

Legally compliant medical surveillance in the workplace

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Medical surveillance is an important intervention in contributing to employee workplace health. Medical surveillance programmes should meet the relevant legislative requirements to ensure legality. This article highlights the perception that, based on personal experience in occupational health practice, there is a common tendency for occupational health practitioners and employers to flout the legislation, thereby rendering their medical surveillance programmes invalid.

Medical surveillance is an important control measure to contribute to worker health and safety. The Occupational Health and Safety Act (OHSA)¹ defines medical surveillance as “a planned programme or periodic examination (which may include clinical examinations, biological monitoring or medical tests) of employees by an occupational health practitioner or in prescribed cases by an occupational medicine practitioner”. The OHSA¹ defines biological monitoring as “a planned programme of periodic collection and analysis of body fluid, tissues, excreta or exhaled air in order to detect and quantify the exposure to or absorption of any substance or organism by persons”.

THE OBJECTIVES OF MEDICAL SURVEILLANCE

These include:

- Determining whether workers are physically and mentally fit to perform their jobs
- Establishing a baseline health profile for individual workers against which subsequent deviations and changes can be evaluated
- Preventing, detecting and treating occupationally related adverse health effects
- Ensuring workers are informed of the health hazards and risks associated with their work
- Ensuring that the work environment does not increase the risk of adverse health effects on workers
- Recommending appropriate interventions to protect the health of workers.

The OHSA¹ and the Mine Health and Safety Act (MHSA)² delegate responsibility to employers to ensure the health and safety of workers in the workplace. In accordance with legislation, every employer is obliged to identify the hazards to which workers are exposed in relation to any work they perform. Thus, every employer needs to ensure that risk assessments are conducted to identify hazards to health in the workplace. Furthermore, where hazards are identified, the employer is obliged to perform occupational hygiene assessments to quantify workers' exposure to hazards.

Regulations in the OHSA¹ and MHSA² stipulate that medical surveillance is mandatory where workers are exposed to specific hazards. Examples of applicable regulations include the Noise-Induced Hearing Loss Regulations,³ Asbestos Regulations,⁴ Hazardous Biological Agents Regulations,⁵ and Ergonomics Regulations.⁶

In order to meet the requirements of legislation regulating medical surveillance, employers are mandated to appoint occupational health practitioner(s) (OHPs) – as set out in Section 13 of the MHSA² and the Regulations of the OHSA¹ – to implement medical surveillance programmes. This regulation implies that OHPs, who include occupational nursing practitioners and occupational medical practitioners (OMPs) with the requisite qualifications in occupational health and occupational medicine, respectively, have a legal mandate to perform the examinations and tests in terms of medical surveillance.

Once appointed, the OHP assumes the responsibility to perform all duties in accordance with the scope of practice, competencies and medical ethics, which are legally defined.

Appointed OHPs tasked with implementing medical surveillance programmes should be familiar with the health hazards in the workplace. This familiarisation can best be achieved through direct participation in the risk assessment process to identify hazards to health. The hazards identified in the risk assessment will enable the OHP to develop occupational risk exposure profiles for each job category, which assist with the design and implementation of a hazard-based or risk-based medical surveillance programme, as required by legislation. The process outlined here invalidates the “spray and pray” approach, which subjects every worker included in the surveillance programme to the same battery of examinations and tests, irrespective of whether or not they are exposed to specific hazards.

The “spray and pray” or “one size fits all” approach is also likely to flout the Employment Equity Act⁷ (EEA) which, in Section 7, prohibits medical testing unless certain conditions are met, e.g. the test is required or permitted by legislation. Therefore, both the employer and the OHP are in breach of the EEA⁷ when prohibited tests are performed during medical surveillance programmes.

The legislation does not allow employers to decide what tests workers should undergo in the absence of a risk assessment. This raises the question of whether, in the absence of a valid risk assessment that meets the legislative requirements, a medical surveillance programme is legal. By extension, the issue is raised of whether OHPs who implement surveillance programmes in the absence of a valid risk assessment are in breach of professional ethics.

Under the International Code of Ethics for Occupational Health Professionals,⁸ the roles of OHPs should be clearly defined, which requires a clear understanding of occupational health practice and ethical principles. OHPs should be allowed free access to the relevant workplace and to relevant information needed for achieving occupational health objectives. OHPs should be recognised as experts in their field and must be allowed full professional independence when executing their responsibilities.

OHPs should avoid activities or situations that may compromise their integrity. They should not, under any circumstances, allow their judgement to be influenced by conflicts of interest. OHPs

should avoid being drawn into situations where perverse incentives influence their decisions regarding medical surveillance, e.g. ignoring ethics and sound practice principles to secure employment or work contracts.

OHPs should be aware that no legislation permits an employer to indemnify an appointed OHP from meeting the professional responsibilities as defined in occupational health and safety law.

CONCLUSION

In conclusion, OHPs should fulfil the role of gatekeepers in ensuring that medical surveillance programmes in the workplace are legally compliant. OHPs should avoid conflicts of interest. OHPs should strive to maintain the highest standard of ethics in the practice of occupational health.

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