

## **Sources of EAP and Employer Risk in Fitness for Duty Evaluations**

by David C. Fisher, Ph.D., LP, ABPP

EAPs and employers often unknowingly expose themselves to imminent risks associated with low quality psychological and psychiatric fitness for duty and risk assessments. Such risks may include employee lawsuits, physical danger and financial consequences. Risk resulting from poorly conducted evaluations can be prevented by the entity that arranges the evaluation, commonly referred to as the Fitness for Duty Evaluation Facilitator. Some of the most common sources of risk are:

### **Unnecessary personal information included in reports**

Most treatment-oriented doctors routinely include confidential health care information in their reports. In treatment situations, this is appropriate, but in a forensic context where reports are delivered to employers, it creates a potential for considerable risk. To avoid compromising the employee, most confidential medical information, such as diagnosis, prescription medications, treatment, lifestyle and other personal information should usually be withheld from such reports. If this information is provided to an employer, an employee could then allege that the employer took action based not on their behavior, but rather due to a prejudice against people with similar medical diagnoses or personal characteristics. Further, some courts have held that including such information is unnecessarily intrusive, and a violation of an employee's right to privacy.

### **Missing or improper consent and release forms**

FFD professional should use specialized employee consent and release forms, designed for fitness for duty and risk assessments. These forms should be reviewed and signed prior to commencing the evaluation. Professionals who do not routinely perform forensic assessments often do not have such forms. Not only do these forms cover release of information issues, but they also address the nature of the relationship established between the doctor and the employee, the potential uses of the information and the foreseeable consequences of completing or refusing to complete the evaluation.

### **Budget evaluations**

Low evaluation fees can signal inadequate forensic assessment expertise. So how do the employer and EAP determine if an evaluation, particularly a low-priced one, is well done and will protect them legally while being fair to an employee? The first step is to consider what goes into an assessment. Skilled forensic psychologists and psychiatrists typically charge between \$200 and \$500 per hour. In a standard psychiatric or psychological fitness for duty or risk assessment, the FFD professional might spend about 7 hours of professional time. This often includes objective psychological testing, interview(s) of work supervisors, EAP or HR professionals, or even an employee's friends and family members. Often the FFD professionals perform an extended clinical interview as well as records review. It is common for low-cost evaluations to omit these often-critical components, which might be necessary to defend employer and EAP decisions, and demonstrate good faith employee management.

### **No standardized assessment protocol**

Unfortunately, most psychologists and psychiatrists do not routinely use a formalized protocol in their fitness for duty and risk assessments. In the absence of a formal assessment plan, the evaluation can be inadequate, therefore increasing the potential risk to EAPs and employers. Following a structured assessment protocol is persuasive evidence that evaluations are performed according to national best practice standards. Also, when FFD experts use assessment protocols, national employers benefit since evaluations are then handled in a consistent manner - regardless of the location of the employee or the professional selected to perform the assessment. Obviously this has implications for employees who might claim that they were treated differently than other employees undergoing similar assessment.

### **No collateral interviews**

FFD professionals should generally be encouraged to contact individuals who know the employee being evaluated. Most commonly, these contacts would include workplace supervisors, spouses, treating doctors and sometimes co-workers. Often professionals who are unfamiliar with forensic assessments will neglect to pursue the critical information that can only be obtained through collateral interviews. Not only can these interviews enable forensically skilled doctors to formulate a solid opinion, but they also demonstrate a good faith effort to obtain all information relevant to an employee.

### **Improperly vetted doctors**

Prior to completing evaluations, the professional's credentials should be verified. This might include licensure status, malpractice and disciplinary history as well as previous lawsuits. EAPs and employers may be unable to accomplish this critical task when coordinating rapid response risk assessments, therefore necessitating the use of a Fitness for Duty Evaluation Facilitator.

### **Using professionals without the highest possible degrees**

Experts in the field generally agree that the highest level of training, such as a Ph.D., Psy.D. or M.D. is best. Some states have adopted statutes that require doctoral level credentials for conducting certain FFD evaluations. Further, a doctoral degree in psychology is recognized by the American Psychological Association as the basic credential for psychologists.

A second issue to consider when selecting a professional is the subjective impression that the expert will present to others. While there are a number of components that comprise a thorough, fair and comprehensive evaluation, it is important to remember that many legal cases revolve around an expert's credibility. If the opposing attorneys select a better qualified professional, even though your expert may have provided an excellent assessment, the judge or jury may nonetheless be swayed by the opposing side. In fact, research has demonstrated, that many judges strongly give preference to evaluations conducted by psychiatrists and doctoral-level psychologists (Redding, Floyd and Hawk; 2001). Other research has shown that juries are often confused by

testimony regarding psychological issues, and consequently tend to side with those experts perceived as having earned the highest degrees.

Individuals with high academic degrees stand a greater chance of winning, and therefore protecting their clients in litigation. Further, some states' mandates for doctoral degrees are a clear indication of the value placed on credentials. With millions of dollars and employee wellbeing at stake, most employers and EAPs are well advised to seek the best qualified and credentialed experts for their psychological fitness for duty and violence risk assessments.

### **Giving incomplete information to the Fitness for Duty Evaluation Facilitator upon referral**

Employers with dangerous or psychiatrically impaired employees often have a considerable amount of information about those individuals' workplace behaviors. This information is often a critical part of the psychological/psychiatric assessment process and can only be provided by the employer. It includes details about what employees said, how they acted, the physical and social environment in which they work, workplace performance, supervisor names, managerial practices and job duties.

Understandably, employers are sometimes reluctant to divulge detailed information about their employees. Of course, providing confidential employee data should never be done without careful consideration of the benefits and costs of doing so. Some employers are concerned about retaliation from the employee. Others want the doctor to form their opinion independently of company managers, whom they think might introduce unfair bias into the assessment. Still others are concerned about company policies or agreements with unions regarding the release of confidential data.

While there are legitimate reasons for withholding information, not providing it to the professional who performs the assessment can increase the risk of an inaccurate evaluation. To better understand its relevance, consider how this information enables professionals to provide a thorough and unbiased assessment:

1. Detailed employee information helps the Fitness for Duty Evaluation Facilitator select the best professional to evaluate the employee.
2. Providing the names of treating professionals helps others avoid selecting professionals who may have a conflict of interest. This ensures that the evaluation will be performed in an unbiased manner, and will most likely withstand subsequent legal challenges.
3. Detailed information about workplace behavior often gives the professional critical data to assess the likelihood of violence. Past behavior is often the best predictor of future behavior, and nowhere is that more important than in the assessment of risk. Having considerable information about the employee's history related to violence or threats will greatly assist in this regard.
4. Employer observations help the professional more thoroughly evaluate employee truthfulness by verifying or refuting employee self reports.
5. Information about coworkers who may have been threatened, or might otherwise be at heightened risk of attack, will likely assist the doctor in protecting those individuals.
6. Such information helps the FFD evaluator learn about managerial style and the environment in which the employee works. This is particularly helpful when a professional is requested to provide management suggestions.

7. Details about employee behavior facilitate the professional's selection of which objective psychological tests to administer. Knowing if others have observed memory problems, difficulties maintaining concentration, argumentativeness, and direct threats of violence may lead evaluators to select among a wide variety of tests, each designed for a different purpose.
8. Some employees (such as those with brain injuries, stroke, serious mental illness etc.) cannot accurately report their behavior, including their abilities and limitations. Without additional data from the employer, the doctors often face serious obstacles in obtaining information that will help them accurately assess the employees' problems.
9. Employees concerned about the repercussions of their behavior tend to minimize or deny past events during their conversations with the expert. If the expert has not been provided any additional data, they likely have to accept what the employee tells them.

### **Using doctors who have treated the employee or who are on the employer's staff**

It is best for employers who need to make managerial decisions to routinely seek opinions from neutral parties. Professionals who provide treatment to the employee, or are on the employer's payroll, are generally not considered to be neutral within the context of FFDEs and litigation. Instead, they are often viewed as having allegiance either to the employee (as a treating professional) or to the employer who pays both of their salaries.

The roles of treating professional and Independent FFDE Examiner virtually always conflict with each other, because a treating professional is not necessarily obligated to protect the interests of the employer. Consider the dilemma of a treating professional whose dangerous patient could experience increased self-esteem as a result of a return to work. Would that professional recommend a return to work to help his/her patient (despite the risks to the employer)? Or would s/he suggest that his/her patient stay away from the workplace to protect the employer, but sacrifice the patient's opportunity to improve his/her self-esteem? The problem in this situation is that the employer also hires the treating professional. As such, this professional has two clients (the employee and the employer), and the interests of those two parties are not the same.

Consider further how a treating professional's financial interests could compound perceived conflicts of interest. Imagine the treating professional who determines that an employee is unfit to return to the workplace, and should first receive intensive psychiatric treatment at his/her own office. As a result, the employee might be concerned that the treating professional refused to return him/her to work in order to generate revenue for the professional's own private practice. Conversely, what if the professional suggested that the employee had been able to return to the workplace? Here, the employer might worry that this opinion was given in part, to reduce the professional's already burdensome private practice schedule.

When employers ask professionals on their own staff to perform FFDEs, they open the door to other problems. Consider what could happen if the staff professional determined the employee posed a physical risk to others and the employee consequently lost his job. In this case, the dismissed employee can allege that the professional is biased, and only concerned about the interests of their mutual employer. While convenient for

the employer, this path offers limited protection from allegations of professional conflict of interest and is often considered to present a high level of risk for all concerned.

### The EAP selects the doctor

Many EAPs lack the ability to ensure that all of the precautionary measures listed above have been taken, thus potentially exposing all parties to risk. Further, being intimately involved in the evaluation process can encourage employees to believe that the EAP is working against their best interests, thus creating an impression that could greatly interfere with the EAP's future relationships with other employees.

### Conclusion

In conclusion, low quality fitness for duty and risk assessments are associated with a high level of risk. Numerous steps can be taken, however, to reduce EAP and employer risk. Among these are the selection of a highly skilled, well-credentialed professional to perform the assessment, the use of formalized assessment protocols and administration of objective psychological testing. Professionals performing the assessments should be provided with complete and detailed information about workplace behavior, encouraged to perform collateral interviews and required to use consent and release forms that are specifically tailored to this type of assessment. Collectively, these measures will increase the value of the assessment, while minimizing risk for all parties.

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