

Office of Personnel Management

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well as to other noncompetitive appointments, and to conversion to career or career-conditional employment.

[33 FR 12429, Sept. 4, 1968, as amended at 57 FR 10124, Mar. 24, 1992]

Subpart B [Reserved]

Subpart C—Consideration for Appointment

§ 338.301 Competitive service appointment.

Agencies must ensure that employees who are given competitive service appointments meet the requirements included in the Office of Personnel Management's Operating Manual: Qualification Standards for General Schedule Positions. The Operating Manual is available to the public for review at agency personnel offices and Federal depository libraries, and for purchase from the Government Printing Office.

[62 FR 44535, Aug. 22, 1997]

Subparts D–E [Reserved]

Subpart F—Age Requirements

§ 338.601 Prohibition of maximum-age requirements.

A maximum-age requirement may not be applied in either competitive or noncompetitive examinations for positions in the competitive service except as provided by:

(a) Section 3307 of title 5, United States Code; or

(b) Public Law 93–259 which authorizes OPM to establish a maximum-age requirement after determining that age is an occupational qualification necessary to the performance of the duties of the position.

[40 FR 42734, Sept. 16, 1975]

PART 339—MEDICAL QUALIFICATION DETERMINATIONS

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AUTHORITY: 5 U.S.C. 1104(a), 1302(a), 3301, 3302, 3304, 3312, 3318, 3320, 3504, 5112; 39 U.S.C. 1005, Executive Order 10577, Rule II, codified as amended in 5 CFR 2.1(a).

SOURCE: 82 FR 5350, Jan. 18, 2017, unless otherwise noted.

Subpart A—General

§ 339.101 Coverage.

This part applies to—

(a) Applicants for and employees in competitive service positions; and

(b) Applicants for and employees in positions excepted from the competitive service when medical issues arise in connection with an OPM regulation that governs a particular personnel action, such as removal of a preference eligible employee in the excepted service under part 752.

§ 339.102 Purpose and effect.

(a) This part defines the circumstances under which OPM permits medical documentation to be required and examinations and/or evaluations conducted to determine the nature of a medical condition that affects safe and efficient performance.

(b) Personnel decisions based wholly or in part on the review of medical documentation, as defined below, and the results of medical examinations and evaluations must be made in accordance with appropriate sections of this part.

(c) Failure to meet medical (which may include psychological) standards and/or physical requirements established under this part means that the applicant or employee is not qualified for the position, unless reasonable accommodation or a waiver is appropriate, in accordance with §§ 339.103 and 339.204. An employee's refusal to be examined or provide medical documentation, as defined below, in accordance with a proper agency order authorized under this part, constitutes a basis for appropriate disciplinary or adverse action. After a tentative job offer of employment conditioned on completion of a medical examination, an applicant's refusal to be examined or provide medical documentation, as defined below, may result in the applicant's removal from further consideration for the position.

§ 339.103 Compliance with disability laws.

(a) The Americans with Disabilities Act (ADA) of 1990, as amended by the Amendments Act of 2008 (collectively the ADA), establishes prohibitions against discrimination and the requirements for reasonable accommodation that apply to the Federal Government through the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791(f). Consequently, actions under this part must comply with the non-discrimination provisions of the Rehabilitation Act, the non-discrimination provisions of the ADA, and their implementing regulations.

(b) Use of the term “qualified” in this part must comply with the Rehabilitation Act, as amended, and the ADA, as amended. Specifically, a “qualified individual with a disability” means that the individual possess the requisite skill, experience, education, and other job-related requirements of an employment position that the individual holds or seeks, and can perform the essential functions of the position with or without reasonable accommodation.

§ 339.104 Definitions.

For purposes of this part—

Accommodation means *reasonable accommodation* as described in the ADA.

Arduous or hazardous positions means positions that are dangerous or physically demanding to such a degree that an employee's medical and/or physical condition is necessarily an important consideration in determining ability to perform safely and efficiently.

Medical condition means a health impairment which results from birth, injury or disease, including mental disorder.

Medical documentation or *documentation of a medical condition* means a copy of a dated, written and signed statement, or a dated copy of actual medical office or hospital records, from a licensed physician or other licensed health practitioner, as these terms are defined below, that contains necessary and relevant information to enable the agency to make an employment decision. To be acceptable, the diagnosis or clinical impression must be justified according to established diagnostic criteria and the conclusions and recommendations must be consistent with generally accepted professional standards. The determination that the diagnosis meets these criteria is made by or in coordination with a licensed physician or, if appropriate, a practitioner of the same discipline as the one who issued the documentation. An acceptable diagnosis must include the information identified by the agency as necessary and relevant to its employment decision. This information may include, but is not limited to, the following:

(1) The history of the medical condition(s), including references to findings from previous examinations, treatment, and responses to treatment;

(2) Clinical findings from the most recent medical evaluation, including any of the following: Findings of physical examination; results of laboratory tests; X-rays; EKGs and/or other special evaluations or diagnostic procedures; and, in the case of psychiatric examination or psychological assessment, the findings of a mental status examination and/or the results of psychological tests, if appropriate;

(3) Diagnosis, including the current clinical status;

(4) Prognosis, including plans for future treatment and an estimate of the

expected date of full or partial recovery;

(5) An explanation of the impact of the medical condition(s) on overall health and activities, including the basis for any conclusion as to whether restrictions or accommodations are necessary and, if determined to be necessary, an explanation supporting that determination; and, either of the following:

(6) An explanation of the medical basis for any conclusion that indicates the likelihood that the applicant or employee will suffer sudden incapacitation or subtle incapacitation by carrying out, with or without accommodation, the tasks or duties of a specific position; or

(7) Narrative explanation of the medical basis for any conclusion that the medical condition has or has not become static or well-stabilized and the likelihood that the applicant or employee may experience sudden incapacitation or subtle incapacitation as a result of the medical condition. In this context, “static or well-stabilized” medical condition means a medical condition which is not likely to change as a consequence of the natural progression of the condition, such as a result of the normal aging process, or in response to the work environment or the work itself.

Medical evaluation program means a program of recurring medical examinations or tests established by written agency policy or directive, to safeguard the health of employees whose work may subject them or others to significant health or safety risks due to occupational or environmental exposure or demands. For example, an agency policy or directive may include medical clearances and medical surveillance to test for occupational exposure to biological, chemical, and/or radiological hazardous agents, occupational diseases, and occupational risk.

Medical restriction is a medical determination that an applicant or employee is limited, or prevented from performing a certain type or duration of work or activity (e.g., standing and/or ability to concentrate) or motion (e.g., bending, lifting, pulling), because of a particular medical condition or physical limitation. The purpose of a

medical restriction is to try to prevent aggravation, acceleration, exacerbation, or permanent worsening of the medical condition or physical limitation.

Medical standard is a written description of the minimum medical requirements necessary for an applicant or employee to perform essential job duties as a condition of employment.

Medical surveillance is the on-going systematic collection and analysis of health data to improve and protect the health and safety of employees in the workplace, and to monitor for health trends both in individual workers and in population of workers. Medical surveillance can include the tracking of occupational injuries, illnesses, hazards, and exposures, as well as laboratory and examination-based medical data, in order to identify findings that could provide an early warning of, or indicate the risk for, an occupational disease. Medical surveillance also is part of compliance with those Federal and state regulations that require medical monitoring when employees use or are exposed to certain hazardous materials.

Physical requirement is a written description of job-related physical abilities that are essential for performance of the duties of a specific position.

Physician means a licensed Doctor of Medicine or Doctor of Osteopathy, or a physician who is serving on active duty in the uniformed services and is designated by the uniformed service to conduct examinations under this part.

Practitioner means a person providing health services who is not a medical doctor, but who is certified by a national organization, licensed by a State, and/or registered as a health professional to provide the health service in question.

Subtle incapacitation means gradual, initially imperceptible impairment of physical or mental function, whether reversible or not, which is likely to result in safety, performance and/or conduct issues that may undermine the agency’s commitment to maintaining a safe working environment for all employees and others.

Sudden incapacitation means abrupt onset of loss of control of physical or mental function(s), whether reversible

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or not, which is likely to result in safety, performance or conduct issues that may undermine the agency's commitment to maintaining a safe working environment for all employees and others.

Subpart B—Medical Standards, Physical Requirements, and Medical Evaluation Programs

§ 339.201 Disqualification by OPM.

OPM must review and decide upon an agency's request to pass over a candidate, who is a preference eligible, on medical grounds pursuant to § 339.306. OPM may deny an applicant employment by reason of physical or mental unfitness for the position for which he or she has applied. An OPM decision under this section or § 339.306 is separate and distinct from a determination of disability pursuant to statutory provisions for disability retirement under the Civil Service Retirement System and the Federal Employees' Retirement System.

§ 339.202 Medical standards.

OPM may establish and/or approve medical standards for a Government-wide occupation (*i.e.*, an occupation common to more than one agency) or approve revisions to its established medical standards. An individual agency may establish medical standards for positions that predominate in that agency (*i.e.*, where the agency has 50 percent or more of the positions in a particular occupation). Such standards must be justified on the basis that the duties of the positions are arduous or hazardous, or require a certain level of health status for successful performance when the nature of the positions involves a high degree of responsibility toward the public or sensitive national security concerns. The rationale for establishing the standard must be documented and supported by a study(ies) or evaluation(s) establishing the medical standard is job-related to the occupation(s). Medical standards established by agencies must be approved by OPM prior to implementation. Standards established by OPM or an agency must be:

(a) Established by written directive and uniformly applied, and

(b) Directly related to the actual performance and requirements necessary for the performance of the duties of the position.

§ 339.203 Physical requirements.

(a) An agency may establish physical requirements for individual positions without OPM approval when such requirements are considered essential for performance of the duties of a specific position. Physical requirements must be clearly supported by the actual duties of the position, documented in the position description, and supported by a study(ies) or evaluation(s) establishing physical requirement(s) is job-related to the occupation(s).

(b) An applicant or employee may not be disqualified arbitrarily on the basis of physical requirements or other criteria that do not relate specifically to performance of the duties of a specific position.

§ 339.204 Waiver of standards and requirements and medical review boards.

(a) An agency must waive a medical standard or physical requirement established under this part when an applicant or employee, unable to meet that standard or requirement, presents sufficient evidence that the applicant or employee, with or without reasonable accommodation, can perform the essential duties of the position without endangering the health and safety of the applicant or employee or others. Additional information obtained by the agency may be considered in determining whether a waiver is appropriate. An agency may establish timeframes, in writing, for submission of initial or additional information for consideration, with allowance for reasonable extensions.

(b) Agencies may, but are not required to, establish medical review boards to help the agency provide a case-by-case, fact-based, individualized assessment whenever an individual is found to not meet agency medical standards or physical requirements. An agency may also use a medical review board as a forum for a higher level of review within the agency when medical questions or issues arise. If established, the Board is expected to recommend

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administrative actions that are consistent with applicable law, as well as applicable and current medical practice standards of care, through the combined expertise of its members.

(c) The use and composition of a medical review board will be determined by the agency. Upon request, an agency will provide to OPM information regarding the composition and use of medical review boards. OPM may issue guidance from time to time as to best practices with respect to the composition and use of such boards.

§ 339.205 Medical evaluation programs.

Agencies may establish periodic medical examinations, medical surveillance, or immunization programs by written policies or directives to safeguard the health of employees whose work may expose them or others to significant health or safety risks due to occupational or environmental exposure or demands. This may include the requirement to undergo vaccination with products approved by the Food and Drug Administration (e.g., for national security reasons or in order to fulfill the duties of a position designated as national security sensitive). The need for a medical evaluation program must be clearly supported by the nature of the work. The specific positions covered must be identified and the applicants or employees notified in writing of the reasons for including the positions in the program.

§ 339.206 Disqualification on the basis of medical history.

An employee or applicant may not be disqualified for any position solely on the basis of medical history. For positions subject to medical standards and/or physical requirements, and for positions under medical evaluation programs, a history of a particular medical condition may result in medical disqualification only if the condition at issue is itself disqualifying, recurrence of the condition is based on reasonable medical judgment, and the duties of the position are such that a recurrence of the condition would pose a significant risk of substantial harm to the health and safety of the applicant or employee or others that cannot be eliminated or reduced by reasonable

accommodation or any other agency efforts to mitigate risk.

Subpart C—Medical Examinations

§ 339.301 Authority to require an examination.

(a) A routine pre-employment medical examination is appropriate only for a position with specific medical standards and/or physical requirements, or that is covered by a medical evaluation program established under this part.

(b) Subject to § 339.103, an agency may require an applicant or employee who has applied for or occupies a position that has medical standards and/or physical requirements, or is covered by a medical evaluation program established under this part, to report for a medical examination:

(1) Subsequent to a tentative offer of employment or reemployment (including return to work from medically based absence on the basis of a medical condition);

(2) On a regularly recurring, periodic basis after appointment in accordance with § 339.205; or

(3) Whenever the agency has a reasonable belief, based on objective evidence, that there is a question about an employee's continued capacity to meet the medical standards or physical requirements of a position.

(c) An agency may require an employee who has applied for or is receiving continuation of pay or compensation as a result of an injury or disease covered under the provisions of the Federal Employees' Compensation Act to report for an examination to determine medical limitations that may affect job placement decisions.

(d) An agency may require an employee who is released from his or her competitive level in a reduction in force under part 351 of this chapter to undergo a relevant medical evaluation if the position to which the employee has assignment rights has medical standards and/or physical requirements, that are different from those required in the employee's current position.

(e)(1) An agency may order a psychiatric examination (including a psychological assessment) only when:

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(i) The result of a current general medical examination that the agency has the authority to order under this section indicates no physical explanation for behavior or actions that may affect the safe and efficient performance of the applicant or employee, the safety of others, and/or the vulnerability of business operation and information systems to potential threats, or

(ii) A psychiatric examination or psychological assessment is part of the medical standards for a position having medical standards or required under a medical evaluation program established under this part.

(2) A psychiatric examination or psychological assessment authorized under paragraphs (e)(1) of this section must be conducted in accordance with accepted professional standards by a licensed physician certified in psychiatry by the American Board of Psychiatry and Neurology or the American Osteopathic Board of Psychiatry and Neurology, or by a licensed psychologist or clinical neuropsychologist, and may only be used to make inquiry into a person's mental fitness as it directly relates to successfully performing the duties of the position without significant risk to the applicant or employee or others, and/or to the vulnerability of business operation and information systems to potential threats.

§ 339.302 Authority to offer examinations.

An agency may, at its option, offer a medical examination (including a psychiatric examination or psychological assessment) in situations where the agency needs additional medical documentation to make an informed management decision. This may include situations where an employee requests, for medical reasons, a change in duty status, assignment, working conditions, or any other different treatment (including reasonable accommodation or return to work on the basis of full or partial recovery from a medical condition) or where the employee has a performance or conduct problem that may require agency action. Reasons for offering an examination must be documented. When an offer of an examination has been made by an agency and the offer has been accepted by the ap-

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plicant or employee, the examination must be carried out in accordance with the authorities cited in § 339.103. The results of the examination must also be used in accordance with the authorities cited in § 339.103.

§ 339.303 Medical examination procedures.

(a) When an agency requires or offers a medical or psychiatric examination or psychological assessment under this subpart, it must inform the applicant or employee in writing of its reasons for doing so, the consequences of failure to cooperate, and the right to submit medical information from his or her private physician or practitioner. A single written notification is sufficient to cover a series of regularly recurring or periodic examinations ordered under this subpart. An agency may establish timeframes, in writing, for submission of medical documentation, with allowances for reasonable extensions.

(1) Refusal or failure to report for a medical examination ordered by the agency may be a basis for a determination that the applicant or employee is not qualified for the position. In addition, an employee may be subject to adverse action.

(2) Refusal or failure on the part of an applicant or the employee to authorize release of any results from an agency ordered or offered medical examination issued in accordance with §§ 339.301 or 339.302, or the results of any previous medical treatments or evaluations relative to the identified medical issue, to authorized agency representatives, including the agency physician or medical review officer and/or independent medical specialists, may be a basis for disqualification for the position by the hiring agency. In addition, an employee may be subject to adverse action.

(b) The agency designates the examining physician or other appropriate practitioner, but must offer the applicant or employee an opportunity to submit medical documentation from his or her private physician or practitioner for consideration in the medical examination process. The agency must review and consider all such documentation supplied by the private physician or practitioner. The applicant or

employee must authorize release of this documentation to all authorized agency representatives. In situations where the medical documentation of the applicant or employee's private physician or practitioner is contradictory and cannot be resolved by the examining physician or the agency physician or medical review officer, the agency may, at its option, pursue another opinion from an appropriate specialist at agency expense. An applicant or employee also may, at his or her option, pursue another opinion from an appropriate specialist at his or her expense in the event of conflicting or contradictory medical documentation.

§ 339.304 Payment for examination.

(a) An agency must pay for all medical and/or psychological and/or psychiatric examinations required or offered by the agency under this subpart, whether conducted by the agency's physician or medical review officer, an independent medical evaluation specialist (e.g., occupational audiologist) identified by the agency, or a licensed physician or practitioner chosen by the applicant or employee. This includes special evaluations or diagnostic procedures required by an agency.

(b) Following conclusion of the initial medical, psychological, and/or psychiatric examination, the agency physician or medical review officer will render a final medical determination. In certain final medical ineligibility determinations, the agency physician or medical review officer may reference supplemental medical examination, testing or documentation, which the applicant or employee may submit to the agency for consideration and further review relative to potential medical eligibility. Under these circumstances, the applicant or employee is responsible for payment of this further examination, testing and documentation.

(c) An applicant or employee must pay to obtain all relevant medical documentation from his or her private licensed physician or required practitioners in instances where no medical examination is required or offered by the agency, but where the agency requests the applicant or employee to provide medical documentation rel-

ative to an identified medical or physical condition in question or where the agency needs medical documentation to render an informed management decision.

(d) An applicant or employee must pay for a medical examination conducted by his or her private licensed physician or practitioner where the purpose of the examination is to secure a change sought by an applicant (e.g., new employment) or by an employee (e.g., a request for change in duty status, reasonable accommodation, and/or job modification).

§ 339.305 Records and reports.

(a) Agencies will receive and maintain all medical documentation and records of examinations obtained under this part in accordance with part 293, subpart E, of this chapter.

(b) The report of an examination conducted under this subpart must be made available to the applicant or employee under the provisions of part 297 of this chapter.

(c) Agencies must forward to the Office of Workers' Compensation Programs (OWCP), Employment Standards Administration, Department of Labor, a copy of all medical documentation and reports of examinations of employees who are receiving or have applied for injury compensation benefits under 5 U.S.C. chapter 81, including continuation of pay. The agency must also report to OWCP the failure of such employees to report for examinations that the agency orders under this subpart. When the employee has applied for disability retirement, this information and any medical documentation or reports of examination must be forwarded to OPM.

§ 339.306 Processing medical eligibility determinations.

(a) In accordance with the provisions of this part, agencies are authorized to medically disqualify a nonpreference eligible. A nonpreference eligible so disqualified has a right to a higher level review of the determination within the agency.

(b) OPM must approve the sufficiency of the agency's reasons to:

(1) Medically disqualify or pass over a preference eligible in order to select a nonpreference eligible for:

(i) A competitive service position under part 332 of this chapter; or

(ii) An excepted service position in the executive branch subject to title 5, U.S. Code;

(2) Medically disqualify or pass over a 30 percent or more compensably disabled veteran for a position in the U.S. Postal Service in favor of a nonpreference eligible;

(3) Medically disqualify a 30 percent or more compensably disabled veteran for assignment to another position in a reduction in force under §351.702(d) of this chapter; or

(4) Medically disqualify a 30 percent or more disabled veteran for noncompetitive appointment, for example, under §316.302(b)(4) of this chapter.

PART 340—OTHER THAN FULL-TIME CAREER EMPLOYMENT (PART-TIME, SEASONAL, ON-CALL, AND INTERMITTENT)

Subpart A—Principal Statutory Requirements—Part-Time Employment

Sec.

340.101 Principal statutory requirements.

Subpart B—Regulatory Requirements—Part-Time Employment

340.201 Regulatory requirements.

340.202 General.

340.203 Technical assistance.

340.204 Agency reporting.

Subpart C [Reserved]

Subpart D—Seasonal and Intermittent Employment

340.401 Definitions.

340.402 Seasonal employment.

340.403 Intermittent employment.

AUTHORITY: 5 U.S.C. 3401 *et seq.*, unless otherwise noted.

SOURCE: 44 FR 57380, Oct. 5, 1979, unless otherwise noted.

Subpart A—Principal Statutory Requirements—Part-Time Employment

§ 340.101 Principal statutory requirements.

This subpart incorporates for the benefit of the user of the principal statutory requirements governing part-time career employment, as contained in 5 U.S.C. 3401–3408, and related provisions of Public Law 95–437.

SHORT TITLE

SEC. 1. This Act may be cited as the “Federal Employees Part-Time Career Employment Act of 1978”.

CONGRESSIONAL FINDINGS AND PURPOSE

SEC. 2. (a) The Congress finds that—

(1) many individuals in our society possess great productive potential which goes unused because they cannot meet the requirements of a standard workweek; and

(2) part-time permanent employment—

(A) provides older individuals with a gradual transition into retirement;

(B) provides employment opportunities to handicapped individuals or others who require a reduced workweek;

(C) provides parents opportunities to balance family responsibilities with the need for additional income;

(D) benefits students who must finance their own education or vocational training;

(E) benefits the Government, as an employer, by increasing productivity and job satisfaction, while lowering turnover rates and absenteeism, offering management more flexibility in meeting work requirements, and filling shortages in various occupations; and

(F) benefits society by offering a needed alternative for those individuals who require or prefer shorter hours (despite the reduced income), thus increasing jobs available to reduce unemployment while retaining the skills of individuals who have training and experience.

(b) The purpose of this Act is to provide increased part-time career employment opportunities throughout the Federal Government.

“§ 3401. Definitions

“For the purpose of this subchapter—

“(1) ‘agency’ means—

“(A) an Executive agency;

“(B) a military department;

“(C) an agency in the judicial branch;

“(D) the Library of Congress;

“(E) the Botanic Garden; and

“(F) the Office of the Architect of the Capitol; but does not include—

“(i) a Government controlled corporation;