

## Germanwings tragedy puts spotlight on employee fit-for-duty procedures

Employers debate workers' rights vs. public safety

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The devastating effect a single employee in a safety-sensitive position can have if he or she evades fit-for-duty procedures was brought chillingly into focus last month when a Germanwings co-pilot, who reportedly hid his mental illness, deliberately crashed a commercial jet into the French Alps.

The crash, which killed 150, was a stark reminder to employers to have a consistently enforced fitness-for-duty policy to avoid potential liability.

Andreas Lubitz locked the flight captain of Germanwings Flight 9525 out of the cockpit on the March 24 flight and set the plane on a crash course, authorities said after reviewing the jet's black box data.

Doctors' notes found in Mr. Lubitz's home stating he was not fit to fly were reportedly never shared with Germanwings' parent company, Deutsche Lufthansa A.G.

Being fit for duty means workers can perform their job functions with or without employer accommodations and without putting themselves or others at risk, experts say.

“As we saw with the (Germanwings) airline pilot incident, doctors don't have an affirmative obligation to notify an employer (if a worker isn't fit for duty), and employees may have a strong

The devastating effect a single



REUTERS

Andreas Lubitz, the German pilot who crashed a plane in the French Alps on Tuesday, March 24, killing 150 people, told officials at this Lufthansa training school in Bremen, Germany in 2009 that he had gone through a period of severe depression, the airline said.

incentive not to disclose what they're experiencing because they fear they'll lose their job," said Kristin Anger, a partner at Summit Law Group P.L.L.C. in Seattle. "You might not know there was even an issue until it's too late."

Employers with workers in safety-sensitive positions, such as commercial drivers and heavy-equipment operators, "have greater latitude in making medical inquiries" because these workers can "cause great harm to themselves or others if they can't do their job safely," Ms. Anger said.

It's a worker's responsibility to work safely, but it's the employer's responsibility to make sure the worker is fit for duty, said Woody Hill, Austin, Texas-based vice president of safety services at workers compensation insurer Texas Mutual Insurance Co.

Employers have to "walk a legal tightrope," balancing the potential liability of workers causing harm, with violating workers' rights under federal laws such as the Americans with Disabilities Act and the Family and Medical Leave Act, Ms. Anger said.

One way to minimize disability and liability litigation is to have a written, consistently applied fitness-for-duty policy that allows the employer to order a physical and/or mental health evaluation of a worker if need be, experts say.

For police officers, firefighters and other first responders, fitness-for-duty evaluations typically are considered a condition of the job, said Theodore Quisenberry, manager of Oakland County's homeland security division in Pontiac, Michigan.

Since police officers have the ability to "restrict peoples' freedom, take them into custody, tell people to do things they may not want to do, ... we need to make sure the people who are making these decisions out there are capable," he said. Even so, "we can't just arbitrarily pick someone and say, 'We're going to send you off to the shrink.'" "

Employers might think they don't have a right to be very specific in their policies, but high workplace hazards call for more specific language, Mr. Hill said, noting that oil and gas employers often require that workers must get at least eight hours of sleep.

If an employee comes to work crying, trembling or having coordination problems, there might be "a reluctance to address it immediately, and I think that's where we're remiss," Mr. Hill said.

Ms. Anger recommends stating clearly in writing that when an employer is concerned about an employee's fitness for duty, the employer can require an evaluation.

"If we get a medical report back saying that somebody is not fit for duty, they're not put out there," Mr. Quisenberry said.

Due to patient privacy rights, employers don't have access to worker's diagnosis or treatment plan, said Dr. Fred Kohanna, Woburn, Massachusetts-based corporate medical director of occupational health services firm AllOne Health Group Inc. They're told only whether a worker is fit for duty and, if not, whether the problem is correctable, he said.

However, many employers are more interested in pre-employment screenings than fitness-for-duty evaluations, said Trish Ennis, Denver-based president of the American Society of Safety Engineers and senior risk control consultant at Willis North America Inc.

“A lot of companies keep their hiring practices separate from their safety departments, but there needs to be a collaboration between risk management, (human resources) and safety,” she said.

Experts say most workers in safety-sensitive jobs comply with recommended treatment because they're not cleared to return to work until they do.

“A Department of Transportation driver who says, 'I don't want to get a stress test' — either because he doesn't want to do it or he doesn't want to pay for it — wouldn't get his (Department of Transportation) medical card” and would not be allowed to continue working, Dr. Kohanna said.

Like pre-employment physical and psychological screenings, there is an expense associated with fitness-for-duty evaluations, which can run from about \$75 to \$180 depending on the medical provider and fee schedule, among other factors, Ms. Ennis said.

Such evaluations can help employers save money and lives in the long run, Dr. Kohanna said.

But not all employers can afford such testing.

As a small employer with about 80 employees, “it's not financially feasible to give everyone a fitness-for-duty exam,” said Jeremy Bethancourt, director of safety, health and training at Scottsdale, Arizona-based LeBlanc Building Co. Inc., a general contractor that specializes in wood frame construction.

Instead, Mr. Bethancourt said he and his supervisors take advantage of the company's small size by developing relationships with workers, approaching them discreetly if they are uncharacteristically irritable or suddenly start making errors. Because workers know they won't be reprimanded for disclosing physical or psychological conditions, they occasionally come forward on their own.

From there, Mr. Bethancourt said they decide together if taking a couple of days off or a leave of absence is necessary.

All employers can benefit from creating a culture where workers want to be forthcoming and get treatment, but workers will be less likely to disclose problems if they think that sharing the information will result in termination, Ms Anger said.

It helps to educate workers “that they may have an entitlement to leave under FMLA or state law for a health-related condition,” and that they may seek help through the company's employee assistance program, she said.

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