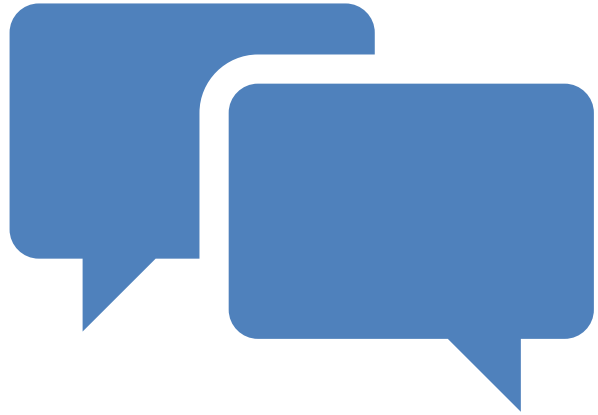




Work-Related Injury and Disability Landscape

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June 20, 2023



Please use the
Q&A function for
any questions





Agenda

Fitness for Duty Process

PERA: The Duty Disability Process

The Rise of Duty Disability Claims

2023 Session Law Chapter 48: Public Safety Duty Disability Bill

Questions?



Fitness for Duty

- What is fitness for duty?
- What does the process look like?
- What steps allow for effective administration?

What is Fitness for Duty (FFD)



- A mechanism utilized to ensure an employee at issue is fit to accomplish all essential functions and physical requirements of a duty position.
- Key tool in assessing approval for leave mandated by law such as FMLA.

FFD – Psychological Context



- It is the **objective** and **reasonable basis** for believing that an employee, as a result of psychological condition or impairment:
 - 1) may be **unable to perform** one or more **essential job functions**; or
 - 2) poses a **direct threat** to their self or others.

When to Initiate the FFD Process



- If an employer believes either:
 - 1) an employee has a medical issue based on reports/observations; or
 - 2) employee or employee's health provider requests evaluation

10 Steps to Effective Administration



1. Check on employee
2. Gather medical information
3. Review medical information
4. Follow-up
5. Accommodation
6. Discuss accommodations
7. Notify
8. Monitor
9. Reassess
10. Conclude

Step 1: Check on the Employee



- Remember to **document and retain** observations/report of medical issue that impact job in a **confidential medical file**.
- Interim actions may need to be taken if threat to health or safety of others.

Step 1: Check on the Employee



- Obtain sufficient proof of medical issue
 - FMLA Certification, Health care provider documentation
- **May need to request additional health care provider documentation and examination.**

Step 1: Check on the Employee



- A. Cover letter justifying the request and requesting a specific FFD provider or employee's own provider
- B. Tennessen warning
- C. Consent form for employer to obtain and release information
 - Cannot require employee to provide medical information
 - If no consent, proceed based on available information Job description
- D. Consent for provider to release information

Step 3: Review Medical Documentation

- Sufficient Medical Documentation (ADA)
 - (1) describes the nature, severity, and duration of the employee's impairment, the activity or activities that the impairment limits, and the extent to which the impairment limits the employee's ability to perform the activity or activities; and
 - (2) substantiates why the requested reasonable accommodation is needed

Source: U.S. DOL, Fact Sheet #28G: Certification of a Serious Health Condition under the Family and Medical Leave Act (February 2013); EEOC, Enforcement Guidance: Reasonable Accommodation and Undue Hardship under the Americans with Disabilities Act, No. 915.002 (Oct. 17, 2002).

Step 4: Follow-up



- Ask any legally permissible follow-up questions of health care provider and/or employee

Step 5: Accommodate



- Reasonable Accommodation analysis should include:
 - Identifying essential functions of the position using Reasonable Accommodation Chart
 - Identifying employee's job-related limitations based on workplace evidence and medical-related documentation
 - Identify all potential modifications

Step 6: Discuss Accommodation



- Engage in interactive process with employee to discuss reasonable accommodations
- Meet with employee and discuss the employee's job-related limitations and how they can possibly be overcome based on your list
 - Discuss the request for reasonable accommodation (if applicable)
 - Take thorough notes

Step 7: Notify Employee



- Notify employee related to accommodation after meeting of denial with reasons OR intended accommodation.
- If no accommodation, then consider voluntary resignation

Step 8: Monitor



- Monitor (“progress reports”) condition and effectiveness.

Step 9: Reassess



- Reassess accommodation duration and other accommodations.

Step 10: Conclude



- Accommodation conclude or employee request return-to-work
 - A. Require fitness-for-duty certification, i.e., ability to perform job functions
 - B. Consider full return-to-work or accommodation
 - C. If unable to return to work, consider removal, including voluntary resignation considering benefits
 - i. Categorize as “nondisciplinary” to avoid any labor contract grievance

BE PROACTIVE



- Proactive measures help to ensure a safe and health workplace
 - Establish policies, procedures, practices, and administrative items
 - Coordinate and administer work groups and committees
 - Conduct health and safety risk assessments
 - Provide support (e.g., Employee Assistance Programs)
 - PTSD and Mental Health Home Toolkit from LMC

Question for the Audience:

- Have you had to address a mental FFD concern with a public safety employee in the last year?

A) Yes

B) No



Question for the Audience:

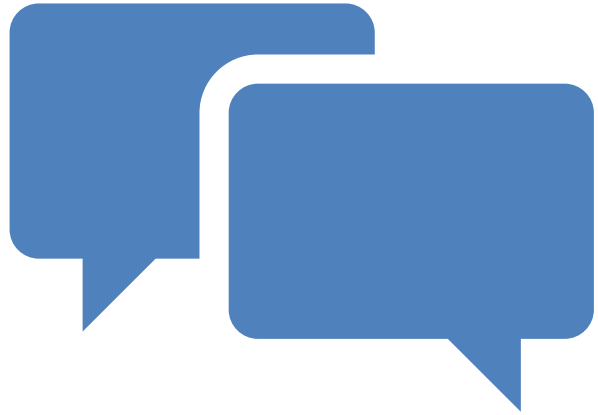
- Do you offer any programs or resources for preventative work-related mental health?

A) Yes

B) No

C) I'll get back to you





Any Questions?





Public Employees Retirement Association (PERA) & the Duty Disability Process

PERA: In General



- Public employers and employees contribute a portion of an employee's wages to PERA.
- PERA pays retirement and disability benefits to eligible retired or disabled employees equivalent to specified portions of a retiree's salary.

Question for the Audience:

- Have you had a police officer or firefighter get approved for a duty disability?

A) Yes

B) No



PERA Duty Disability



“Duty disability” means

- “a condition that is expected to prevent a member for a period of not less than **12 months** from performing the normal duties of the position held by [an officer],
- and that is the **direct result** of an injury incurred during . . . The performance of **inherently dangerous duties** that are specific to the positions covered by [a police or fire] retirement plan.”

Duty Disability Application



- Applicant must submit two medical reports
 - Licensed medical doctor; and
 - Licensed medical doctor, psychologist or chiropractor
- Employer is notified of application
 - Notification includes “primary reason” for disability, unit certification form and required information form.

Duty Disability Application



- PERA's medical advisor reviews the medical reports submitted.
- Once the medical advisor provides a recommendation, PERA reviews the recommendation.
- PERA then either approves or denies the application.

PERA Duty Disability Benefits



- Generally, 60% of average salary until age 65 paid out of the PERA fund; and
- Continued health insurance benefits from employer until age 65.
 - Public employers may apply for reimbursements from the Department of Public Safety (DPS)
 - **BUT:** reimbursement is paid based on the availability of funds for each eligible member plus dependents.

The Rise of Duty Disability Claims



Question for the Audience:

- For those of you that have had duty disability claims, how many have you had total?

- A) 1
- B) 2
- C) 3+



Police and Fire Disability Applications



- **118** applications were received in 2019
- **241** applications were received in 2020
- **307** applications were received in 2021
- **257** applications were received in 2022

Question for the Audience:

- In 2022, approximately, what is the average age of newly hired police officers?

- A) 21-35
- B) 36-45
- C) 46-55
- E) 56+



Police and Fire Disability Applications by Age



August of 2020 - May of 2022

22-30: **21**

31-35: **50**

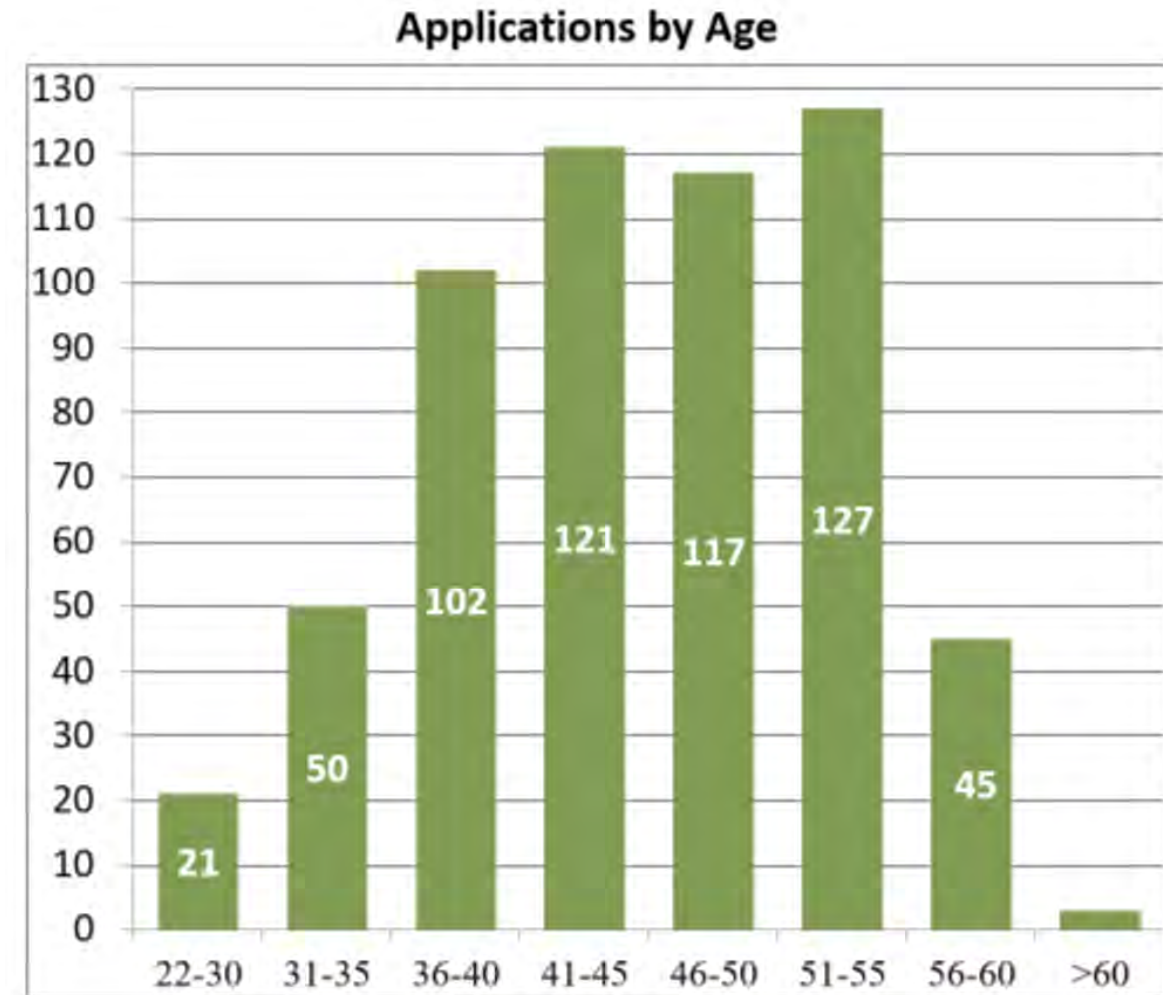
36-40: **102**

41-45: **121**

46-50: **117**

51-55: **127**

56-60: **45**



Source: Data prepared by PERA staff. Data is from August 17, 2020 thru May 27, 2022.

POP QUIZ for the Audience:

- Which type of disability has the most applicants?

- A) Physical
- B) Neurological
- C) Physical + PTSD
- D) PTSD



Police and Fire Disability Applications by Type



- The types of applications by percentage:
 - Physical: **16%**
 - Neurological: **2%**
 - Physical + PTSD: **2%**
 - PTSD: **80%**

Disability Applications by Organization and Employer

Applications by Organization

- Police: **80%**
- Sherriff: **9%**
- Fire: **9%**
- Other: **2%**

Applications by Employer

- Minneapolis: **38%**
- Saint Paul: **11%**
- Hennepin County: **4%**
- Met Council: **3%**
- Other: **44%**

Source: Data prepared by PERA staff. Data is from August 17, 2020 thru May 27, 2022



Duty Disability Appeal Process

Legal Standards

Appeal/Litigation
Process

Duty Disability Appeal



- Employers can petition to PERA and OAH determinations impacting health insurance only – not PERA Duty Disability.

Duty Disability Legal Standard



(1) “a condition that is expected to prevent a member for a period of not less than **12 months** from performing the normal duties of the position held by [an officer], and
(2) that is the **direct result** of an injury incurred during . . . The performance of **inherently dangerous duties** that are specific to the positions covered by [a police or fire] retirement plan.”

Process of Petition



- Burden of proof is on the employer
 - Preponderance of the evidence
- Employer must show that when PERA made its duty disability determination, PERA was more likely wrong than right applying the standard
 - Condition not a direct result injury arising out of inherently dangerous duties
 - Condition not expected to last >12 months

The Litigation Process:

Employer must file a petition for review with PERA within **60 days** of PERA's determination who then files it with OAH

OAH will assign an Administrative Law Judge (ALJ)

PERA provides its entire file on this matter to the parties

The Litigation Process:

The ALJ schedules a prehearing conference to discuss timelines for discovery (i.e., formal exchange of information in writing and/or verbal depositions), mediation, and hearing

Consider resolution through attorney-to-attorney discussions and/or mediation

Parties proceed with discovery, consider making a motion for summary disposition, retaining an independent expert, and preparing for a hearing

The Litigation Process:

ALJ holds a trial-type hearing with the parties' arguments, testimony from witnesses, and exhibits and either verbal closing arguments or post-hearing briefs

ALJ issues decision on petition for review

Either side may appeal to the Minnesota Court of Appeals



2023 Session Law Chapter 48: Public Safety Duty Disability Bill



Public Safety Duty Disability Bill

Mental health treatment
requirement

Employer-required
wellness training

Funding for DPS program
to administer
reimbursement

Mental Health Treatment Requirement



- Officers will be required to go through mental health treatment prior to applying for duty disability benefits.
- Officers are required to apply to PERA for treatment
- 24 weeks leave entitlement
- Employer will be required to continue paying salary and benefits while officers receive treatment
 - Reimbursable by Department of Public Safety

Mental Health Treatment Requirement



- Approval:
 - An applicant who applies for treatment must receive approval by PERA.
 - In the form and manner of:
 - A report by a mental health professional diagnosing the employee with a mental illness and finding that the employee is currently unable to perform the normal duties of the position; and
 - Documentation from the employer certifying the dates the employee was on duty in a position covered under the police and fire plan.

Mental Health Treatment Requirement



- Approval:
 - An employee who receives approval is not considered disabled unless:
 - The employee completes the requirements under this section,
 - Receives final confirmation, and
 - Applies for disability benefits under section 353.031 before receiving duty disability benefits.

Mental Health Treatment Requirement



- Approval:
 - PERA must notify employer that an employee's application has been submitted and request certification from the employer within six days after the application has been received.
 - An employer must submit the certification within five business days of receiving notice and the employee shall receive approval no later than 14 business days after the employee's application is received.

Mental Health Treatment Requirement



- Treatment required:
 - An employee who receives approval must complete 24 weeks of treatment for the diagnosed mental illness before applying for duty disability benefits.
 - Treatment shall be at the direction of a mental health professional.
 - The employer shall pay for the treatment costs to the extent not paid for by the employee's health insurance and may seek reimbursement.

Mental Health Treatment Requirement



- Treatment required:
 - The mental health professional must assess the employee's progress monthly and at the end of the 24 weeks, include any changes.
 - A final confirmation must include a report from the mental health professional containing:
 - An opinion about the employee's prognosis,
 - The duration of the disability, and
 - The expectations for improvement following the treatment.

Mental Health Treatment Requirement



- Additional 8 weeks of Treatment:
 - If mental health professional determines in report that employee is making progress and employee's prognosis is expected to improve with further treatment, the employee must complete an additional 8 weeks of treatment.
 - A total of 32 weeks of treatment

Mental Health Treatment Requirement



- Treatment required:
 - The employee may return to part- or full-time work prior to the completion of the treatment if the mental health professional determines that they are medically able to do so.
 - The employee may return to light duty assignments prior to the completion of the treatment, if deemed medically appropriate by the mental health professional AND with the employer's approval.
 - Employee is assumed to be fit for duty

Mental Health Treatment Requirement



- Fitness for duty presumed
 - Employee that is cleared/determined able to return to work or light duty is presumed to be fit for duty, except employer may request independent medical exam within 6 weeks of receiving the determination that employee is fit.

Employer-Required Wellness Training



- Employers will have reimbursement for the cost of a continued health insurance benefit for disabled employees **only if** the employer has implemented mental injury prevention measures (i.e., wellness training).

Employer-Required Wellness Training



(b) **Beginning on January 1, 2024**, a public employer is **not** eligible for reimbursement under paragraph (a) unless the employer provides at least one of the following:

(1) **annual wellness training** to peace officers and firefighters who either are employed or volunteer for the employer; or

(2) an **employee assistance program** or peer support program.

Question for the Audience:

- Do you offer an employee assistance program?
 - A) Yes
 - B) No



Wellness Training for Police Officers



- Wellness training for peace officers under paragraph (b), clause (1), must incorporate the learning objectives established by the Peace Officer Standards and Training Board under section 626.8478, which provides:
- **Learning objectives and training course.**
 - (a) The board must create learning objectives to prepare peace officers for the stressful and traumatic events that are common to policing and teach officers methods to process and cope with the stress and trauma inherent to policing. The learning objectives must be updated as the board considers appropriate.
 - (b) The commissioner of public safety, in consultation with the board, must create a training course that incorporates each of the learning objectives established by the board under paragraph (a).

Wellness Training for Police Officers



- **Record keeping is required:**
 - “The head of each local and state law enforcement agency shall maintain written records of the agency’s compliance with the requirements of [the wellness program].
 - The written records are subject to periodic review by the board and must be made available to the board at its request.”

Wellness Training for Firefighters



“No later than **February 1, 2024**, the Minnesota Fire Initiative must create a wellness training program for public employers to offer to firefighters... Training programs established in the Hometown Heroes Assistance Program under section 299A.477, subdivision 2, clause (4), satisfy the requirements of [the wellness training program].”

Fund Appropriation



- \$100 Million will be appropriated to the Department of Public Safety for the following uses to:
 - Cover administrative costs to administer reimbursements for continued health insurance coverage, and costs to implement and administer wellness training;
 - Cover administrative costs of the MSRS and PERA after treatment accounts are depleted; and
 - Fund reimbursements of public employers.
 - Employee mental health treatment + salary and benefits
 - Continuation of health benefits if deemed duty disabled

Fund Appropriation



- If, after 2024, the account does not have enough money remaining from the \$100M to cover all administrative costs and reimbursements, DPS must:
 - First cover the administrative costs of MSRS and PERA;
 - Then (if any remaining funds), cover fund reimbursements of public employers

Funding Issues



- According to PERA, approximately **20 peace officers or firefighters** apply for duty disability each month (240 annually)
 - The average **monthly salary and benefits** is **\$7,800** (\$93,600 annually)
 - Assume weekly salary and benefits of **\$1,800 weekly** (93,600/52)
 - Assume **5% will not receive initial approval** and **24 weeks of treatment** will be reimbursed for **228 applicants**.
 - 24 weeks x \$1,800 salary and benefits x 228 applicants = **\$9,849,600**

Funding Issues



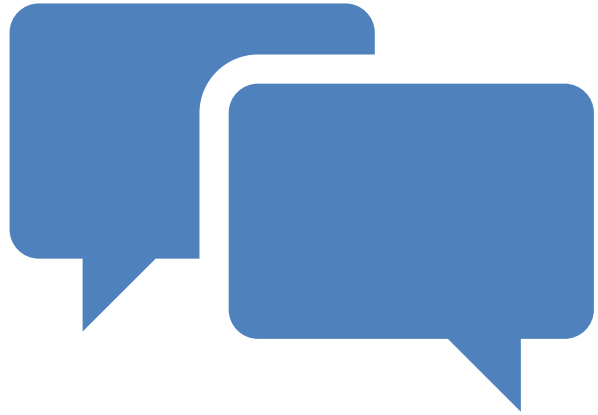
- Assuming 100% of applicants will require an additional 8 weeks of treatment.
 - 8 weeks x \$1,800 ongoing salary and benefits x 228 applicants = **\$3,283,200**
- Assume costs for 24 weeks of treatment will be **\$1,012,320** (\$185/hr with 1 treatment per week x 24 weeks x 228 claims = \$1,012,320)
 - Costs for the additional 8 weeks of treatment will be **\$337,440** (\$185 x 8 x 228)

Funding Issues



PERA Reimbursements	FY24	FY25	FY26	FY27
Treatment 24 weeks	\$1,012,320	\$1,012,320	\$1,012,320	\$1,012,320
Treatment 8 additional weeks	\$337,440	\$337,440	\$337,440	\$337,440
Salary/benefits 24 weeks	\$9,849,600	\$9,849,600	\$9,849,600	\$9,849,600
Salary/benefits 8 additional weeks	\$3,283,200	\$3,283,200	\$3,283,200	\$3,283,200
Total	\$14,482,560	\$14,482,560	\$14,482,560	\$14,482,560

Source: HF1234 – 1UE, *Peace Officer Duty Disability, Wellness Training*, Her, Kaohly (April 21, 2023)



Any Questions?



Upcoming Event



- **Public Employer Workforce & Compensation Tools**
 - **Presenters:**
 - Rachel Parker, Human Resources Analyst
 - Brandon Fitzsimmons, Labor and Employment Attorney, Flaherty & Hood, P.A.
 - **When:** 10a.m. to 11:30a.m. on **June 27**



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