Department of Veterans Affairs

Legalities of Employee Health Promotion Activities

1. Following is the answer to the liability question of whether the government is absolved of any liability if a participating employee signed a Liability Waiver and Release form. On that form, the employee would affirmatively release the government from all liability, both as to any claims for workers' compensation or for any tort liability, against the Department of Veterans Affairs (VA) Medical Center or its employees. It will be assumed that the equipment and/or space to be used were purchased for use by VA patients using appropriated dollars. The issue of contractor liability has also been addressed in the event it is contemplated to contract for an outside vendor to provide equipment/services for this program.

2. Based on the reasons explained more fully below, there is legal authority to use government space/equipment for a government sponsored employee fitness program. In terms of the liability issue; however, it is not believed that such a form would insulate the government from liability. However, that should not deter the hospital from offering this plan to employees due to the overall beneficial effect on employee morale and fitness. For ease in reviewing this opinion, separate head notes have been used for guidance.

3. In a series of opinions, the Office of General Counsel (OGC) has addressed the issue involving the use of exercise equipment purchased for patient use by employees pursuant to an employee fitness program. (See OGC Opinion, "Establishment of Exercise Programs at VA Medical Centers for VA Employees Citation: VAOPGCPREC 42-91, VET. AFF. OP. GEN. COUNS. PREC. 42-91, 1991.) In those opinions, the OGC was asked to consider the following two issues:

   a. Is there legal authority to allow employees to use, for their own health benefit, equipment paid for from the medical care appropriation and intended for patient use?

   b. What, if any, liability is there for employee use of such equipment during non-duty status times such as before and after work or lunch breaks?

4. Use of Government Facility/Equipment - With regard to the first issue, OGC concluded that the authority for establishment of a physical fitness program is found in 5 U.S.C. §7901 permitting the establishment of a health service program which can include preventive health programs. Section (a) of the statute states that the establishment of such a program must be within the limits of appropriation available. Section (b) states a health service program may be established by contract or otherwise.

5. In that opinion, OGC indicated that the use of facilities by both patients and employees was implied by section 7901 to the extent necessary to implement its provisions. Thus, the statute did not require the construction of totally separate facilities in every agency, nor did it make special provisions for VA facilities in that regard. With

regard to the issue of spending appropriated dollars for equipment for the purpose of employee fitness, OGC stated, "There is no restriction in the statute limiting the program to one particular physical location within an agency. There is a longstanding medical program for VA employees currently in operation pursuant to the statute in question. It requires the use of examining rooms and facilities that might also be used by VA patients. Employees' health services are paid for from the medical care appropriations. The Physical Fitness Program is an extension of the health care services currently being offered, and logically, may be paid from the same funds…there is obviously a direct relationship between the quality of health care provided to Veterans ... and the maintenance of well-being in those charged with the responsibility for patient care." In our view, the same rationale applies in the case of the Physical Fitness Program, thus permitting the costs of the programs to be paid from medical care appropriations.

"Another example of the permitted use of VA equipment by both VA employees and patients is found at 38 U.S.C. §233, which allows the administrator to provide recreational facilities, supplies, and equipment for the use of patients in hospitals, and employees in isolated installations." The Personnel Policy Manual, MP-5, Part I, Chapter 90 regulates use of the equipment to avoid interference with patient needs. The above statute, although not controlling in the matter in question, is an indication of legislative intent to provide for the well-being of VA employees consistent with patients' needs."

6. Accordingly, based on the aforementioned guidance from OGC, there is no legal objection in employees at this VA Medical Center using equipment that may have been purchased for patient use.

7. Government Liability - Injury to Employees While Exercising - With regard to the second issue, government liability for injuries sustained by employees while participating in the fitness program is affected by the Federal Employees' Compensation Act (FECA), at 5 U.S.C. Chapter 81 and the Federal Torts Claims Act (FTCA), at 28 U.S.C. §1346(b). FECA is an exclusive no-fault remedy for federal employees who are injured while in the performance of official duties. Compensation is determined by the Office of Workers' Compensation Programs which is part of the Department of Labor. Decisions on claims are final and no judicial appeal is available. The statute requires that the employee be injured in the performance of duty (5 U.S.C. §8102 and 8103).

8. Whether or not an employee is engaged in the performance of duty is a factual determination made by the Department of Labor in each case. Appellate courts that have interpreted the words “while in the performance of his duty" have held that the injury must arise out of the special zone of danger created by an obligation or condition of employment. Wright v. United States, 717 F.2d 254, 257 (6th Cir.1983). A strong argument can be made that compensation for injuries would be authorized by and limited to FECA on the basis that the Physical Fitness Program benefits the VA by improving employee morale and health and is available only to VA employees on VA premises. The program is financed by the VA and participation would be encouraged. In an illustrative case, the Federal Employees Compensation Appeals Board has

decided that injury sustained in an off-government premises softball game by a federal employee, while off duty, was covered under FECA because the Government was promoting the game and was involved in its financing. Dustin, 33 ECAB 571 (1983). The situation cited by Dr. Yevich (i.e., employee is injured off duty using weights) appears to be very similar in nature. In sum, it appears that even though an employee participating in the Physical Fitness Program is off duty, he or she may nevertheless be covered by FECA. A definitive answer on the issue of FECA coverage cannot be supplied for this opinion because of the importance of the facts of each particular case and the willingness of the courts to substitute their judgment for that of the Department of Labor.

9. Government Liability - Government Employees Who Administer the Physical Fitness Program – A facility may be contemplating using government employees to provide yoga training though the training may be occurring after hours. The issue of liability for individuals is treated differently under federal law. FECA protects only the government from suit, not an employee injured on the job and covered by FECA. FECA has been held to retain the right to sue an individual coworker who negligently caused the injury. Allman v. Hanley, 302 F.2d 559 (5th Cir.1962). Should an employee who administers the Physical Fitness Program be sued; however, the defense of immunity can be raised by that employee. In Harlow v. Fitzgerald, 102 S.Ct. 2727, 2738 (1982), it was held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. It can reasonably be argued that engaging in an agency-promoted and sponsored fitness program constitutes a discretionary function which shields the employee from civil liability in accordance with Harlow v. Fitzgerald, supra. Should a situation occur where an employee is in fact given notice of being sued, he or she should immediately contact the facility director and the Employee Health Office so that appropriate action can be taken to protect that employee.

10. Government Liability - Contractors - An exception to the ability of an individual to sue the government within FECA is found at 28 U.S.C. §2671, which states that a contractor with the United States is not a federal agency for the purposes of the Act. Consequently, operation of the fitness center by a contractor immunizes the government from responsibility for negligent injury to a participant. In United States v. Orleans, 425 U.S. 807, 813-814 (1976), it was held that if the detailed physical performance of the tasks assigned is under the control of the contractor, the government is exempt from liability. For example, one way to limit government liability is through the use of a contract to hire an outside vendor to provide yoga training. Such procurement should go through the facility/Veterans Integrated Service Network (VISN) Contracting Office to ensure that the request for procurement indicates that control of the performance of the tasks is left to the contractor. If this occurs, the government will be free from any liability for injury to an employee participant based on the independent contractor's actions.

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