

## *Managing disability and illness: An employer's right to request information from absentee employees*



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When an employee is absent due to a disability or illness, employers often struggle with determining the proper scope of information they are entitled to seek from the employee and the proper manner in which to obtain it.

In some cases, employers ask for too much information, too soon and too often. In other instances, employers are overly concerned about offending human rights and privacy legislation, and then simply fail to intervene at all, to the detriment of their business.

One thing is clear, both extremes can be costly: the former approach may result in a finding of harassment against the employer, with damages potentially being awarded in court; the latter may result in an avoidable long-term absence while also preventing the employer from hiring a temporary replacement.

Unfortunately, a “one-size-fits-all” approach will not do, either. Finding the proper balance in a given case must be determined by specific analysis. For that reason, keeping apprised of the relevant issues is a key element to any successful strategy.

### **A Balancing of Rights**

An employer is entitled to request medical information from an absentee employee that will allow the employer to exercise its management rights or to fulfill its obligations pursuant to contract or statute. That right is limited, however, by human-rights and privacy legislation protecting individuals. Yet, the protection afforded to employees under these statutes is not absolute either. An employer has a right to require that its employees perform work regularly

and in certain circumstances that will take priority over the protection afforded an employee by statute.

Typically, when an employee is absent from work due to an illness, an employer may ask that employee for medical documentation to justify the absence. However, the fact that an employer may ask for medical documentation does not necessarily include a right to know the employee's particular diagnosis. Usually, some suggestion of improper conduct on the part of the employee is necessary

before an employer is permitted to demand such information, or when such information becomes necessary for the purposes of accommodation. Such factors also commonly accompany those circumstances in which an employer is permitted to ask an employee to submit to an independent medical examination. Again, this does not open the flood gates and thereby permit the employer to be privy to all medical information about the employee. A request for disclosure should be limited to the information that is necessary for the employer to fulfill its obligations.

### **A Shared Responsibility**

Various court decisions have mandated that employers and employees have a shared responsibility under human-rights legislation when it comes to disability. Where an employer is a member of a labour union, the Supreme Court of Canada has determined that the parties who must work together in the search for accommodation include the employer, the employee and the union.

While nothing requires a person to reveal a disability, when an accommodation is requested, the parties must co-operatively share

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information and seek solutions in order to address the accommodation obligation meaningfully under human-rights legislation.

It is the responsibility of persons with disabilities to:

- Inform their employers of their accommodation requirements.
- Co-operate in obtaining and providing necessary information, including medical or other expert opinions.
- Participate in discussions about solutions.
- Work with the employer (and union if applicable) on a continuing basis to manage the accommodation process.

It is an employer's responsibility to:

- Accept requests for accommodation in good faith.
- Request only information that is required to make the accommodation.
- Obtain expert advice or opinion where necessary.
- Take an active role in ensuring that possible solutions are examined.
- Maintain the confidentiality of persons with disabilities.
- Deal with accommodation requests in a timely way.
- Bear the cost of any required medical information or documentation – to the extent that it does not cause "undue hardship" within the meaning of human-rights statutes.

Incorporating these guidelines into workplace policies will, no doubt, be beneficial for any employer grappling with how best to manage absenteeism due to disability and illness.

### A "Reasonable" Response

An older British Columbia court decision highlights the fact that seeking and providing sufficient information is truly a shared responsibility between

employees and employers. In *Gracia v. Sears Canada Inc.*, the court found that an absentee employee was properly terminated when he failed to respond to his employer's reasonable request for medical information. After the employee's claim for workers compensation benefits was rejected, and the employee was confirmed fit to return to work by a doctor, the employer gave the employee three options: return to work, take a leave of absence of up to three months without pay, or produce a doctor's letter supporting his position of disability, which would entitle him to more leave and to sick pay.

The employer repeatedly presented the choices to the employee over the course of four months and received no response from the employee. When the employer did not receive a response after the third request, the employee was terminated. Since there was no employment contract, the court considered whether the employer acted reasonably. Ultimately, the Court found that the employer "did its best to be fair" and that "the request was not unreasonable." As such, the Court found that the employee had failed to carry out the reasonable direction of the employer.

In contrast, an often cited case from Ontario showcases the severe consequences associated with taking an overly aggressive approach when seeking information from an absentee employee who claims to be incapable of returning to work. In *Prinzo v. Baycrest Centre for Geriatric Care*, the Ontario Court of Appeal upheld a judgment against the employer

awarding damages in lieu of a reasonable notice period, as well as additional damages for the intentional infliction of mental suffering. An important consideration that arose in this case was the repeated telephone calls made to an absentee employee inquiring about her ability to return to work. The lower court found that such calls were extremely upsetting to the employee and caused her emotional distress. Further, the calls were, in fact, harassing and indicated or implied malingering on the part of the employee. Such conduct on the part of the employer formed part of the Court's decision to award aggravated damages.

### Sound Employment Practices

Employers must be careful in their communications with an employee who claims to be incapable of returning to work. An employer should make only reasonable inquiries to determine when the employee can safely return to work. In order to assess, the "reasonableness" of a specific inquiry, or of a policy that is incorporated into a personnel policy manual, employers must be mindful of evolving human-rights and privacy policies as well as jurisprudence of courts and arbitration boards (in a unionized environment) which may have a direct impact on this issue.

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