical practitioner. Employees need to remember that appropriate medical information falls within the list provided earlier in this document.

If, after receiving additional medical information, the employer remains dissatisfied with the medical information provided, it will likely request the employee to undergo an IME by a doctor of their choosing.

According to the case law, the employer must be open to other options to satisfy its concerns short of demanding an assessment by a doctor not of the employee's choosing. The onus lies on the employer, to provide "cogent evidence" in support of its position for an IME since the need for an IME is described as "drastic action" which must have a "substantial basis" and will only be required in "*exceptional and clear circumstances*".

In those rare and exceptional instances where an IME may be appropriate, employees along with their union representative should meet with the employer to discuss the options of having the IME conducted by a medical practitioner of the employee's choosing or one that is jointly chosen.

Where the employer insists the employee undergo an IME by a doctor of their own choosing, we recommend that a copy of the *Grover* decision (2005 PSLRB 150) and the Federal Court's decision (T-1975-05) be provided to the employer in support of our position. These are available at the following links:

[http://www.pslrb-crtfp.gc.ca/decisions/summaries/2005-150\\_e.asp](http://www.pslrb-crtfp.gc.ca/decisions/summaries/2005-150_e.asp) <http://decisions.fct-cf.gc.ca/en/2007/2007fc28/2007fc28.html> .

The decision in *Grover* (2005 PSLRB 150), upheld by the Federal Court in 2007 (T-1975-05) and the Federal Court of Appeal (A-84-07) in 2008, confirms that an Independent Medical Examination (IME) to determine fitness to work is only considered in "*exceptional and clear circumstances*".

In summary, the *Grover* decision maintained the following important principles:

- The employer must clearly communicate the questions or concerns they have regarding an employee's medical certificate and afford the employee an opportunity to have his/her personal physician provide the required information.
- The request for an IME to determine fitness to work should be considered only in "*exceptional and clear circumstances*". The justification for it should also be fully disclosed to the employee.

- The employer may require an employee to submit to a physical or psychiatric medical examination by a specialist of its choice only when management can demonstrate it had serious reasons to believe the employee's physical or mental condition is such that the employee cannot adequately perform his/her job, or the employee's condition may affect the health and security of others.
- Where there is no reasonable justification for an IME request, it follows there is no basis to discipline an employee who refuses to submit to an IME.

In virtually all cases where medical information is required, the employer should accept appropriate medical information from an employee's treating medical practitioner. Employees are encouraged to seek complete and relevant medical information from their treating medical practitioner so that the employer can satisfy its obligation to ensure a safe work place.