

Protecting Medical Privacy

Safeguarding Private Health Information From the Postal Service's Prying Eyes

The principle of doctor-patient confidentiality is fundamental in our society. We take comfort in the fact that our highly sensitive medical records remain private and protected. But can we really count on that? After all, other entities may have an interest in gaining access to our medical records—insurance companies, government agencies, and employers, just to name a few.

This article will focus on the Postal Service as an employer and its relationship to employee medical records. It will explore the complex intersection of an employee's right to medical privacy with the employer's interest in obtaining such records.

The reasons that the Postal Service might advance its interest in obtaining an employee's medical information are varied. As examples, they can include normal absences due to sick leave, requests for leave under the Family Medical Leave Act (FMLA), injuries related to the Office of Workers' Compensation Programs (OWCP), requests for Reasonable Accommodation, and requests for light duty.

However, the fact that an employer may have an *interest* in ac-

quiring an employee's private medical information does not automatically translate into a *legal or contractual right* to obtaining it.

In too many cases, management's pursuit of medical information is groundless. It may be because some supervisor doesn't like a particular employee. Or some manager wants to pressure employees as a whole to reduce either the sick leave rate or workers' compensation costs.

Fortunately, regulations and the contract place limits on management's ability to acquire medical information—which this article will explore.

Sick Leave Absences

An employee's absence due to sick leave is one of the most common triggers for the Service to request medical information. The Employee and Labor Relations Manual (ELM) contains provisions for sick leave documentation.

Medical documentation is required for sick leave absences that exceed three days, in accordance with ELM 513.362. It can also be required under ELM 513.361 for

absences of three days or less, when the employee is on restricted sick leave or when the supervisor deems documentation desirable for the protection of the interests of the Postal Service.

However, the Service does not have free access to an employee's protected medical information just because there is a requirement to provide medical documentation. That's because there are limits on what the medical documentation must contain.

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ELM 513.364

When employees are required to submit medical documentation, such documentation should be furnished by the employee's attending physician or other attending practitioner who is performing within the scope of his or her practice. The documentation should provide an explanation of the nature of the employee's illness or injury sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence. Normally, medical statements such as "under my care" or "received treatment" are not acceptable evidence of incapacitation to perform duties. Supervisors may accept substantiation other than medical documentation if they believe it supports approval of the sick leave request.

A single phrase from this cite has a history of being troublesome for employees and union stewards alike. The phrase is "an explanation of the nature of the employee's illness or injury." Historically, some supervisors have grabbed onto that phrase and not let go. They have insisted on management's right to deny sick leave to an employee because of a lack of a diagnosis within the medical documentation.

However, management has no contractual or legal right to know an employee's diagnosed condition in this type of case. Postal Service headquarters has acknowledged this in a recent letter:

M-01629

"The Postal Service's position is that ELM 513.362 and 513.364 are consistent with the Rehabilitation Act and do not require the employee to provide a diagnosis."

Clearly, the phrase "nature of the employee's illness" within ELM 513.364 must not be read as requiring a diagnosis. Rather, it should be read in context with the rest of the sentence, the qualifying phrase: "sufficient to indicate to management that the employee was (or will be) unable to perform his or her normal duties for the period of absence." Thus, under ELM 513.36, a letter carrier may only be required to provide medical documentation such as this example: "Please excuse (patient) from work for the period of March 13-16. He was suffering from a medical condition that totally incapacitated him from work."

Medical Inquiries

The JCAM provides that management may make medical inquiries in certain circumstances. For instance, if an employee seeks to have an absence protected under the Family and Medical Leave Act (FMLA), management has the right to verify that the employee's (or family member's) health condition actually qualifies under the Act.

JCAM (page 10-16)

Management is within its rights to ask employees about the circumstances of their condition in order to determine whether absences may be protected under the FMLA and/or whether absences are for a condition which requires the ELM 865 return to work procedures.

Although the JCAM states that management is within its rights to make such inquiries for FMLA and return to work procedures, it does not provide specifics on how such inquiries may be made. Therefore, it is necessary to exam-

ine other contractual provisions and federal regulations to determine how management may make such inquiries in each case. This article will look first at rules for medical inquiries in the ELM 865 return-to-work procedures, followed by rules for such inquiries in FMLA-covered absences.

Return to Work Clearances

In M-01629, the Postal Service stated that ELM 513.36 is consistent with the Rehabilitation Act, which limits an employer's rights to make medical inquiries. In the same way that a diagnosis may not be required for regular sick leave absences, the Rehabilitation Act also limits management's rights in requiring return-to-work clearance.

Up until 2005, the Postal Service regularly required employees returning to duty after 21 or more days of absence (or with certain medical conditions, e.g. diabetes,

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cardiovascular diseases) to provide detailed medical reports—not just a physician’s statement that the employee was able to return to work.

In 2005, the Postal Service revised the ELM to bring it into compliance with the Rehabilitation Act’s restrictions on medical inquiries. Therefore, language regarding the 21 days and the specific medical conditions was deleted from ELM 865 at that time.

This revision removed management’s blanket policy of requiring medical documentation for these situations. Instead, management must now make an individualized assessment in deciding whether it may require a return-to-work clearance. It must look at each situation on a case by case basis:

ELM 865.1—Certification Required:

All Bargaining Unit Employees and Those Nonbargaining Unit Employees Returning From Non-FMLA Absences

Return-to-work clearance may be required for absences due to an illness, injury, outpatient medical procedure (surgical), or hospitalization when management has a reasonable belief, based upon reliable and objective information, that

- a. The employee may not be able to perform the essential functions of his/her position, or*
- b. The employee may pose a direct threat to the health or safety of him/herself or others due to that medical condition.*

In making this determination, management must consider the essential functions of the employee’s job, the nature of the medical condition or procedure involved, guidance from the occupational health nurse administrator, occupational health nurse, and/or the Postal Service’s physician regarding the condition or procedure involved, and any other reliable and objective information to make an individualized assessment whether there is a reason to require the return-to-work documentation. In cases of occupational illness or injury, the

employee will be returned to work upon certification from the treating physician, and the medical report will be reviewed by a medical officer or contract physician as soon as possible thereafter.

Under the current ELM language, a letter carrier returning to work following a hospitalization, for instance, should be medically cleared based on a simple statement from his or her health care provider affirming the ability to return to work. The only way management could require detailed medical reports would be if it had a “reasonable belief, based on reliable and objective information,” that the letter carrier in this instance might be unable to perform the essential functions of the position or might pose a direct threat to self or others.

Although the Rehabilitation Act removed management’s blanket policy on return to work clearances, it is still important for union representatives to be aware of the documentation requirements. That’s because there may be cases where management actually does have “reliable and objective information” that would provide a basis for return to work clearance, the documentation requirements are found in ELM 865.4.

ELM 865.4 Documentation Required

All medical certifications must be detailed medical documentation and not simply a statement that an employee may return to work. There must be sufficient information to make a determination that the employee can perform the essential functions of his/her job, and do so without posing a hazard to self or others. In addition, the documentation must note whether there are any medical restrictions or limitations on the employee’s ability to perform his/her job, and any symptoms that could create a job hazard

for the employee or other employees. The occupational health nurse administrator, occupational health nurse, or the Postal Service’s physician evaluates the medical report and, when required, assists placing employees in jobs where they can perform effectively and safely.

Note that it is the Service’s medical personnel who evaluate the medical reports. To protect the privacy of their medical information, employees in such cases should ensure that they do not provide the medical reports to their supervisors for forwarding to the Medical Unit. Rather, the employee should request that his or her physician send the medical documentation directly to the Postal Service’s medical personnel.

Also, there should be no undue delay in returning these employees to work. The fact that there may be “reliable and objective information” that return to work clearance is necessary for a given employee does not mean that he or she should be prevented from returning in a timely manner. The parties agreed to the Return to Duty Memo, which addresses the timing of return to work clearances, and states (in pertinent part):

Memo Re: Return to Duty

- 1. To avoid undue delay in returning an employee to duty, the on-duty medical officer, contract physician, or nurse should review and make a decision based upon the presented medical information the same day it is submitted. Normally, the employee will be returned to work on his/her next workday provided adequate medical documentation is submitted within sufficient time for review.*
- 2. The reasonableness of the Service in delaying an employee’s return beyond his/her next workday shall be a proper subject for the grievance procedure on a case-by-case basis.*

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Family Medical Leave

The initial documentation for absences covered by FMLA can be found in ELM 515.51.

ELM 515.51 General

An employee must provide a supervisor a PS Form 3971 together with documentation supporting the request, at least 30 days before the absence if the need for the leave is foreseeable. If 30 days notice is not practicable, the employee must give notice as soon as practicable. Ordinarily the employee should give at least verbal notification within 1 or 2 business days of the time the need for leave becomes known. A copy of the completed PS Form 3971 is returned to the employee along with a copy of Publication 71, which details the specific expectations and obligations and the consequences of a failure to meet these obligations. Additional documentation may be requested of the employee, and this must be provided within 15 days or as soon as practicable considering the particular facts and circumstances.

The supervisor should provide the employee a copy of his or her PS Form 3971 along with a USPS Publication 71, "Notice for Employees Requesting Leave for Conditions Covered by the Family and Medical Leave Act." The Form 3971 should also indicate whether additional documentation is necessary in order to designate the leave as FMLA.

If additional documentation is necessary for FMLA coverage, an employee may provide such certification on optional Form WH-380, forms created by the union, or any other form that contains the same basic information.

It is important to realize that the law does not require the employee to give the Postal Service copies of any *medical records* for FMLA-covered

absences. The employer may only require the employee to provide a *medical certification* which confirms that a serious health condition exists.

Not only is the employer not entitled to medical records for absences covered by FMLA, but information about the diagnosis is also excluded. Certification forms (both from NALC and the Department of Labor's WH-380) do not provide for the identification of a diagnosis. For instance, NALC's form states under Item 3:

NALC form

Medical facts: Please describe briefly the medical facts which fit the category checked above, without including a specific diagnosis or prognosis.

For verification that an employee has a qualifying condition, all of the information that is required on the form relates solely to identifying one of the six FMLA conditions—not to identifying the employee's specific medical condition. In other words, the health care provider must include information that is sufficient to identify one of the 6 serious health conditions, but not to the point of actually providing a diagnosis. (The 6 conditions include: 1) hospital care, 2) absence plus treatment, 3) pregnancy, 4) chronic conditions requiring treatments, 5) permanent/long-term conditions requiring supervision, 6) non-chronic conditions requiring multiple treatments.)

Likewise, an employee is able to maintain his or her privacy regarding the type of treatment received from the health care provider. The employee is not required to provide information on the specific drug that the health

care provider has prescribed in order to be eligible for FMLA. This is very important. It would defeat the purpose of omitting a diagnosis on the FMLA certification form only to later reveal it by naming a prescription drug that is used to treat only certain specific medical conditions. Privacy is maintained in that the FMLA certification forms ask for such information only in general terms:

WH-380

*Question 6(c) If a regimen of continuing treatment by the patient is required under your supervision, provide a **general description** of such regimen (e.g., prescription drugs, physical therapy requiring special equipment).*

(Emphasis added.)

NALC forms

If additional treatments will be required for the condition, please describe: the nature of such additional treatments or continuing regimen of treatment under your supervision (e.g. prescription drugs, physical therapy requiring special equipment); the probable number of such treatments; the length of absence required; and the actual dates of the treatments, if known.

Under FMLA, the Postal Service is barred from directly contacting the employee's health care provider to obtain information beyond what is contained in the certification documents.

29 CFR § 825.307(a)

If an employee submits a complete certification signed by the health care provider, the employer may not request additional information from the employee's health care provider. However, a health care provider representing the employer may contact the employee's health care provider, with the employee's permission, for purposes of clarification and authenticity of the medical certification.

There are several layers of privacy protections in these federal regulations. First, the employee's physician may be contacted only by the employer's health care provider, not a supervisor. Second, that contact may be made only with the employee's permission. Finally, the Service's inquiry to the physician may not seek additional information regarding the health condition of the employee (or family member, as applicable). The inquiry may only *clarify or authenticate* the medical certification.

In addition to the privacy that FMLA ensures by barring physician contact without the employee's permission, is the protection that applies to the handling of medical documents associated with the medical certifications. Federal regulations provide that such documents be maintained as confidential records.


29 CFR § 825.500(g)

Records and documents relating to medical certifications, recertifications or medical histories of employees or employees' family members, created for the purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements (see 29 CFR §1630.14(c)(1)), except that:

1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations.

It is clear that federal regulations under FMLA dictate that an employee's medical information must remain confidential. Therefore, the Service's medical personnel should not disclose confidential medical information to the supervisor or managers. Supervisors may be informed only about a letter carrier's

physical restrictions and/or the necessary accommodations for such restrictions—without having any access to the private medical information associated with the FMLA certification documents.



Neither the diagnosis nor information about the specific medical treatment should be included on FMLA certification forms.



This discussion of FMLA certifications began with ELM 515.51. This section states “an employee must provide a supervisor a PS Form 3971 together with documentation supporting the request.” As discussed earlier, the FMLA certification—when it lacks the type of information that is considered restricted, such as a diagnosis or specific treatment—is very general. Therefore, it is possible that an employee might feel comfortable with submitting the FMLA certification to his or her supervisor. And, in fact, that is the process provided for in ELM 515.51, where it states that an employee submits the certification to his or her supervisor.

Many times, however, a health care provider fails to keep the certification general and actually identi-

fies the specific diagnosis or prescribed medications. An employee in this situation may prefer to maintain his or her privacy by not handing the certification to the supervisor. In fact, even if the certification does not contain a specific diagnosis or prescribed medication, an employee may still be reticent about giving it to the supervisor. There is no requirement to do so; the employee may submit the certification directly to the district FMLA Coordinator instead.

Union activists should caution their members about the relative risk to privacy in submitting an FMLA certification that contains a diagnosis (or other restricted medical information) to floor supervisors or station management.

Ultimately, of course, it is up to the employee to decide to whom he or she will submit the FMLA certification. If the employee decides to submit the certification to his or her supervisor after receiving such a caution, at least the employee will have done so after being fully informed. There can be no doubt, however, that the employee has the choice of submitting the FMLA certification to the FMLA Coordinator or the supervisor. The Service acknowledged this in the following correspondence:

M-01635

“Employees can submit their FMLA information to a supervisor or the FMLA Coordinator. The Postal Service is considering revisions to ELM 515.51. In the interim, the field will be informed that supervisors should be forwarding the employee's FMLA information to the FMLA Coordinator, whenever received.”

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Why doesn't the FMLA certification process require a health care provider to obtain a waiver from the patient to release information on the FMLA certification form? Regulations do not require that because, in the FMLA process, the health care provider is simply releasing the information to the patient. It is the employee who then chooses whether or not to release the information to the employer. Therefore, no waiver is necessary.

An employee may choose not to submit an FMLA certification to the employer. However, doing so means that he or she is giving up the opportunity of obtaining FMLA coverage for the absence:

29 CFR § 825.311(b), relevant part:

If an employee fails to provide a medical certification within a reasonable time under the pertinent circumstances, the employer may delay the employee's continuation of FMLA leave. If the employee never produces the certification, the leave is not FMLA leave.

HIPAA

We just discussed the fact that waivers are not necessary for FMLA certifications because the information is being released directly to the employee or patient. It is now necessary to examine the regulations regarding the release of information from a health care provider to a third party—in our case, the employer.

We'll begin with the Health Insurance Portability and Accountability Act (HIPAA). This is a very broad federal law enacted by Congress in 1996. The law deals with more than just privacy stan-

dards, however. For instance, HIPAA addresses various issues such as pre-existing conditions and health insurance coverage for employees who lose or change their jobs.

For our purposes, we'll be looking at the section of HIPAA that deals specifically with the release of medical information. This section is known as the Privacy Rule and it took effect on April 14, 2003. The Privacy Rule provides a national standard for protecting an individual's health information.

The Privacy Rule applies to the following, which are referred to as "covered entities":

- **Health Plans**—including health, dental, vision, and prescription drug insurers, HMOs, Medicare, Medicaid, employer-sponsored group health plans, government health plans.
- **Health Care Providers**—any person or organization that provides, bills, or is paid for health care. This can include physicians, dentists or other individual practitioners as well as institutional providers like clinics or hospitals.
- **Health Care Clearinghouses**—such as billing services.

The Privacy Rule also specifies what type of information is protected. That would be any information that could be directly connected to an individual. Such information is referred to as "protected health information" or PHI. It includes information that would disclose:

- The individual's physical or mental health condition (whether past, present, or future).
- The individual's treatment or health care.
- The individual's payment for health care.

Now that we see what entities the Privacy Rule applies to and the type of information it deals with, we are ready to examine an employer's ability, if any, to access that information.



The Privacy Rule addresses opposing needs—the need for privacy vs. the need for quality health care and the public good.



Of course, in establishing federal regulations regarding protected health information (PHI), the simplest thing for the federal government to have done would have been to implement federal regulations stating that no one could ever access any PHI, no matter what. It would be much less complicated and messy to just say that the doctor-patient relationship is sacred and that no information could ever be disclosed.

However, that is not practical because of the ultimate outcome of such a policy. A physician who referred a patient to a specialist for surgery would not be able to share medical information with that specialist or the hospital. Dangerous communicable diseases could spread in an uncontrolled manner if physicians were barred from pro-

viding notification of outbreaks. A health care providers would be unable to disclose the fact that his or her patient had suffered multiple broken bones as a result of child abuse.

These examples make it clear that it is unrealistic to think that information should never be disclosed. Since the reality is that some disclosures will occur, it is the intent of the Privacy Rule to regulate how those disclosures can take place. Essentially, the Privacy Rule provides regulations that balance two separate needs—the need for protecting medical privacy vs. the need for quality health care and the public good.

The Privacy Rule regulations are found in 45 CFR §164. Within those regulations, there are parts that deal specifically with different types of disclosures:

- 1) uses and disclosures for which the patient’s authorization is required,
- 2) uses and disclosures requiring an opportunity for the patient to agree or object, and
- 3) uses and disclosures for which there is no requirement for the patient’s authorization or his or her opportunity to agree or object.

It is the last one that we are concerned with in this article because disclosure to the employer that the individual has agreed to or authorized would not ordinarily be an issue. What the employee would take issue with would be the employer’s attempt to obtain the his or her PHI without the employee’s authorization. These regulations are found in 45 CFR §164.512.

The following are examples of disclosures of PHI that do not require the individual’s authorization:

- §164.512(c) addresses individuals who may have been exposed to or risk spreading a communicable disease.
- §164.512(f) concerns medical emergencies that are the result of abuse, neglect, or domestic violence.
- §164.512(h) covers disclosures related to organ and tissue donation of deceased individuals.
- §164.512(k) refers to an individual’s separation or discharge from military service and the subsequent disclosures to the VA to determine eligibility for benefits.

These examples are provided in this article simply to give the union activist an idea of the various types of disclosures that exist within §164.512 and how those disclosures are regulated. (Each type has its own unique disclosure rules.)

There is no provision in the Privacy Rule that specifically gives the Postal Service free access to employee medical records.

One thing is certain, however. There is no provision in §164.512 that specifically states that the Postal Service may obtain access to an employee’s protected health information without the individual’s

authorization. However, even though the Service does not have broad-based access like that, there is one part of the Privacy Rule that could affect Postal employees. That is §164.512(l), which deals with disclosures related to workers’ compensation for on-the-job injuries. The standards for this type of disclosure are discussed more fully below.

Office of Workers’ Compensation

The Privacy Rule regulates disclosures related to on-the-job injuries or illnesses. These regulations are found in 45 CFR §164.512(l), which state:

§164.512(l)

(l) Standard: Disclosures for workers’ compensation. A covered entity may disclose protected health information as authorized by and to the extent necessary to comply with laws relating to workers’ compensation or other similar programs, established by law, that provide benefits for work-related injuries or illness without regard to fault.

This type of disclosure is obviously necessary because it enables the Office of Workers’ Compensation (OWCP) to provide the benefits to which the employee is entitled following an on-the-job injury or illness. If the health care provider was unable to provide medical information to OWCP, the employee’s medical bills would go unpaid and the disabled employee would go without wage loss compensation.

Union activists should understand this one very important point, however: The Privacy Rule *does not say* that anyone, including the

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employer, has free access to an employee's private health information just because he or she has a work-related condition. What the Privacy Rule *does* say is that such disclosures are regulated by the laws that otherwise exist for any given workers' compensation program (state or federal).

In our case, that law would be the Federal Employees' Compensation Act (FECA) and its implementing regulations. That is where we must look to learn the rules for disclosure of PHI for a Postal employee whose injury or illness is work-related.

The regulations under FECA allow the employer to obtain protected health information only in the following manner:

20 CFR § 10.506 May the employer monitor the employee's medical care?

The employer may monitor the employee's medical progress and duty status by obtaining periodic medical reports. Form CA-17 is usually adequate for this purpose. To aid in returning an injured employee to suitable employment, the employer may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. However, the employer shall not contact the physician by telephone or through personal visit. When such contact is made, the employer shall send a copy of any such correspondence to OWCP and the employee, as well as a copy of the physician's response when received. The employer may also contact the employee at reasonable intervals to request periodic medical reports addressing his or her ability to return to work.

In enforcing 20 CFR § 10.506, union activists should also cite the

Service's internal regulations, which mirror FECA's implementing regulations:

ELM 545.52 Determining Return to Work Capability

The control office or control point must monitor the employee's medical progress and determine return to work capability by obtaining periodic medical reports. Form CA-17 may be used for this purpose. . . To aid in returning an injured employee to suitable employment, the control office or control point may also contact the employee's physician in writing concerning the work limitations imposed by the effects of the injury and possible job assignments. However, FECA prohibits contacting the physician by telephone or through a personal visit except for administrative purposes such as determining whether a fax has been received or ascertaining the date of a medical appointment. A copy of all written correspondence to the employee's physician and any response received must be sent to the OWCP and the employee. The employee may be contacted at reasonable intervals to request periodic medical reports concerning return to work potential.

This regulation identifies the only way that, under FECA, the employer can obtain medical information from the physician. The protections are significant. The Service's contact must be in writing with a copy given to OWCP and the employee (along with the physician's response). Further, the contact may be only in regard to the employee's work limitations or possible job assignments. If the employer contacted the physician for any other reason—to object to surgery as a treatment, for example—that contact would be a violation of the regulations.

Although the Service's access to PHI from the health care provider is limited to its authority under 20 CFR § 10.506, it does have another

avenue for obtaining medical information related to the on-the-job injuries or illnesses. The Service can request the information directly from OWCP—as opposed to the individual's health care provider. OWCP provides the following guidance for the employer:

CA-550, A-15 Is the employer entitled to know what an employee's workers' compensation file contains?

Yes. While workers' compensation records are protected from release under the Privacy Act, the employer is considered a party to the claim. It may receive information in the employee's file under the "routine use" provision of the regulations under which the Privacy Act is administered. Such information includes medical reports. Employers are expected, however, to handle this information with care and to restrict access to those with a specific need to have.

In CA-810, OWCP goes into much greater detail in describing how the employer may obtain access to work-related medical information in OWCP's possession. In reading the following portion of CA-810, the reader is advised that "claims staff" refers to OWCP employees, while "agency personnel" refers to Postal Service personnel.

CA-810 Chapter 9-2 Inspection and Protection of Records

Claims staff are instructed to provide agency personnel with copies of all significant correspondence to employees, even when the employees are no longer on the agency's rolls. Under the routine use provisions of the regulations governing release of information under the Privacy Act, agencies are entitled to obtain copies of other materials in their employees' compensation file as well.

The use of these copies must, however, be consistent with the reason the information was collected. In practice, this means that the use must be connected in some way with the compensation

claim. Agencies may not use copies of information from claim files in connection with EEO complaints, disciplinary actions, or other administrative actions without the employee's consent. Any questions concerning use or release of records should be directed to the district office.

To safeguard the privacy of information in compensation files, much of which is inherently sensitive, agencies should observe the following procedures:

Making Specific Requests. Requests from the agency for materials in a case file should include the specific reason for requesting the information (e.g., to verify that the employee actually worked for the agency, or to attempt reemployment with the worker). OWCP will release the requested information either by telephone or in writing once satisfactory identification is presented. . . Representatives of an investigative body within an agency may also obtain information upon presentation of proper credentials as long as the purpose for the request is stated.

Inspecting Files. An agency representative may ask to inspect files at the district office. OWCP will accommodate all such requests subject to logistical and physical limitations, including reasonable advance notice of the visit and a list of cases to be reviewed. Here again, the purpose should be stated specifically and the reviewer

should be identified before the visit. . . **Penalties Under the Privacy Act.** It is not appropriate for agency personnel to inspect records without a specific and valid purpose for doing so (that is, curiosity is not an acceptable reason for review). Agency personnel who review files should be conversant with the restrictions of the Privacy Act and the penalties stipulated for violations. These penalties include fines and imprisonment. OWCP will deny further access to any individual who improperly uses information from OWCP files.

Note that OWCP is prohibited under the Privacy Act (not to be confused with HIPAA's Privacy Rule—see box below) from providing medical information to the employer unless the employer has a valid reason for requesting the information—and that “curiosity” does not constitute a valid reason. When management requests copies of medical reports without a valid reason, OWCP has responded to the Postal Service in the past with letters similar to this:

We cannot provide the copies requested. Under the routine use provisions of the Privacy Act, employing agencies are entitled to copies of limited material from the compensation files. In order to be entitled to copies, the agency must show an ability to “use” the document provided. This

means the agency must use the requested document independently from our Office. . . Examples of inappropriate requests include copies of medical reports that do not show an ability to work, copies of other documents to “complete” your records, or copies of documents to allow you to review our actions or comment on their appropriateness.”

In sum, for information related to work limitations and possible job offers, the Service may contact the health care provider in writing—subject to providing copies of the correspondence to and from the physician to the employee and OWCP. If the Service wants access to any other medical information related to the OWCP claim, it must contact OWCP for that information. Even then, the Service must be able to show that it has a “use” for each document it requests in accordance with the Privacy Act.

Medical free-for-all

Although it is clear that the Postal Service is provided sufficient access to medical information for work-related injuries and illnesses by OWCP regulations, man-

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Privacy Act & the Privacy Rule—They're not the same

Even though the names are similar, don't confuse the Privacy Act with HIPAA's Privacy Rule. They are two entirely separate things.

The Privacy Act of 1974 provides privacy protection for personal information that any given **federal agency possesses**. Under the Privacy Act, a federal agency may only disclose information from a system of records, inter-

nally or externally, under the following circumstances:

- 1) The individual authorized the disclosure in writing, OR
- 2) The disclosure is within one of 12 authorized exceptions (one of which is “for routine uses within a U.S. government agency).

Postal Service regulations implementing the Privacy Act are found within 39 CFR § 261-268. Also refer

to the Postal handbook AS-353, *Guide to Privacy and the Freedom of Information Act*.


In contrast, the Privacy Rule under HIPAA applies to protected information that a **covered entity possesses** (health care providers, health plans, etc.) Privacy Rule disclosure regulations are discussed thoroughly starting on page 6 of the main article (and are found in 45 CFR § 164.512.)

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agement has, at times, made attempts to bypass that system to obtain even more PHI.

Form 2488. The PS Form 2488, Authorization for Medical Report, was originally developed so that management could obtain medical information for those seeking employment with the Postal Service. Its original purpose had nothing to do with seeking the release of medical reports for current employees. However, at a some point, the Service began using it that way. In fact, when an employee is injured at work, management now has a checklist of forms to provide to the employee—one of which happens to be the Form 2488.



An employee signing Form 2488 waives all rights to medical privacy thus allowing the Service free access to private medical records.



However, if an employee signs the Form 2488, he or she is granting the Service authorization to obtain information from the health care provider for **any and all medical conditions** that the employee may have—not just the

medical information related to the on-the-job injury or illness. Signing the Form 2488 means that the employee has agreed to waive all rights to medical privacy and has allowed the Postal Service open access to all of his or her protected health information.

The Service claimed this form was necessary because some physicians refused to fill out a CA-17, Duty Status Report. Without the CA-17, management would not be able to determine an employee's physical restrictions. However, in a rare event like that, an employee can easily solve this problem by writing his or her own short note to the physician specifically authorizing release of the CA-17—and nothing more.

An employee cannot be forced to sign a Form 2488. Union activists should refer to M-01430 to support an employee if management attempts to force him or her to sign the Form 2488.

M-01430

The issue in this case is whether management violated the National Agreement by use of a PS Form 2488, Authorization for Medical Report, to obtain an employee's written authorization to obtain medical evidence from the employee's attending physician. Form CA-17 "Duty Status Report" is usually adequate to obtain medical information concerning an injured employee's job-related medical condition and work restrictions. If a medical provider will no release the Form CA-17, without a medical release, PS Form 2488 may be used to secure the release. Completion of PS Form 2488 by the injured employee is voluntary, and Section 10.506 of the regulations governing claims under the Federal Employees' Compensation Act sets forth the rules under which employing agencies may request medical reports from the attending physician of injured employees.

NALC strongly advises employ-

ees not to sign the PS Form 2488 because it would release his or her entire medical history to the Postal Service. The employee's signature on that form could result in the employer having a free-for-all with the employee's PHI.

OWCP Forms. The Postal Service has also used another avenue to try and obtain protected health information to which it was not entitled. Its attempt was based on the paragraph that is found on OWCP forms—just above the employee's signature line (on the CA-1, CA-2, and CA-2a). The paragraph states:

I hereby authorize any physician or hospital (or any other person, institution, corporation, or government, agency) to furnish any desired information to the U.S. Department of Labor, Office of Workers' Compensation Programs (or to its official representative). This authorization also permits any official representative of the Office to examine and to copy any records concerning me.

Management has argued that the phrase "or to its official representative" actually referred to the Postal Service's Injury Compensation Control Office (ICCO). Therefore, the Service asserted that it, as OWCP's official representative, was entitled to examine and copy any of the employee's records.

However, the fact is that the Postal Service *is not* an official representative of the Department of Labor OWCP. FECA provides that only employees of the Department of Labor may be delegated to act as representatives for OWCP, not employees of the Postal Service or any other federal agency:

5 U.S.C. 8145

The Secretary of Labor shall administer and decide all questions arising under, this subchapter. He may-

- 1) *appoint employees to administer this subchapter; and*
- 2) *Delegate to any employee of the Department of Labor any of the powers conferred on him by this subchapter.*

USPS-OIG. The Postal Service is currently looking for new ways to obtain its employees' protected health information. In 2007, NALC became aware that agents from the Postal Service-Office of Inspector General (USPS-OIG) had developed form letters to send to health care providers seeking employees' protected health information. NALC and APWU filed a joint lawsuit in U.S. District Court on January 17, 2008 in an effort to stop OIG agents from obtaining an employee's PHI without the employee's knowledge or consent. For more details, see the article in this Activist on page 14.

Medical Records

Employees who are concerned about medical privacy have more to worry about than just the Postal Service trying to obtain access to "outside" medical records. The fact is, the Service also maintains employee medical records of its own—the improper handling of which could cause the release of highly sensitive medical information.

To comply with the Privacy Act (see box on page 9), the Postal Service's system of records must provide privacy protection for personal information that it possesses. For the medical records that the Postal Service has in its possession, the Service implemented Management

Instruction EL-860-98-2, which provides for the three types of employee medical records: restricted medical records, administrative medical records, and OWCP-related medical records.

- 1) **Restricted medical records.** These records are defined by the Postal Service in Management Instruction EL-860-98-2:

Restricted medical records contain medical information that is highly confidential, reflect the privileged employee-occupational health provider relationship, and have the most limitations placed on both their access and disclosure. . . Only medical personnel or postal personnel with a need to know have access to this material. . . These records are maintained only in medical offices or facilities in employee medical folders (EMFs) unless otherwise directed by the national medical director.

Some examples of what the EMF includes are:

- Form 2485, Medical Examination and Assessment.
- Records containing a diagnosis.
- Medical information used to assess disability retirement requests.
- Medical documentation for limited or light duty for medical reasons.
- FMLA medical documentation, when it includes restricted medical information, diagnosis and/or does not involve OWCP.
- Medical documentation related to involuntary separation for medical reasons.
- Lab, X-ray, or EKG records.
- Fitness-for-duty medical reports.

The Postal Service is required to mark all records that contain restricted medical information as

“RESTRICTED MEDICAL” and to place them in locked cabinets—with the keys in the possession of medical personnel. The location of these locked cabinets include Health Units, contract medical facilities, or offices of the Occupational Health Nurse Administrator (OHNA) or senior/associate area medical directors.

The postal nurse or physician is directly responsible for the protection of privacy of the restricted medical information:

ELM 868.3

Preservation of Privacy—Preservation of the privacy of medical records is a direct responsibility of the postal physician or nurse (see Management Instruction EL-860-98-2, Employee Medical Records). In facilities where no medical personnel are assigned, the district occupational health nurse administrator arranges with the installation head to properly secure the medical records.

For example, when an employee is sent for a fitness-for-duty exam (FFD), the physician does not send the results of that exam to the employee's supervisor. The FFD exam results are instead sent to the district OHNA, who forwards a copy to the associate area medical director for review and discussion. After that, the postal physician or OHNA will interpret the employee's work capability for management or for the employee. However, the medical information within the original medical reports remains restricted medical information and are handled as such:

Management Instruction EL-860-98-2

Observing Confidentiality—The fitness-for-duty report may contain personal medical information that is not related to the employee's work capability and should only be released by

Continued on page 12

Protecting Medical Privacy

continued from page 11

the medical records custodian in its entirety if management need-to-know conditions exist and prescribed formal request for release of information protocols are followed in accordance with Management Instruction EL-860-98-2, Employee Medical Records.

Of course, supervisors often receive copies of medical documentation from employees to support requests for things like sick leave or light duty. Medical documents that contain a diagnosis are considered restricted medical records. Therefore, when a supervisor receives a medical document from an employee that contains a diagnosis, he or she must send it to the appropriate custodian of medical records for that installation so that it can be placed in the employee medical folder (EMF).

2) **Administrative medical records.** These are documents are medical in nature, but are also necessary to management for operational reasons. Examples of these types of documents are requests for sick leave on PS Form 3971 or a physician statement regarding an employee's fitness-for-duty (as long as it contains no restricted medical information). These documents enable management to run the floor. Unlike restricted medical records, non-medical personnel maintain these documents. Another difference from restricted medical records is that they are stored in the employee's official personnel folder (OPF) instead of the EMF.

Although these records do not receive the highest degree of protection that is accorded to restricted medical records, the custodians of administrative medical records are still responsible for ensuring that

they are handled in accordance with Postal Service policies. Such records may be accessed by postal managers with a legitimate need to know.

3) **OWCP-related medical records.** These records include medical information related to a claim that has been filed for an on-the-job illness or injury. These can include medical reports, correspondence, OWCP decisions, CA-forms, and any other documents related to the OWCP claim.

These documents are maintained by the Service's Injury Compensation personnel. Even though they may contain information regarding diagnosis, treatment, and prognosis, they are not maintained in the EMF with the restricted medical information.

OWCP requires these documents to be stored in folders apart from the EMF and the OPF. The only exception would be if an employee gave management a notice of an injury, but chose not to file a claim with OWCP. In such a case, the notice of injury would be retained in the employee's EMF, not the Injury Compensation file.

The jurisdiction of the Injury Compensation files differs from the files for restricted medical information and administrative medical information. While the EMF and OPF are systems of records belonging to the Postal Service, Injury Compensation files are instead under the jurisdiction of OWCP. These files are considered OWCP files that are simply housed at an alternate location—in the Service's Injury Compensation office.

To read more information than is contained in this article on the three types of employee medical records, read Management Instruction EL-860-98-2. (As an example of the other information provided in

the Management Instruction, it contains specific procedures for use and disclosure of restricted medical information.)

Finally, the ELM also specifically provides for the preservation of medical privacy of OWCP-related documents under the Privacy Act:

ELM 547.61 Privacy Act Protection

All records, medical and other reports, statements of witnesses, and other papers relating to the injury or death of an employee or other person entitled to compensation or benefits under the Act are sensitive in nature, and no employee of the Postal Service may disclose information from or pertaining to the records to any person except as directed in these instructions. . .

An employee's right to obtain records

An employee may wonder whether his or her private medical records are really being protected in accordance with federal regulations and contractual rules. A union activist may be able to assist an employee in discovering violations, such as restricted medical information that is improperly filed within the OPF or the employer's improper personal contact with an attending physician.

If an employee suspects that privacy protections have been ignored or violated, he or she may request copies of certain files to verify that fact. The following are specific rules and regulations for obtaining files:

- Personal medical files—An employee might want to contact his or her personal health care provider to request a copy of the medical file. The Privacy Rule requires covered

entities to disclose protected health information (or an accounting of disclosures of it) to the individual who is the subject of the medical file, if he or she requests access to it.

- **OWCP files**—An injured worker can obtain a copy of his or her OWCP file in accordance with 20 CFR § 10.12, which states: “A claimant seeking copies of his or her official FECA file should address a request to the District Director of the OWCP office having custody of the file.” Claimants may prefer to receive their file on computer disk as opposed to receiving a paper file. If so, the claimant should simply express that preference in his or her request.
- **Injury Compensation file (ICCO)** An injured worker is able to obtain copies of records related to his or her on-the-job injury that are in the possession of the Postal Service by contacting the District ICCO. Regulations for release of this information to the claimant include the EL-505 Sec. 12-10 and handbook AS-353 Appendix 100.850.
- **Official Personnel Folder (OPF)** An employee may want to review his or her OPF to ensure that it does not contain restricted medical information. Disclosure policies for OPFs are contained in the AS-353 Appendix 100.000,
- **Employee Medical Folder (EMF)** Rules for disclosure for the EMF are located in the AS-353 Appendix 100.700.

Union activists should ensure that the Postal Service follows all regulations in 1) seeking to obtain an individual’s medical information and 2) protecting the privacy of the medical information that is already in its custody. ■

Steward’s Quick Reference Guide For Privacy Rules and Regs

Topic	Rules & Regs	Location in Activist
Sick Leave Absences	ELM 513.361 ELM 513.362 ELM 513.364 M-01629	Page 1
Medical Inquiries	Rehabilitation Act of 1973, as amended 29 CFR § 1614.203	Page 2
Return to Work Clearances	ELM 865.1 ELM 865.4	Page 2
FMLA	JCAM page 10-16 ELM 515.51 M-01635 29 CFR § 825.307(a) 29 CFR § 825.500(g) 29 CFR § 825.311(b)	Page 4
HIPAA—Privacy Rule	45 CFR § 164.512 45 CFR § 164.512(l)	Page 6
OWCP	ELM 545.52 20 CFR § 10.506 CA-550, A-15 CA-810, Chapter 9-2 EL 505, Chapter 12 AS-353, Appendix 100.850	Page 7
Privacy Act of 1974	39 CFR § 261-268 ELM 547.6 Handbook AS-353	Pages 9 & 11
Form 2488	M-01430	Page 10
Fitness for Duty	Management Instruction EL-860-98-2	Page 11
Medical Records in possession of USPS	Management Instruction EL-860-98-2 ELM 868.3	Page 11

Office of Inspector General's Assault on Medical Privacy

A lucky few get a phone call from their physician's office alerting them to the fact that OIG agents have attempted to obtain access to their protected health information. Unfortunately, however, most employees have no idea that OIG agents have either attempted or succeeded in obtaining their medical information.

The NALC first became aware of the OIG's assault on medical privacy in September 2007. At that time, NALC received a copy of an OIG form letter used by its agents to get physicians and health care providers to disclose protected health information. Not only that, but the form letter also advises the physician not to inform the patient (the affected employee) that the disclosure has taken place.

President Young wrote to the USPS Board of Governors, which supervises the USPS-OIG, demanding the cessation of the practice. The Board of Governors denied this request by letter dated November 2, 2007.

On January 17, 2008, NALC and APWU filed a joint lawsuit against the Postal Service and the USPS-OIG in U.S. District Court in New York. (You may obtain a copy of the complaint at nalc.org.) The lawsuit alleges that the OIG practice is a violation of federal statutes and regulations and the U.S. Constitution. The suit asked the court to render a judgment on the following:

- Declaring unlawful and unconstitutional the USPS and OIG policy and practice of obtaining and disclosing employees' protected health information without their knowledge or consent.

- Enjoining USPS and OIG, their agents, representatives and employees, from continuing such policy and practices.
- Granting such other relief as is just and proper.

Union activists should be alert for any example of OIG agents using the form letter in question or otherwise improperly obtaining access to protected health information. Although the form letters are not completely identical, there are consistent elements within them that make them easily recognizable.

The form letters to the physician typically state, "Normally, the Postal Service employee who is the subject of the inquiry would have a right under the HIPAA Privacy Rule to know that his or her protected health information has been disclosed. . . OIG requests that you refrain from notifying the individual." Some of the form letters go on to say, "Compliance with this request is mandatory."

Typically the form letters start with: "This letter provides you with the statutory and regulatory authority that allows you to release protected health information requested by the Office of Inspector General of the United States Postal Service."

The OIG agents have not limited their use of this letter to any one type of situation. Following receipt of the Board of Governors' November 2 letter, NALC investigated and discovered numerous instances in which OIG agents have obtained private health information without the employees' knowledge or con-

sent. Many of the instances involved on-the-job injuries or OWCP claims. However, the OIG agents also sought to obtain medical information related to FMLA conditions.

In some cases, OIG agents sought medical information that was not related to either OWCP or FMLA, but was simply questioning whether an employee's claim of being sick was true or not.

Because health care providers have been intimidated into disclosing protected health information and keeping the disclosure hidden from the employee, the union activist may be completely unaware that a violation has taken place. Without notification, the employee may learn of the OIG contact only by a sudden change in the demeanor of the health care provider (or even a refusal to continue providing treatment in the future).

For the sake of prevention, an employee may consider writing a short note to his or her health care provider containing instructions not to allow disclosure of protected health information to either the Postal Service or the USPS-OIG.

Alert to union reps:

Union activists who become aware of examples of the OIG obtaining and disclosing protected health information of Postal employees should **immediately contact their National Business Agent's office** (who will forward that information on to the NALC Compensation Department). ■

Training Seminars & State Conventions

Listed below are training seminars and state association conventions for 2007. For more information, contact your National Business Agent.

Region 1—NBA Manny Peralta (714) 750-2982
California, Hawaii, Nevada, Guam

April 10 Regional Training, Los Angeles
April 11-12 California State Convention, Los Angeles

Region 2—NBA Paul Price (360) 892-6545

Alaska, Utah, Idaho, Montana, Oregon, Washington
Mar. 3-6 Shop Steward College 2, Blue River, OR
Mar. 31-Apr. 3 Shop Steward College, Bryce Canyon, UT
April 7-10 Shop Steward College, Seely Lake, MT
April 13-18 Shop Steward College, Boise, ID
April 20-24 Shop Steward College, Goldbar, WA
April 24-26 Idaho/Montana State Convention, Idaho Falls
May 1-3 Oregon State Convention, Pendleton, OR
May 16-17 Washington State Convention, Wenatchee
Oct. 5-10 Regional Assembly, Olympia, WA

Region 3—NBA Neal Tisdale (217) 787-7850

Illinois
June 25-28 Illinois State Convention, Peoria, IL
Sept. 28-Oct. 1 Fall Statewide Training Seminar, Peoria, IL

Region 4—NBA Wesley Davis (501) 760-6566

Arizona, Arkansas, Colorado, Oklahoma, Wyoming
Apr. 18-19 Colorado State Convention, Colorado Springs
May 1-3 Oklahoma State Convention, Tahlequah, OK
May 15-17 Wyoming State Convention, Riverton, WY
June 13-14 Arkansas State Convention, Hot Springs, AR

Region 5—NBA Mike Weir (314) 872-0227

Missouri, Iowa, Nebraska, Kansas
April 18-20 Nebraska State Convention, Norfolk, NE
May 1-3 Kansas State Convention, Wichita, KS
May 4-6 Iowa State Spring Training, Altoona, IA
June 6-8 Missouri State Convention, Branson, MO
Oct. 18-19 Nebraska State Fall Training, Grand Island
Oct. 26-28 Iowa State Fall Training, Coralville, IA

Region 6—NBA Pat Carroll (248) 589-1779

Kentucky, Indiana, Michigan
Mar. 1-2 Kentucky Spring Training, Cumberland Falls
May 16-17 Indiana State Convention, Merrillville, IN
May 18-20 Michigan Spring Training, Detroit, MI
Oct. 11-13 KIM Fall Training, Troy, MI

Region 7—NBA Ned Furr (612) 378-3035

Minnesota, North Dakota, South Dakota, Wisconsin
April 11-13 South Dakota Training, Chamberlain, SD
April 25-27 North Dakota Training, Minot, ND
April 28-May 2 Regional Training Seminar, Minneapolis, MN

Region 7 (continued)

May 16-18 Wisconsin State Convention, Green Bay, WI
Sept. 12-14 South Dakota Training, Chamberlain, SD
Oct. 5-8 Minnesota State Training, Deerwood, MN
Oct. 24-26 North Dakota State Training, Williston, ND
Oct. 31-Nov. 2 Wisconsin State Training, Neenah, WI

Region 8—NBA Lew Drass (256) 828-8205

Alabama, Louisiana, Mississippi, Tennessee
April 17-18 Mississippi State Convention, Vicksburg, MS
May 30-31 Tennessee State Convention, Nashville, TN
June 27-28 Alabama State Convention, Montgomery, AL

Region 9—NBA Judy Willoughby (954) 964-2116

Florida, Georgia, North Carolina, South Carolina
March 7-9 Steward Training, Orlando, FL
March 28-29 Steward Training, Durham, NC
April 10 Steward Training, Hilton Head, SC
April 11-12 South Carolina State Convention, Hilton Head
April 16-18 Regional Congressional Lobbying Trip, DC
Summer (TBA) Georgia State Convention

Region 10—NBA Gene Goodwin (281) 540-5627

New Mexico and Texas
June 5-7 New Mexico State Convention, Albuquerque
Oct. 11-13 Fall Regional Rap Session, Kerrville, TX

Region 11—NBA William Cooke (518) 382-1538

Upstate New York and Ohio
Mar. 30 Legislative Seminar, Columbus, OH
April 22-24 New York Congressional Breakfast, DC
June 10-11 Ohio Congressional Breakfast, DC

Region 12—NBA William Lucini (215) 824-4826

Pennsylvania, South and Central New Jersey
March 4-6 New Jersey Congressional Breakfast, DC
May 4-6 New Jersey State Seminar, Atlantic City, NJ
May 20-22 Pennsylvania Congressional Breakfast, DC

Region 13—NBA Tim Dowdy (757) 934-1013

Delaware, Maryland, Virginia, West Virginia, Wash DC
March 11-12 West Virginia Shop Steward Training, TBA
April 20-22 Regional Officers' Training, Dover, DE
May 1 Regional Congressional Breakfast, DC

Region 14—John Casciano (617) 363-9299

Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont
April 6 Maine Congressional Breakfast, Bangor, ME
May 16-17 Massachusetts State Convention, Sturbridge
June 13-15 New Hampshire State Convention, Bartlett

Region 15—NBA Lawrence Cirelli (212) 868-0284

New York, North New Jersey, SW Connecticut, Puerto Rico, Virgin Islands
May 4-6 New Jersey Training, Atlantic City, NJ

USPS

BY THE NUMBERS

2008—1st Quarter

<u>USPS Operations</u>	<u>Number</u>	<u>Change from SPLY*</u>
Total mail volume year-to-date (YTD) (Millions of pieces)	55,394	-3.0%
Mail volume by class (YTD in millions)		
<i>First-Class</i>	24,363	-3.9%
<i>Priority Mail</i>	240	-4.9%
<i>Express</i>	12	-10.9%
<i>Periodicals</i>	2,202	1.2%
<i>Standard (bulk mail)</i>	27,662	-2.6%
<i>Packages</i>	318	-3.4%
<i>International</i>	243	-0.9%
Daily delivery points	149 mil.	1.7%
<i>Percent city</i>	68%	-0.4%
<i>Percent rural</i>	30%	2.0%
<i>Percent Highway Contract</i>	2%	0.1%
City carrier routes	162,921	-0.6%
Rural carrier routes	75,994	3.0%

*SPLY = Same Period Last Year

<u>USPS Operations</u>	<u>Number</u>	<u>Change from SPLY*</u>
Estimated Net Income (\$mil.)	\$672.0	—
<i>Total Revenue</i>	\$20,369	3.7%
<i>Total Expense</i>	\$19,697	-13.1%
City carrier employment	232,155	3.5%
<i>Percent union members</i>	92.0%	-0.8%
City Carrier Casuals	45	-97.2%
<i>Percent of bargaining unit</i>	0%	—
Transitional	12582	—
<i>Percent of bargaining unit</i>	5.4%	—
City carriers per delivery supervisor	17.4	-1.7%
Career USPS employment	680,642	-2.0%
City carrier avg. straight-time wage	\$23.55/hr	2.9%
City carrier overtime ratio (OT hrs/total work hours)	13.6%	—
Ratio SPLY	16.7%	—



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