

July 14, 2011

**MEMORANDUM NO: 060-11HR**

**TO:** Agency Administrators

**FROM:** Bobbie Chappell, Director of Human Resources

**VIA:** Rip Colvin, Executive Director

**RE: Policy Clarification 2011-#004: The Employee Assistance Program -General Terms and Policies Governing Time Off**

The Workforce Development and Benefits Team have issued Policy Clarification: 2011-#004, *The Employee Assistance Program - General Terms and Policies Governing Time Off*.

Given that all State Personnel System (SPS) agencies, the Justice Administrative Commission, and the circuits/agencies it administratively serves receive Employee Assistance Program (EAP) services under the same contract and that employee access to these benefits should be uniform and equitable, it is necessary to address some basic principles for using EAP. In addition, when a supervisor or manager refers an employee to the EAP, it is important that any necessary participation during work hours be administered consistently and pursuant to applicable laws. Therefore, this policy clarification articulates general policies concerning EAP and provides specific guidance to supervisors and managers on attendance issues.

Please contact Andy Snuggs at [SnuggsA@justiceadmin.org](mailto:SnuggsA@justiceadmin.org) if you have any questions.

Thank you.

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Attachment



Department of Management Services  
Division of Human Resource Management

# POLICY CLARIFICATION

**STATUTORY/RULE REFERENCE NUMBER:**

*Fair Labor Standards Act (FLSA) - 29 Code of Federal Regulations (C.F.R.) 785.11 – General;  
Section 110.1091, Florida Statutes (F.S.), Employee Assistance Programs; Public Records Exemption;  
Section 112.0455, F.S., Drug-Free Workplace Act; and  
Section 440.102, F.S., Drug-free Workplace Program Requirements*

**TRACKING NUMBER:**

2011-#004

**SUBJECT:**

*The Employee Assistance Program - General Terms and Policies Governing Time Off*

**APPROVAL SIGNATURE: Sharon D. Larson, Director****EFFECTIVE DATE:**

July 6, 2011

**Issue:**

Given that all State Personnel System (SPS) agencies receive Employee Assistance Program (EAP) services under the same contract and that employee access to this benefit should be uniform and equitable, it is necessary to address some basic principles for using EAP. In addition, when a supervisor or manager refers an employee to the EAP, it is important that any necessary participation during work hours be administered consistently and pursuant to applicable laws. Therefore, this policy clarification articulates general SPS policies concerning EAP and provides specific guidance to supervisors and managers on attendance issues.

**Policies:**

- Agencies should proactively promote the EAP to ensure employees are aware of this valuable resource and are familiar with the wide range of issues that EAP can help them address.
- Pursuant to Section 110.1091(2), F.S., a state employee's personal identifying information contained in records held by an employing state agency relating to an employee's participation in an employee assistance program is confidential and exempt from the provisions of Section 119.07(1) and Section 24(a), Art. I of the State Constitution. Additionally, pursuant to the federal Health Insurance Portability and Accountability Act (HIPAA), information concerning an employee's use of the EAP, regardless of whether contact was initiated solely by the employee or with the agency's assistance, shall be treated in a confidential manner by the EAP provider and, to the extent they have any involvement, the agency.
- Under the state's current EAP contract, consultations under EAP are free and may be in person or by telephone. While there is no set number of office visits that are covered, EAP is not intended to address long term treatment needs, so it is possible that after initial assessment and a certain number of sessions, employees who are deemed to need long-term counseling will be referred by EAP to the most appropriate level of care outside the EAP. Since each of the State's employee group health insurance companies may have differences in coverage for outpatient or inpatient services, such referrals will take into consideration the employee's present group insurance plan and ability to pay.

Generally, an employee has the right to refuse a referral to EAP and may discontinue participation at any time. However, regardless of how the employee chooses to address the performance or behavioral issues at hand, it is critical for the supervisor to point out to the employee that, if the performance expectation and/or corrective behavior is not achieved within the timeframe prescribed by the agency, the agency will take normal disciplinary measures or other appropriate action. There are four ways that employees may access EAP:

**Employee Initiated**

1. Self-Referrals – Employees are always welcome to self refer to the EAP for themselves or anyone living in their household. They may do so confidentially, without the employer's knowledge. However, when it is not feasible to schedule any required consultation sessions or office visits after work hours, employees should follow their respective agency's normal procedures for requesting time off and using the appropriate type of accrued leave or authorized leave without pay.

**Supervisory Initiated**

**For specific guidance on using supervisory referrals, refer to the document entitled "Understanding EAP Referral Types" under "My Quick Links" for Supervisors on the Horizon Health (An Aetna Company) website for state users under the People First system.**

2. Informal Supervisory Referrals – If the supervisor has recommended EAP as a resource, but it is not feasible to schedule any required consultation sessions or office visits after work hours, employees should follow their respective agency's normal procedures for requesting time off and using the appropriate type of accrued leave or authorized leave without pay.
3. Supervisory (Formal) Referrals – If the supervisor is using EAP as adjunct support to help the employee address the problem at the root of the performance decline or substandard conduct, the employee will be granted work time to attend an initial assessment/consultation session. For all subsequent visits the employee shall be granted use of accrued leave or authorized leave without pay.
4. Mandatory Referrals – If the supervisor, in consultation with the HR office, has determined that a mandatory referral is appropriate (based on agency policy and applicable state or federal laws where automatic referral to EAP is part of a formal protocol and refusal to participate can lead to dismissal), the initial assessment/consultation session through the EAP shall be considered work time. For any subsequent outpatient EAP participation that cannot be accommodated after work hours and for any needed in-patient treatment, the employee shall be granted use of accrued leave or authorized leave without pay.

Note: In cases where it does not negatively impact operations, supervisors may also allow the employee to convert to a flexible schedule that accommodates EAP participation with minimal loss of work time.

**Background:**

The use of the EAP as a management tool for agencies has been provided in law since 1990. Although the original focus of EAPs (and still an important role) is effective management of workplace issues associated with substance abuse and emotional distress, today EAPs offer a variety of services to employees, all of which are designed to support workplace productivity and safety. For these reasons, the SPS recognizes the use of EAP in helping employees address a wide range of personal issues that are affecting their job performance or workplace behavior.

Currently, the State of Florida's authorized EAP service provider is Horizon Health/Aetna, a People First subcontractor. Services offered include, but are not limited to, employee counseling, critical incident stress management, and fitness for duty evaluations. A critical goal of the EAP is to provide consultations and treatment referrals for employees, so that the impact of behavioral disorders, medical disorders, substance abuse problems or other personal difficulties are minimized and employees are able to get back to working effectively as soon as possible.

The EAP also supports the rehabilitation of employees for whom formal referral to a treatment program for substance abuse issues is a legal requirement of the safety sensitive or special risk positions that they hold.

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**Applicable Statute/Rule Citations:****FLSA 29 CFR 785.11 - General**

Work not requested but suffered or permitted is work time. For example, an employee may voluntarily continue to work at the end of the shift. He may be a pieceworker, he may desire to finish an assigned task or he may wish to correct errors, paste work tickets, prepare time reports or other records. The reason is immaterial. The employer knows or has reason to believe that he is continuing to work and the time is working time.

**Section 110.1091, F.S., Employee assistance programs; public records exemption.--**

(1) An employing state agency may provide a counseling, therapeutic, or other professional treatment program to assist any state employee who has a behavioral disorder, medical disorder, or substance abuse problem or who has an emotional difficulty that affects the employee's job performance. Each employing state agency may designate community diagnostic and referral resources as necessary to implement the provisions of this subsection.

(2) A state employee's personal identifying information contained in records held by an employing state agency relating to an employee's participation in an employee assistance program is confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

**Section 112.0455, F.S., Drug-Free Workplace Act.--**

(8)(m) No employer may discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test.

(n) In addition to the limitation under paragraph (m):

**POLICY CLARIFICATION**

**TRACKING NUMBER:**

2011-#004

1. Except as provided in subparagraph 3., no employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive confirmed drug test, unless the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under a health insurance plan, an employee assistance program or an alcohol and drug rehabilitation program, and:

a. The employee has either refused to participate in the employee assistance program or the alcohol and drug rehabilitation program or has failed to successfully complete such program, as evidenced by withdrawal from the program before its completion or a report from the program indicating unsatisfactory compliance, or by a positive test result on a confirmation test after completion of the program; or

b. The employee has failed or refused to sign a written consent form allowing the employer to obtain information regarding the progress and successful completion of an employee assistance program or an alcohol and drug rehabilitation program.

(v) If an employee is unable to participate in outpatient rehabilitation, the employee may be placed on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave-without-pay status, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay. Upon successful completion of an employee assistance program or an alcohol and drug rehabilitation program, the employee shall be reinstated to the same or equivalent position that was held prior to such rehabilitation.

**Section 440.102, F.S., Drug-free workplace program requirements.--**

(11)(a) If an employee who is employed by a public employer in a safety-sensitive position enters an employee assistance program or drug rehabilitation program, the employer must assign the employee to a position other than a safety-sensitive position or, if such position is not available, place the employee on leave while the employee is participating in the program. However, the employee shall be permitted to use any accumulated annual leave credits before leave may be ordered without pay.

(b) An employee who is employed by a public employer in a special-risk position may be discharged or disciplined by a public employer for the first positive confirmed test result if the drug confirmed is an illicit drug under section 893.03, F.S. A special-risk employee who is participating in an employee assistance program or drug rehabilitation program may not be allowed to continue to work in any special-risk or safety-sensitive position of the public employer, but may be assigned to a position other than a safety-sensitive position or placed on leave while the employee is participating in the program. However, the employee shall be permitted to use any accumulated annual leave credits before leave may be ordered without pay.

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