Common Misunderstandings about the ADA, HIPAA, OSHA and Employee Medical Information.

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Scenario 1

An employee is struck by a forklift and taken by ambulance to the nearest hospital, which is 25 miles away. A supervisor follows the ambulance to the hospital. Family members arrive and the supervisor is unable to obtain information from the hospital because they advised him that HIPAA and other confidentiality restrictions prohibit them from updating employee on his condition.

The supervisor suspects that bones were broken but also knows that the employee was conscious and talking easily to people when the ambulance took him to the hospital. The family members are distraught and have directed a certain amount of anger at the company and do not want to talk to the supervisor.
Scenario 1 (con’t)

The accident occurred at 3 PM and around 8:30 that night, the supervisor assumes that the employee will be kept overnight, but does not know if the employee is being kept overnight because of treatment or for observation.

The next morning, Saturday, the HR director tries to get a Worker's Compensation case management nurse to contact the hospital and get more information, but no one is assigned until the following Tuesday. On Monday, OSHA arrives on site and asked why the overnight hospitalization was not reported to OSHA within 24 hours as required. OSHA learned of the accident from the emergency responders, who notified OSHA.
Scenario 1 (con’t)

Two days later, OSHA requested copies of the OSHA 300 injury log and of the OSHA form 301/First Report of Injury, and demands to know why there is little detail on the 300 Log and in the Form 301.

OSHA subsequently issued citations against the employer for (1) failure to notify OSHA of an overnight hospitalization for treatment within 24 hours, (2) failure to describe the body part and injuries suffered in the form 300, and (3) failure to identify whether the accident involved days away from work, etc.
Scenario 1 - questions

• What are the deadlines for providing Injury and Accident-related information to OSHA and completing OSHA Forms 300, 300A and related documents?
• What legal requirements limit the employee from getting information about an employee patient’s status in the early stages?
• How can an employer obtain the necessary information?
OSHA Workplace Injury Recordkeeping Obligations

• Is the employer required to maintain the OSHA 300 Log?
  ▪ Exemptions are found at OSHA.gov, Recordkeeping page.

• IF yes, the injury must be properly entered on the 300 Log within 7 days.
  ▪ You can revise the entry if it is later found to be non-work related.

• The employer must complete the OSHA Form 301, which is generally the same as the state “First Report of Injury.” within 7 days.
### OSHA's Form 300 (Rev. 12/2004)

Log of Work-Related Injuries and Illnesses

**(Note: This can type into the fields will same is.)**

Because the forms in this recording package are "fillable/editable" PDF documents, you can type into the input text fields and then save your entries using the free Adobe PDF Reader. In addition, the forms are programmed to auto-calculate as appropriate.

Please note:
- **OSHA's Form 300** is required by law. Employers must record every work-related injury and illness, even those that involve loss of time, restricted work activity, or job transfer. For more details, go to <https://www.osha.gov/pls/oshaweb/owadisp.showdocument?p_table=OSHA_Forms&p_id=27657>.
- **Significant work-related injuries and illnesses that are designated by a physician or licensed health professional.**
- **Work-related injuries and illnesses that meet any of the specific recording criteria listed in 29 CFR 1904.7.**

**Form 300: Log of Injuries and Illnesses**

<table>
<thead>
<tr>
<th>(A)</th>
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<th>(C)</th>
<th>(D)</th>
<th>(E)</th>
<th>(F)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Date of Injury or Illness</td>
<td>Employee's Name</td>
<td>Date of Injury (Month, Day, Year)</td>
<td>Date of Injury (Month, Day, Year)</td>
<td>Date of Injury (Month, Day, Year)</td>
<td>Date of Injury (Month, Day, Year)</td>
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</table>

**Reg. 1904.7** - [Link](https://www.osha.gov/pls/oshaweb/owadisp.showdocument?p_table=OSHA_Forms&p_id=27657)

**Reg. 1904.8** - [Link](https://www.osha.gov/pls/oshaweb/owadisp.showdocument?p_table=OSHA_Forms&p_id=27657)

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**Key 2: Close the case**

**Reg. 1904.8** - [Link](https://www.osha.gov/pls/oshaweb/owadisp.showdocument?p_table=OSHA_Forms&p_id=27657)

**Reg. 1904.9** - [Link](https://www.osha.gov/pls/oshaweb/owadisp.showdocument?p_table=OSHA_Forms&p_id=27657)

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OSHA's Form 300A (Rev. 04/2004)

Summary of Work-Related Injuries and Illnesses

All establishments covered by Part 1903 must complete this Summary page, even if no work-related injuries or illnesses occurred during the year.

To make the form easier to complete, use the individual columns for each category. Then write the totals for each column.

Number of Cases

<table>
<thead>
<tr>
<th>Total number of cases</th>
<th>Total number of cases with injuries away from work</th>
<th>Total number of cases with job-related illnesses or conditions</th>
<th>Total number of cases with cases other than compensable cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
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<tr>
<td>(9)</td>
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</tbody>
</table>

Number of Days

<table>
<thead>
<tr>
<th>Total number of days away from work</th>
<th>Total number of days of job-related illnesses or conditions</th>
<th>Total number of days other than compensable cases</th>
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<tr>
<td>0</td>
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</tbody>
</table>

Injury and Illness Types

<table>
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<tr>
<th>Total number of...</th>
<th>(1) Skin disorder</th>
<th>(2) Berylliosis, lead</th>
<th>(3) Respiratory conditions</th>
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Year 20

U.S. Department of Labor
Occupational Safety and Health Administration

Form approved OMB No. 1240-0074

Finish Report page (Form 301) on February 2 by using data from the previous year. Report the number of cases and injuries for the year covered by the form. For the purposes of this report, a covered Employer is defined as an employer who has at least one employee. The number of employees is based on the average number of employees employed in the 12-month period preceding the year covered by the form. The number of employees must be estimated or calculated on the basis of the data available. Employees must be employees who are in receipt of pay or are employed on the first day of the month of the calendar year. Employees must be paid on a regular basis, at least weekly, throughout the calendar year. Firms with employment of 10 or more employees must complete the form. Firms with less than 10 employees must complete the form if they have 12 or more work-related injuries or illnesses in the calendar year. The form must be filed by the employer with the appropriate OSHA office in the state in which the employer is located. The form must be filed within 7 days of the date the OSHA is required to be filed. Firms with employment of 10 or more employees must complete the form. Firms with less than 10 employees must complete the form if they have 12 or more work-related injuries or illnesses in the calendar year.
OSHA’s Form 301 (Rev. 4/2004)

Injury and Illness Incident Report

This Injury and Illness Incident Report is one of the forms you must fill out when a recordable workplace injury or illness has occurred. If you receive notice that a recordable injury or illness has occurred, you must fill out this form and/or an equivalent form. Your state workers’ compensation, insurance, or other reports may be acceptable substitutes for this form.

Within 7 calendar days after you receive notice that a recordable injury or illness has occurred, you must fill out one of these forms to the best of your knowledge and belief and mail it to OSHA. If you need additional copies of this form, you may photocopy the prompt or insert additional form pages in the PDF and then save as many as you need.

Information about the employee:

1. Full name
2. Street
3. City State ZIP
4. Date of birth Month Day Year
5. Date hired Month Day Year
6. OSHA 301 form

Information about the case:

1) Cause of injury or illness

2) Time of event AM or PM

3) Check if death was caused

4) Injuries

5) OSHA 301 form

Information about the physician or other health care professional:

6) Name of physician or other health care professional

7) Date of treatment

8) If treatment was given away from the worksite, where was it given?

9) Location

10) City State ZIP

11) Title

12) Phone Date Month Day Year

Note: Please refer to the OSHA’s Form 301 instructions for further details and regulations.
OSHA Injury Reporting Obligations.

Employers must now report the following to OSHA:

• All work-related fatalities and three or more hospitalizations within 8 hours (same as current requirement)
• All work-related in-patient hospitalizations of one or more employees within 24 hours
• All work-related amputations within 24 hours
• All work-related losses of an eye within 24 hours
OSHA Injury Reporting Obligations.

IN PATIENT HOSPITALIZATIONS:

In-patient hospitalization is defined as a formal admission to the in-patient service of a hospital or clinic for care or treatment.

1904.39(b)(10) Do I have to report an in-patient hospitalization that involves only observation or diagnostic testing?

- No, you do not have to report an in-patient hospitalization that involves only observation or diagnostic testing. You must only report to OSHA each inpatient hospitalization that involves care or treatment.

But, Get it in writing
Making Sense Out of HIPAA Limitations.

Who Does HIPAA Apply To?

1) **“Covered Entities”:**
   - health care providers
   - health care clearinghouses, and
   - group health plans

2) **Business Associates:**
   - performs function on behalf of a covered entity or provides it with specific services, and
   - has access to individually identifiable health information
   - E.g., TPA, attorney, broker, actuary, accountant, service provider
What benefit plans must comply with HIPAA?

“Group Health Plans”
1) an employee welfare benefit plan (defined in ERISA),
   - Including insured and self-insured plans
2) that provides medical care, and
3) either
   - has 50 or more participants; or
   - is administered by an entity other than the employer that established and maintains the plan.
Benefits Plans subject to HIPAA:

- individual plans providing medical care
- major medical plans
- dental and vision plans
- health flexible spending arrangements
- governmental health plans
- church plans

- wellness programs
- employee discount programs that provide discounted medical services
- retiree health plans
- on-site medical clinics (as a provider)
Benefits plans that might have to comply with HIPAA:

- supplemental benefits (cancer insurance, hospital indemnity)
- employee assistance plans
- long-term care
- cafeteria plans
- life insurance

*coverage depends upon whether these plans provide medical care and whether they are maintained by an employer.*
Fully-insured Plans

- Most fully-insured plans will attempt to keep a “hands off” approach
- Summary Health Information
- Enrollment data
- Claims assistance
- FSAs and HRAs
Self-insured Plans

• Self-insured plans generally cannot qualify for “hands-off” status

• Includes the following self-insured arrangements:
  ▪ FSAs and HRAs (limited exception re excepted benefits)
  ▪ Employee Assistance Programs (EAPs)
  ▪ Group health (major medical type) plans
  ▪ Wellness Programs affiliated with a group health plan
Protected Health Information (PHI)

• Individually identifiable health information created or received by a Covered Entity or Business Associate which relates to past, present, or future health care or payment for health care

• Excludes employment records

• Examine source, purpose and use to determine whether a document is an employment record

• ePHI is PHI stored or transmitted electronically
Information that is not PHI

• Summary Health Information (SHI)
  ▪ Info summarizing claims history, expenses or types of claims from which all identifying information has been removed
  ▪ SHI may be used only for modifying or terminating a health plan or seeking bids for coverage
  ▪ Use this information if feasible!

• Enrollment/disenrollment information

• Info you receive in your HR (not health plan) role. Determine which “hat” you are wearing when you received the info.
HIPAA’s Privacy Rule

• Use/Disclosure of PHI without Authorization:
  ▪ Treatment
  ▪ Payment
    • Activity undertaken to fulfill plan responsibility for provision of benefits or obtain reimbursement for health care. Includes eligibility and coverage determinations, adjudication of benefit claims, coordination of benefits, determining cost-sharing, risk adjusting, billing, premium collection, claims management, medical necessity, cost review and utilization review.
  ▪ Healthcare Operations
    • Activities directly related to treatment or payment. Includes internal quality oversight review, credentialing, legal services, audit functions, general administration, placing reinsurance, underwriting renewal or replacement of a contract of health insurance.
  ▪ Other Disclosures
    • To the individual, Business Associates, or as required by law
  ▪ Emergencies
• If not, individual authorization is required
Minimum Necessary Standard

• Covered Entity/Business Associate must limit disclosure of PHI to the minimum necessary
• Only employees with a need to know may have access
• Identify employees who need access to PHI and limit access to those employees and the specific PHI necessary for them to perform job function
• Requests: establish policies and procedures limiting PHI disclosure to amount and type necessary
HIPAA’s Security Rule

• Ensures the confidentiality, integrity, and availability of all electronic PHI (‘ePHI’) that you can create, receive, maintain, or transmit
• Protects against reasonably anticipated threats
• Protects against uses or disclosures of ePHI that can reasonably be anticipated
• Protects regardless of where ePHI is accessed
• Employers with fully-insured plans are generally exempt from the Privacy Rule requirements to adopt privacy policies and procedures and deliver privacy notices; but every plan must comply with the Security Rule
Medical Inquiries and Examinations

• Pre-offer inquiries
  ▪ Should not ask about disabilities or medications

• Post-offer inquiries
  ▪ No need for medical test to be related to job, but withdrawal of offer must be
  ▪ Same test for all applicants for same job
  ▪ Agility and drug tests not medical tests

• Once employment starts
  ▪ Must be job-related
Scenario 2

Jennifer operates a forklift at the Atlanta distribution center. She has commented to the number of coworkers that she suffers from a seizure disorder; however, her medications have the seizures under control and she claims not to have had an episode in several years.

- Can the employer ask Jennifer about her condition and ask for proof that she can safely perform the essential functions of the job?
- Does OSHA maintain physical qualification standards for a forklift operator?
Scenario 3

Bob drives a pickup truck provided by the company. He works as a technician and may carry light materials and tools. Bob has a cardiac condition and the company is aware that he has missed work twice in recent years for bypass operations, and visibly looks unhealthy.

- What can the employer do about its concern that Bob might have a heart attack or pass out while on public roads?
- Can the employer require Bob to satisfy physical qualification standards in the Federal Motor Carrier Safety Administration regulations?
Follow the ADA Process.

Under the ADA, you must **Reasonably Accommodate** a **Disabled** employee or applicant unless doing so is an **Undue Hardship** or creates a **Direct Threat** to health or safety.

An employer must go through an **Individualized Interactive Process** with the employee.

Initiate the interactive process when the employee’s disability is **known** or **apparent**. For example, when:

- Employee requests an accommodation
- Employee presents doctor’s note with work restrictions
- Employee exhausts FMLA leave
- Employer otherwise becomes aware of need for accommodation through third party or observation
Evaluation of Direct Threat and Undue Hardship.

Direct Threat.
- Employee must not pose an imminent risk of substantial harm.
- Fear of a future harm is not sufficient.
- Evaluation of risk should be based on reasonable medical judgment and available objective evidence.

Employers are entitled to know:
- Healthcare provider’s qualifications
- Nature and duration of restrictions but not necessarily entitled to know diagnosis
- Employee’s limitations
- Need for reasonable accommodation
- Suggested accommodation(s)

May request medical documentation and information.
- Be clear on what you are seeking so that employee and physician know the request is narrowly tailored to the restriction or concern at issue

If medical information provided still unclear, may require Independent Medical Examination (IME).
• 17. **When may an employer refuse to hire, terminate, or temporarily restrict the duties of a person with epilepsy because of safety concerns?**

An employer only may exclude an individual with epilepsy from a job for safety reasons when the individual poses a direct threat. A "direct threat" is a significant risk of substantial harm to the individual or others that cannot be eliminated or reduced through reasonable accommodation. This determination must be based on objective, factual evidence, including the best recent medical evidence and advances in the treatment of epilepsy.

In making a direct threat assessment, the employer must evaluate the individual's present ability to safely perform the job. The employer also must consider:

- the duration of the risk;
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur; and
- the imminence of the potential harm.

The harm must be serious and likely to occur, not remote or speculative. Finally, the employer must determine whether any reasonable accommodation (for example, temporarily limiting an employee's duties, temporarily reassigning an employee, or placing an employee on leave) would reduce or eliminate the risk.
ADA Confidentiality Obligation

Medical information obtained from offerees or employees must be kept confidential.

- information obtained regarding the medical condition or history of the offeree/employee is collected and maintained on separate forms and in separate medical files with restricted access and is treated as a confidential medical record, except that:
  - supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
  - first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
  - government officials investigating compliance with this chapter shall be provided relevant information on request.
EEOC Guidance.

18. May an employer require an employee who has had a seizure at work to submit periodic notes from his doctor indicating that his epilepsy is under control?

• Yes, but only if the employer has a reasonable belief that the employee will pose a direct threat if he does not regularly see his doctor. In determining whether to require periodic documentation, the employer should consider the safety risks associated with the position the employee holds, the consequences of the employee's inability or impaired ability to perform his job, how long the employee has had epilepsy, and how many seizures the employee has had on the job.

1. FMCSA Physical Qualifications for Drivers.

• The FMCSA is responsible for the medical certification of drivers of commercial motor vehicles operating in interstate commerce as defined by 49 C.F.R. 390.5. A commercial motor vehicle (CMV) is defined as any motor vehicle used on a highway in interstate commerce to transport passengers or property when the vehicle generally has a gross weight of at least 10,001 pounds and is designed or used to transport more than eight passengers (including the driver) for compensation. Id.
Scenario 4

Sam is known to be a heavy drinker. He often comes to work smelling of alcohol, unshaven, and looks rough, but has not experienced significant performance problems. He drinks heavily at any firm event, but has not engaged in any conduct warranting discipline. Coworkers comment that they are unnerved by how completely drunk he gets when he is with them. He passes out, and has been observed leaving a party to drive when he was probably impaired.

- He is a salesperson who uses his own cars to travel to see customers.
- What can the company do to limit its risk?
- Can the company approach him about reports and observations about his non-work related drinking?
What about the ADA?

- Alcoholism will most likely be a disability.
- A rehabilitated drug addict is protected under the ADA.
- Leave of absence for rehabilitation may be considered reasonable accommodation (before violation of policy).
- A current user of illegal drugs is not protected under the ADA.
- An individual with alcoholism is protected under the ADA, but may be disciplined for violating Company policy or work rule.
Drug & Alcohol Policies: The ADA

• The EEOC regulations explain that “individuals disabled by alcoholism are entitled to the same protections accorded other individuals with disabilities.”

• Although courts generally do not consider alcoholism a “per se” disability – an alcoholic is a person with a disability when the condition “substantially limits” him or her in at least one “major life activity.”

• The ADA also protects individuals who do not currently drink alcohol but have a record of alcoholism.
Drug and Alcohol Policies – the ADA

• Employers may require an employee who is an alcoholic or who is currently using illegal drugs to meet the same performance standards of performance and behavior as other employees;

• Employers do not have to tolerate poor job performance or unsatisfactory behavior such as absenteeism, tardiness, insubordination or on the job accidents related to an employee’s alcoholism if similar performance or conduct would not be tolerated in other employees.

• The ADA specifically permits employers to prohibit the use of alcohol and the illegal use of drugs in the workplace and to discipline employees for such use.

• Employers may maintain a drug free workplace standard.
Drug & Alcohol Policies: Family and Medical Leave Act (FMLA)

- The FMLA provides twelve weeks of leave and reinstatement for employee with a “serious medical condition.”
- In most cases, drug addiction will be considered a “serious medical condition.”
- Substance Abuse Rehabilitation may count as FMLA leave.
- An employer is not prohibited from taking action against an employee for illegal drug use even if the employee who has entered a treatment program if the employer has a uniform policy that such use will result in termination.
Scenario 5

Marie works as an analyst in a white collar setting entering data, talking on the phone, and coordinating with various coworkers in adjoin cubes. Marie reported to work with several heavy bandages on her left arm and hand. Marie explained that she has MRS and does not know how she contracted it. She said that her doctor told her that she poses no infection risk as long as she keeps her open wounds covered. Employees are concerned that they may get exposed from doorknobs, keyboards, or from the break room which everyone shares.

- Should the employer approach Marie?
- What should the employer tell employees?
Scenario 6

Several coworkers advise the HR director that Mickey told them that he has TB, but it is okay to work. Mickey has not approached HR or the supervisor, and employees are concerned about exposure risk.

- How should HR approach Mickey?
- What should HR tell coworkers?
- How is TB regulated by state public health authorities question?
Infectious Disease - TB.

• Follow Public Health Guidance, including from the CDC, NIOSH, OSHA, and state Health departments. CDC/NIOS Site on Workplace TB Issues: [https://www.cdc.gov/tb/](https://www.cdc.gov/tb/)

• States aggressively manage TB, requiring healthcare providers to notify the public health department and even pursuing criminal actions for failure to do so.

• When someone says they have TB,” that can mean many things.

• TB is not as easily transmitted in most settings as employees may fear. See NIOSH section, “What to Do if You are Exposed.” [https://www.cdc.gov/tb/topic/basics/exposed.htm](https://www.cdc.gov/tb/topic/basics/exposed.htm)

• Manage information and employee fear.
Infectious Disease – MRSA.

From the CDC:
Methicillin-resistant *Staphylococcus aureus* (MRSA) is a cause of staph infection that is difficult to treat because of resistance to some antibiotics.

How do I prevent the spread of MRSA?

- Cover your wounds with clean, dry bandages until healed.
  Follow your healthcare provider’s instructions about proper care of the wound. Pus from infected wounds can contain MRSA.
  - Do not pick at or pop the sore.
  - Throw away bandages and tape with the regular trash.
- Clean your hands often.
  You, your family, and others in close contact should wash hands often with soap and water or use an alcohol-based hand rub, especially:
  - after changing a bandage
  - after touching an infected wound
  - after touching dirty clothes
- Do not share personal items such as towels, washcloths, razors, and clothing, including uniforms.
- Wash laundry before use by others and clean your hands after touching dirty clothes.
Scenario 7

Employer offers a wellness program. Employees who participate in the employer’s group health plan are eligible to participate in the wellness program, and can earn a reward of $50 off their monthly premium if they complete a HRA.

- Is the wellness program covered by HIPAA?
- How can the employer use the information obtained from the HRA?
- Is the $50/month reward permissible?
FISHER & PHILLIPS LLP

IS DEDICATED EXCLUSIVELY TO REPRESENTING EMPLOYERS IN
THE PRACTICE OF EMPLOYMENT, LABOR, BENEFITS, OSHA, AND
IMMIGRATION LAW AND RELATED LITIGATION.

THESE MATERIALS AND THE INFORMATION PROVIDED DURING
THE PROGRAM SHOULD NOT BE CONSTRUED AS LEGAL ADVICE
OR AS CRITICAL OF THE CURRENT OR PAST ADMINISTRATIONS.

THIS PRESENTATION DOES NOT CONSTITUTE LEGAL ADVICE.
EVERY SITUATION IS DIFFERENT AND MAY REQUIRE
CONSULTATION WITH COUNSEL.
Thank You

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