Medical Information and Privacy Rights in Employment

Prepared For: Legal Education Society of Alberta

Labour and Employment

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For Presentation in:
Edmonton – January 22, 2015
Calgary – February 5, 2015
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INTRODUCTION

Some of the most contentious issues in grievance arbitrations relate to the use and disclosure of an employee’s medical information. These issues are often so contentious because the information being demanded or being disclosed is extremely sensitive and lies at the heart of what any employee would consider to be “personal information.”

What I will be reviewing in this paper is the role of medical information at various stages of the sick leave or disability leave process and some cases that have dealt with alleged improper uses of or demands for such information. These cases arise largely in three distinct areas. One area is in relation to regular sick leave or short term disability leave. Another area is with respect to Long Term Disability leave and the third is in relation to an employee’s return to work following an absence, either to full duties or seeking an accommodated position. One thing I will not be dealing with in this paper is medical information required in the course of an absence resulting from an on the job injury involving workers compensation legislation of some kind.

As with all things in a collective agreement context, the first source in assessing an employee’s obligations with respect to the provision of medical information is the collective agreement. In theory, a collective agreement could set out exactly what medical information the parties have agreed will be required to justify certain medical absences. In practice however, parties rarely set out these rights and obligations in specific terms in a collective agreement. Mostly this is a good thing, because it will allow all parties to respond flexibly to each situation as it arises – a one size fits all approach is generally not appropriate in matters concerning medical information. However, this absence of agreed upon rules can also lead to confusion about exactly what an employee is required to provide to justify a medically-based absence from work. This is where decided cases can assist in providing guidance to employers, unions and employees in relation to what is expected of them in such situations.

The same privacy interests and legitimate business requirements of employers will also arise in non-collective agreement contexts, involving individual employees. In theory, employers in that context are entitled to no more or less information than employers in a collective agreement context (subject to specific requirements contained in collective agreements). However, the obvious problem that individual employees face is how they enforce their privacy rights and protect their sensitive medical information. A polite request that an employer or insurer modify their form or limit the scope of the
medical information requested is not likely to be successful. On the other hand, an outright refusal to provide certain requested information or to sign a consent for disclosure form puts the employee at risk of termination of at least termination of the benefits at issue. As such, while much of the law discussed below is equally applicable to the individual employment context, caution is called for in respect to the advice provided to individual employees facing such issues.

**ARBITRATION CASES**

The following cases have been loosely separated into cases dealing with medical information disclosure forms, cases dealing with requests of medical information to support a sick leave or disability leave and requests for information in cases dealing with requests for accommodation.

Cases dealing with forms generally spell out a requirement that the request for information be reasonably necessary to satisfy the business purpose of the employer. The use of forms that request information can be acceptable in cases with short or long-term leave, as opposed to casual sick days, but their contents have to be approached sensitively. They cannot ask directly about diagnosis and cannot include a requirement that the employee authorize for release of medical information from the doctor or authorization to speak to the doctor directly. Additionally, forms must be used in consideration of the individual circumstances; sometimes they will not be appropriate despite an employee meeting one or two typical triggers.

Individual cases build on when information is reasonably necessary. Generally they describe a process of back and forth between the employer and employee. For casual sick leave the employer should not typically need a doctor’s note, unless this is a term in the collective agreement or there is reason to suspect the employee is abusing leave. Even with suspicions of abuse there is case law that states the employer should go back to the employee with their concerns to attempt to rectify them. Where short or long-term leave is involved, a sick note will generally suffice and where it does not the employer is again typically expected to go back to the employee with their concerns and allow the employee to address them, possibly by providing more information from their doctor.

In return to work cases where safety interests of the employee, other employees or the public may be at risk, arbitrators have recognized a greater business interest for the employer and as a result have allowed employer requests that are far more intrusive than what employees under general leaves would be expected to provide. However even in these cases the requirement that employers go through the employee for further information has typically been the rule – at least until that process is frustrated. Accommodation cases tend to overlap with many return to work cases but place a