

## VICE PRESIDENT'S MESSAGE

Brian Murphy, PT, DPT, OCS, MTC

This is an exciting time to position your practice for specialization in Occupational Health Physical Therapy. Employers are seeking preferred providers with expertise to keep their workforces healthy and productive through prevention of injuries, promotion of safe physical activity, and safe therapies to alleviate musculoskeletal pain and dysfunction. It has been an honor to serve as your OHSIG Vice President and Education Chair over my 3-year term. We still have much more to be done to empower and position our members for excellence in occupational health physical therapy and prevention. We have many exciting projects moving forward and will be looking for volunteers to assist as we implement a new strategic plan in 2020. We are making great progress with our mentorship program and Work Rehab CPG initiatives. I also want to thank everyone that attended and assisted with our last Webinar on Exoskeletons, particularly our speaker, Matthew Marino.

As we move forward to the upcoming Combined Sections Meeting in Denver, I am excited to promote the OHSIG's general programming session, Friday, February 14th from 8 a.m. to 10 a.m. This will be preceded by a continental breakfast for OHSIG networking that starts at 7:15 a.m. This course is titled *Best Practices in Functional Capacity Evaluation: Raising the Bar*, presented by Steve Allison and David Hoyle. It will be a great opportunity to learn from leaders in Occupational Health Physical Therapy.

If you have any ideas or suggestions for us to consider, please reach out to me or any of our officers listed on the OHSIG web page: <https://www.orthopt.org/content/special-interest-groups/occupational-health>. Your active involvement helps us continue to advance our mission. This issue of *OPTP* includes the release of the newly updated *Current Concepts on Regulatory Compliance in Occupational Health*. An electronic version of this document with active reference links to more information may be accessed at <https://www.orthopt.org/content/special-interest-groups/occupational-health/current-concepts-in-occ-health>. Enjoy!

## Current Concepts in Occupational Health: Regulatory Compliance

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### PREFACE

This document for Current Concepts in Occupational Health Regulatory Compliance was created to inform physical therapy professionals about key regulations that impact services to promote workplace safety, health, and job accommodation. This document is retitled and represents a major update to replace "Occupational Health Physical Therapy: Legal and Risk Management Issues Guidelines" that was adopted on July 11, 2011.

Hyperlinks are provided to underlined text throughout this document to enable navigation access to more in depth informa-

tion on key regulations and interpretive guidance, rather than including a reference list. If these links are not present or active, then the user is encouraged to download the electronic pdf version of this document and other OHSIG documents for Current Concepts in Occupational Health of interest at: <https://www.orthopt.org/content/special-interest-groups/occupational-health/current-concepts-in-occ-health>.

### INTRODUCTION

The role of physical therapy professionals in Occupational Health has continued to expand and evolve to prevent injuries and improve employee health and productivity. This supports the vision of the American Physical Therapy Association (APTA) to transform society by optimizing movement to improve the human experience. Below are references to key regulations that impact practice; however, the readers should be aware that individual state laws may have additional restrictions that relate to employment discrimination and occupational health practice. Health care services provided to an employee that is disabled or working with restrictions are more complex, because the employer is a third party that should be engaged through an integrated care process to address job-specific return to work barriers.

### REFERENCES TO KEY REGULATIONS

1. **Workers' Compensation Insurance Programs** are governed by state and federal laws whose central feature is the creation of "no fault" insurance coverage for injured workers. While coverage varies from state to state, Workers' Compensation programs generally cover injuries that "arise out of, and in the course of" employment by providing wage replacement and medical payments to cover a worker's injury. Generally, Workers' Compensation claims are managed according to rules and regulations that are set by state or federal regulatory bodies. Decisions about compensation awards also may be appealed through the court systems. Some states allow the employer to direct care to preferred treatment providers, whereas others allow for choice by the injured worker. There are 4 monopolistic states remaining for workers' compensation insurance in the U.S.—North Dakota, Ohio, Wyoming, and Washington. Two states, Texas and Oklahoma, have laws that allow employers to opt out from having Workers' Compensation coverage.
2. **Social Security Amendments of 1956** modifies the Social Security Administration (SSA) program that began in 1935 to provide for monthly benefits to permanently and totally disabled workers aged 50-64; to reduce the age to 62 as the retirement age for benefits to certain women; and to provide for continuation of a child's insurance benefits who are disabled before attaining 18 years of age.
3. **Title VII of the Civil Rights Act of 1964** prohibits employment discrimination based on race, color, religion, sex, and national origin by federal agencies and businesses with 15 or more employees. Title VII permits employment tests as long as they are not "designed, intended or used to discriminate because of race, color, religion, sex or national origin." Em-

- ployers are not permitted to (1) adjust the scores of, (2) use different cutoff scores for, or (3) otherwise alter the results of employment-related tests on the basis of race, color, religion, sex, or national origin.
4. **Age Discrimination in Employment Act of 1967 (ADEA)** protects certain applicants and employees over the age of 40 from employment discrimination based on age.
  5. **Occupational Safety and Health Act of 1970**, or “OSH Act,” was enacted to assure safe and healthful working conditions for working men and women; by authorizing enforcement of the standards developed under the Act; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions; by providing for research, information, education, and training in the field of occupational safety and health; and for other purposes. The OSHA Act contains a general duty clause requires each employer to provide a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.
  6. **Section 501 of the Rehabilitation Act of 1973** prohibits federal government agencies from discriminating against job applicants and employees based on disability, and requires affirmative action for employment of persons with disabilities.
  7. **The Pregnancy Discrimination Act of 1978** amends Title VII of the Civil Rights Act of 1964 to forbid discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.
  8. **Part 1607 Uniform Guidelines for Employment Selection Procedures** were issued by the Equal Employment Opportunity Commission, or “EEOC,” in 1978 to incorporate a single set of principles that are designed to assist employers, labor organizations, employment agencies, and licensing and certification boards to comply with requirements of Federal law prohibiting employment practices that discriminate on grounds of race, color, religion, sex, and national origin. They are designed to provide a framework for determining the proper use of tests and other selection procedures that are used as a basis for any employment decision.
  9. **The Americans with Disabilities Act of 1990**, or “ADA,” prohibits discrimination against people with disabilities in employment (Title I), in public services (Title II), in public accommodations (Title III), and in telecommunications (Title IV). **Title I of the ADA** prohibits private businesses with 15 or more employees from discriminating against a “qualified individual with a disability” who, with or without reasonable accommodation can perform the essential functions of the job. This law protects persons that (1) have a physical or mental impairment that substantially limits one or more life activities, (2) have a record of such an impairment, and (3) are regarded as having such an impairment.
  10. **Family and Medical Leave Act of 1993**, or “FMLA”, provides certain employees with up to 12 weeks of unpaid, job-protected leave per year and requires that group health benefits be continued during FMLA leave, if the employee is unable to perform the essential functional of the job due to having a serious illness or must take leave to care for a family member under specific circumstances and qualifying criterion.
  11. **Health Insurance Portability and Accountability Act of 1996 (HIPAA)** and subsequent privacy and security rules required HHS to adopt national standards for electronic health care transactions and code sets, unique health identifiers, and security.
  12. **ADA Amendments Act of 2008 (ADAAA)** amended the ADA and section 705 of the Rehab Act to make a number of significant changes to the meaning and interpretation of the ADA definition of “disability” to ensure that definition would be broadly construed and applied without extensive analysis by the courts.
  13. **Genetic Information Non-disclosure Act of 2008**, or “GINA,” restricts employers and other entities from requesting, requiring, or purchasing genetic information, and strictly limits the disclosure of genetic information.
  14. **2010 ADA Standards for Accessibility Design** are revised regulations for Titles II and III of the Americans with Disabilities Act of 1990 “ADA” in the Federal Register on September 15, 2010. This sets minimum requirements for newly designed and constructed or altered State and local government facilities, public accommodations, and commercial facilities to be readily accessible to and usable by individuals with disabilities.
  15. **Title I of the Affordable Care Act of 2010**, or “ACA,” provides coverage in Sec. 2713 for Preventive Health Services. A group health plan and a health insurance issuer offering group or individual health insurance coverage shall, at a minimum provide coverage for and shall not impose any cost sharing requirements for— “(1) evidence-based items or services that have in effect a rating of ‘A’ or ‘B’ in the current recommendations of the United States Preventive Services Task Force.
  16. **Incentives for Nondiscriminatory Wellness Programs in Group Health Plans** was enacted in 2013 for implementation of the ACA increased the maximum permissible reward under a health-contingent wellness program offered in connection with a group health plan (and any related health insurance coverage) from 20% to 30% of the cost of coverage. The final regulations further increase the maximum permissible reward to 50% for wellness programs designed to prevent or reduce tobacco use. These regulations also include other clarifications regarding the reasonable design of health-contingent wellness programs and the reasonable alternatives they must offer in order to avoid prohibited discrimination. Note: Further guidance about incentives is expected to be issued soon.
  17. **EEOC Final Rule 29 CFR 1630** was enacted in 2016 to implement Regulations under the ADA to address the extent to which employers may use incentives to encourage employees to participate in wellness programs that ask them to respond to disability-related inquiries and/or undergo medical exams.
  18. **EEOC Final Rule 81 FR 31143** was enacted in 2016 to implement GINA to address the extent to which an employer may offer an inducement to an employee for the employee's spouse to provide information about the spouse's manifestation of disease or disorder as part of a health risk assessment (HRA) administered in connection with an employer-sponsored wellness program.
  19. **Affirmative Action for Individuals With Disabilities in Federal Employment** are new regulations introduced by EEOC in 2018 for federal agencies to set employment goals to have 12% of its workforce become individuals with disabilities,

and 2% of its workforce be people with “targeted” disabilities such as blindness, deafness, paralysis, convulsive disorders, and mental illnesses among others. The regulation does not apply to the private sector or to state or local governments.

20. **Part 60-741 Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors Regarding Individuals with Disabilities** was enacted in 2019 to promote compliance with section 503 of the Rehabilitation Act of 1973, as amended (29 U.S.C. 793). This requires Federal contractors and subcontractors with government contracts in excess of \$15,000 to take affirmative action to employ and advance employment qualified individuals with disabilities. Contractors are expected to review all physical and mental job qualification standards to ensure that, to the extent qualification standards tend to screen out qualified individuals with disabilities, they are job-related for the position in question and consistent with business necessity. This regulation established an affirmative action goal of 7% of the workforce for employment of qualified individuals with disabilities for each job group in the contractor's workforce, or for the contractor's entire workforce.

## RELEVANCE TO OCCUPATIONAL HEALTH SERVICES

### Employment Medical Examinations

The employer and physical therapy provider should ensure that employment medical exams are consistent with regulatory requirements, best practices, and business necessity. The medical exam process should be uniformly applied to all entering employees in the same job category. An employer's decision to reject a job candidate based on medical reasons must be justified by information that is directly related to the candidate's job fitness-for-duty. Examiners should therefore be aware of essential job functions and job qualification criteria before administering a post-offer employment screen. The ADA requires employers to treat any medical information obtained from a disability-related inquiry or medical exam as a confidential medical record that is stored in a separate location from the employee's file. A good practice by employers is not to acquire additional information from the examiner that is not relevant to job fitness, insurance purposes, or mandated health surveillance programs. Physical therapy professionals may be called upon by the employer to perform a functional job analysis to validate the physical demands for essential job functions. For example, verifying the loads and methods for materials handling required to perform essential job functions may be used as evidence to demonstrate that passing criteria for a lift or carry task is valid.

Title I of the ADA of 1990 and related case law has prompted employers to take a more job-relevant and functional approach to medical exams that are administered to job candidates. The ADA prohibited most disability-related inquiries and medical exams until after a job applicant accepts a conditional offer of employment. Tests for illegal drug use and federally-mandated exams for certain industries such as Department of Transportation (DOT) physicals are exceptions that may be administered pre-employment before extending a job offer. Before extending a job offer, an employer may also ask a job applicant whether he/she can perform job-related functions or ask him/her to perform an agility test to demonstrate the ability to perform representative job tasks (such as climbing a ladder or lifting a weight), provided no medical exam or monitoring is performed. If an accommodation is requested at any point of the hiring or medical exam process, the employer is expected to engage with the job candidate in an interactive process

to evaluate whether the requested accommodation is reasonable and would not impose an undue hardship to perform the essential functions of the job.

In 2000, EEOC issued Enforcement Guidance: Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act. During the post-offer phase of employment, the scope of the medical exam remains relatively unrestricted, provided the scope of exams are consistent for all workers in the same category of jobs. For example, a post-offer employment exam may include a common set of health questions or biometrics to establish a baseline for health history, movement deficits, or other risk factors. One exception is that GINA regulations issued in 2008 specifically prohibit medical inquiries or tests that relates to genetic or family history during employer-mandated medical exams. Since most medical inquiries and exams are prohibited until after a conditional job offer, employers must be prepared to justify withdrawal of the job offer based on information that is functional and relevant to job performance or business necessity.

It is important to recognize that job candidates in protected categories such as females, older workers, and persons with disabilities may demonstrate lower performance results on employment tests that assess fitness for jobs with higher physical demands. The employer must be prepared to justify business necessity when the exam process or pass/fail criteria have an adverse impact on categories of persons who are protected by the Civil Rights Act, ADEA, and ADA. EEOC's Uniform Guidelines for Employment Selection of 1978 state that where cutoff scores are used, they should normally be set to be reasonable and consistent with normal expectations of acceptable proficiency within the workforce.

EEOC Enforcement Guidance on Disability Inquiries and Medical Exams states that once an employee is doing the job, his/her actual performance is the best measure of ability to do the job. After employment begins, the employer may make disability-related inquiries and require medical exams only if they are job-related and consistent with business necessity. A worker may be required by the employer to submit to an employment medical exam under only limited circumstances after employment begins. If an employee is applying for a new job, an employer should treat the employee as an applicant for the job, thus following the same medical exam process that is required for all job applicants that are considered for the same category of jobs.

Employees do not need to be treated as applicants when they are non-competitively entitled to the new position based on seniority or satisfactory performance, unless the new position has different medical standards or physical requirements than the previous position.

The employer may also require an employee to undergo a medical exam if the employer has a reasonable belief that an employee's ability to perform essential job functions will be impaired by a medical condition. A fitness-for-duty evaluation is a medical evaluation performed by a health care professional at the request of the employer. Common circumstances that justify the need for a fitness-for-duty evaluation include:

- Application for pay or compensation as a result of an on-the-job injury or disease.
- Return from absence due to a work-related or non-occupational injury or illness.
- Exceeding employer policy limits for temporary restricted duty.
- Request for job accommodation.

- Reports of worker' difficulty performing work duties.
- Documentation of declines in expected job performance.
- Evidence that the worker may pose a direct threat of serious harm to him/herself or others.

The ADA and FMLA regulations permit the employer to require clearance from the employee's personal physician for the employee to perform medical exam tasks or return to job activities that require physical exertion, e.g., heavy lifting. A best practice for this is to develop and apply a uniform policy or practice that requires all similarly situated employees with the same job category or health issue to obtain and present a certification by the employee's health care provider that clears the employee to resume work and perform all essential job functions. For workers who experience physical difficulty due to a temporary health condition such as pregnancy, accommodation may be warranted to avoid strenuous exertion during job or medical exam tasks until the worker is medically stable after the pregnancy is over. In addition, periodic medical exams and other monitoring may be provided under specific circumstances such as OSHA medical screening and surveillance of workers exposed to high noise levels or chemicals, Department of Transportation Physical Examinations to medically-certify fitness-for-duty of commercial motor vehicle drivers, or Federal Aviation Administration medical certification of pilots.

### Job Accommodation

Employment discrimination against qualified individuals with a disability is prohibited for agencies of the Federal Government by Section 501 of the Rehabilitation Act of 1973 and for private businesses with 15 or more employees by the ADA of 1990. Additionally, state-specific regulations may provide additional protections or remedies to protect the rights of persons that (1) have a physical or mental impairment that substantially limits one or more life activities, (2) have a record of such an impairment, and (3) are regarded as having such an impairment. These regulations encourage the implementation of reasonable accommodations to enable a person with a disability to perform the essential functions of an employment position. The EEOC provides employers with guidance to frequently asked questions such as "How are essential functions determined" and other frequently asked ADA questions at the web page: The ADA: Your Responsibilities as an Employer. Federal contractors and federal government employers have affirmative action goals to employ a percentage of the workforce that have disabilities. EEOC Guidance to common questions by job applicants with disabilities is available at: Job Applicants and the Americans with Disabilities Act (<https://www.eeoc.gov/facts/jobapplicant.html#potential>).

The ADAAA broadened the statutory definition of disability for the ADA and rejected the holdings in several Supreme Court decisions to make it easier for an individual seeking protection to establish that he or she has a disability. The critical inquiry under the ADAAA is no longer based on whether the individual has a disability, but whether the covered entities have engaged in an interactive process to support reasonable accommodation of qualified applicants or employees who report having a disability. If a job accommodation is requested by a job candidate or incumbent employee, physical therapy professionals may be consulted by the employer or other parties to assist with functional job analysis of physical demands of essential and marginal job functions, worker evaluation to assess functional limitations, and implementation of reasonable accommodations to enable safe and productive job

performance.

Workers' compensation claims are generally exempt from HIPAA privacy rules; however, HIPAA privacy rules would apply to medical records requests and communications with other stakeholders when addressing job accommodation requests for employees with non-occupational health conditions. The FMLA regulations also apply to job accommodation requests for reduced work schedule or need for additional rest breaks.

Once a person is hired and has started work, an employer generally can only ask medical questions or require a medical exam if the employer needs medical documentation to support an employee's request for an accommodation or if the employer believes that an employee is not able to perform a job successfully or safely because of a medical condition. Medical exams may be challenged for their validity and whether they were performed in accordance with business necessity.

The EEOC's website ([www.eeoc.gov](http://www.eeoc.gov)) contains a number of documents addressing various ADA issues, including the following:

- Definition of Disability
- Reasonable Accommodation and Undue Hardship
- Preemployment Disability-Related Questions and Medical Examinations
- The ADA and Psychiatric Disabilities
- Pregnancy Discrimination

### Functional Capacity Evaluation

A functional capacity evaluation (FCE) is a performance-based medical assessment of an individual's physical and/or cognitive abilities to safely participate in work and other major life activities. In a Job/Occupation Specific FCE, the worker's functional abilities are matched directly to the physical and/or cognitive demands of a specific job(s) or a specific occupation(s). This provides a more comprehensive assessment job fitness-for-duty than physician estimates of work restrictions based on worker self-reports or physical exam findings. An emerging trend for best practice in workers' compensation is to authorize physical and occupational therapists to recommend work restrictions. For example, the State of Washington has implemented a Job Analysis form that includes a review section for the FCE Therapist and treating occupational/physical therapist to recommend return to full duty, return with modifications, etc. This is consistent with research that supports the use of performance-based FCEs to provide more objective and accurate evidence to substantiate worker restrictions.

An "Any Occupation FCE" may be requested to justify the need for disability benefits in long term disability claims, Social Security disability claims, or Workers' Compensation claims when it is known that the worker will not be returning to his/her specific job. Social Security regulations define disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment(s) that can be expected to result in death or has lasted or can be expected to last for a continuous period of not less than 12 months. Objective evidence about functional limitations of claimants with severe impairments must be compared to the functional demands of representative occupations in the national economy to determine if substantial gainful employment opportunities exist.

Currently, the Social Security Administration (SSA) uses data for Selected Characteristics of Occupations defined in the Dictionary of Occupational Titles (DOT) to make this determination; however, the DOT has not been updated in more than 20

years. The worldwide acceptance of the DOT as a taxonomy for job demands has prompted occupational health professionals to use similar terminology when recommending physical work restrictions for workers. The SSA is implementing a new Occupational Information System to replace the DOT that will incorporate changes in methods for collecting job demands through the Occupational Requirements Survey (ORS). The Bureau of Labor Statistics (BLS) is conducting the ORS to provide the SSA with job-related information regarding physical demands; environmental conditions; education, training, and experience; as well as cognitive and mental requirements of work in the national economy. The new terminology and methods described in the Occupational Requirements Survey (ORS) Collection Manual Version 4.1 is a new reference for physical therapists and other occupational health professionals to consider when doing a job analysis and performing worker exams to relate worker abilities to job demands.

Physical therapists who perform FCEs for workers' compensation, disability, and legal cases should be well-versed in the ADA and applicable state workers' compensation laws when designing FCE procedures and evaluating worker restrictions. For workers' compensation claims, the physical therapist may be asked to clarify which functional work restrictions are based solely on allowed conditions for the claim and determine the prognosis for functional improvement with therapy. In contrast, an employer's response to requests for job accommodation requests must consider health-related limitations from both work-related and non-occupational health conditions. The OHSIG provides additional resources to promote clinical excellence, accountability, and consistency of an FCE through their document "Current Concepts in Functional Capacity Evaluation: A Best Practices Guideline."

### Musculoskeletal Injury Prevention and First Aid

Enforcement to discourage unsafe work practices is justified primarily by the General Duty Clause of the OSH Act of 1970 that requires employers to provide "a place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm." Employers with more than 10 employees (with some exemptions) must keep a record of serious work-related injuries and illnesses. OSHA specifies recordkeeping criteria that detail how and when employers must report injuries as "recordable." Minor injuries that require only first aid and no lost time or work restrictions do not need to be recorded.

Physical therapists must be aware of whether their provision of on-site early intervention services may be considered "first aid" or recordable as medical treatment that is beyond the scope of first aid. Standard Interpretations are letters or memos written by OSHA officials in response to public inquiries or field office inquiries regarding how some aspect of or terminology in an OSHA standard or regulation is to be interpreted and enforced by the agency. For example, in May 2019 the APTA obtained a Letter of Interpretation from OSHA for Clarification of Soft Tissue Massage. This states that physical therapists may perform soft tissue massage as a first aid measure without being recordable, since soft tissue massage is considered first aid and "OSHA considers the treatments listed in [the regulation in question] to be first aid regardless of the professional status of the person providing the treatment." Additional OSHA standard interpretations impacting first aid can be found at [https://www.osha.gov/laws-regs/interlinking/standards/1904.7\(b\)\(5\)\(ii\)/standard\\_interpretations](https://www.osha.gov/laws-regs/interlinking/standards/1904.7(b)(5)(ii)/standard_interpretations).

Physical therapy professionals consult with employers to support workplace ergonomic programs to prevent and manage musculoskeletal disorders: Service options include:

- Job analysis to identify and reduce physical demands and musculoskeletal risk factors/hazards.
- Physical exam and triage of workers that report musculoskeletal symptoms.
- Delivery of OSHA-compliant First Aid services as an early intervention for work-related musculoskeletal conditions.
- Assignment and progression of workers to physically suitable work during recovery.

The OHSIG also provides resources related to ergonomics through their Current Concepts document: "Current Concepts in Occupational Health: Work-Related Injury/Illness Prevention and Ergonomics Guidelines." OSHA's ergonomics website provides other helpful resources to encourage best practices for ergonomics programs.

### Managing Injuries that Limit Work Participation

Work-related injuries that result in death, days away from work, restricted work or transfer to another job, medical treatment beyond first aid, or loss of consciousness must be recorded based on the criteria set forth in OSHA Standard 1904.7.

The investigation process for work-related injury claim has several steps. Specific requirements exist in each state, but, in general, the first step is for the employee to notify the supervisor (company) of the injury. This notification should include the time, date, location, and activity of the injury. Proper notification is required to be completed within the timeline outlined by the jurisdiction where the injury occurred. The employer is responsible for providing the employee with the proper forms to file a work injury claim and for conducting an accident investigation as outlined by OSHA. After the employer submits the claim, all pertinent accident and medical information is reviewed by the insurance company and a determination is made to either accept or reject the work-related injury claim. Physical therapy professionals should be aware that the HIPAA Privacy Rule regulations may apply throughout this process.

The process for managing an injury that results in lost-time or work restrictions should follow a similar process for work-related and non-occupational injuries. The physical therapist should be aware that the employer may have a duty to make reasonable accommodations under state workers' compensation laws and/or the ADA regulations, regardless of whether the worker has temporary, episodic, or permanent restrictions due to a work-related or non-occupational health-related condition. In order to help reduce lost productivity after the onset of an injury or illness, a physical therapist may be asked to assist by helping to define the essential functions, physical demands, and identify accommodation options for the job by conducting a functional job analysis. This information can assist both the employer and the employee, by expediting the transition back to work after an injury.

The physical therapist's knowledge and expertise with primary care of musculoskeletal conditions, evidence-based rehabilitation, functional abilities of the employee, and functional demands of the job will assist the employer in reducing productivity loss through early intervention during recovery. The OHSIG provides additional guidance on this topic in Current Concepts in Occupational Health: Managing an Acute Injury that Limits Work Participation.

## Wellness Program Consultation

Employer-sponsored wellness programs have become increasingly popular as employers attempt to reduce health care costs and promote employee health and productivity. These wellness programs can vary widely in scope, from smoking cessation programs, to providing for gym memberships, to programs requiring health risk assessments that provide medical care interventions. Wellness programs are governed by extensive rules and regulations that physical therapists should be aware of if they are involved in designing or delivering these programs.

Section 2713 of the Patient Protection and Affordable Care Act of 2010 requires group and individual health insurance plans to provide minimum coverage without cost sharing requirements on a number of preventive health services. One of the mandated prevention services included in current recommendations by the United States Preventive Services Task Force is coaching to inspire behavioral change for healthy physical activity. This recommends offering or referring adults who are overweight or obese and have additional cardiovascular disease (CVD) risk factors to intensive behavioral counseling interventions to promote a healthy diet and physical activity for CVD prevention. Physical therapists are leaders in examining fitness and promoting healthy physical activity because of expertise in alleviating musculoskeletal pain and dysfunction that limits participation in physical activities.

The ACA made space for employers to provide incentives that allow for limited rewards or penalties for those who participate in non-discriminatory wellness programs in group health plans. Employers may offer financial incentives to enhance employee participation in wellness programs that include disability-related inquiries and medical exams. Many programs obtain medical information from employees by asking them to complete a health risk assessment and/or undergo biometric screenings for risk factors (such as high blood pressure or cholesterol). Participation in such assessments must be voluntary and disclosure of medical information obtained through an HRA is subject to final rules under GINA, the ADA, and the Incentive Programs for Nondiscriminatory Wellness Programs in Group Health Plans.

The scope of information that may be collected during health risk appraisals and biometrics is not specified as long as the program complies with the applicable rules. For example, physical therapy professionals may offer movement screens and follow-up behavioral coaching to promote suitable physical activity to supplement or replace traditional approaches to HRA and biometric

screening. Musculoskeletal movement screening to identify risk factors and promote suitable physical activity may also be provided as a wellness program benefit to workers who report musculoskeletal symptoms or difficulties with physical activity progression.

Wellness programs also must comply with the ADA and the GINA if the wellness program asks participants to respond to inquiries regarding disability, require medical exams, or provide information about a spouse's manifestation of a disease or disorder as part of an HRA. Specifically, the HRA must disclose which questions might solicit genetic information and employees must not be *required* to answer such questions. Responses to an HRA cannot be shared with employers unless the data is de-identified in accordance with the rules in order to protect the privacy of individual participants. The EEOC issued a final ruling in 2016 for compliance with the ADA and GINA that outline the requirements for wellness program compliance.

There have been a number of court challenges on how the 30% reward/penalty provision has been implemented for participants in employer-sponsored wellness programs. In August 2017, a U.S. district judge found that the EEOC did not adequately justify the 30% reward/penalty provision for participating in employer-sponsored wellness programs and ordered a timely reconsideration of these provisions by the EEOC. Before providing consultation services to employers on workplace wellness programs, check the EEOC's website (<https://www.eeoc.gov/>) to make sure you know what the current rules are and obtain legal advice before designing or recommending wellness programs that include incentives or disincentives to participate.

## CONCLUSION

This document introduces key regulatory compliance issues that impact services by physical therapy professionals that relate to employment. The information referenced in this document is not an all-inclusive for rules and regulations. Individual states often have specific rules and regulations that impact regulatory compliance during physical therapy services. As always, you should seek legal advice if you are unsure of how these rules and regulations affect the services that you provide in your role as a physical therapy professional. More in depth information on these topics is available in the OHSIG independent study course, "The Injured Worker" (<https://www.orthopt.org/content/education/independent-study-courses/browse-archived-courses>).



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