

EMPLOYEE MEDICAL ABSENCES – WHAT CAN THE EMPLOYER ASK

by David P. Negus
February 2009

Your project has tight deadlines and suddenly your employee is away. The next day you get a cryptic one line physician's note stating "off until further notice". What can and should you do?

Vague medical notes

First, follow-up on the physician's note. Employers have always had the right to enquire into an employee's absence¹. When employees put their health status in issue they have a duty to account. Privacy of the employee's health information is a concern, but so is the employer's need to manage the absence and plan for the return to work. Employers are not entitled to know everything about an employee's medical situation, but generally employers should know the nature of the illness (but not necessarily a specific diagnosis), a prognosis and an expected return to work date.

The uncooperative employee

What if the employee will not cooperate with a request for information? Try to address the employee's concerns, but eventually the employer will have to consider serious consequences, e.g. a warning first and then possibly a refusal to extend the leave or termination of employment. First, however, take away the excuses for refusing to cooperate.

To address privacy concerns, employers need to explain the business reason for requesting the information and the limited nature of the request. If cost is an issue (physicians often charge their patients for reports) offer to pay the physician's fee. If you have a relationship with a physician consider suggesting that your physician communicate with the employee's physician. Illness may cloud an employee's judgment and therefore the employer must be able to demonstrate that it has tried to work with the employee before first warning and then taking serious action.

When doing right can become a wrong

Sometimes too much communication with an employee on medical leave will result in an allegation that the employer is harassing the employee. In one instance² a court concluded that the employer intentionally inflicted mental suffering and awarded the employee damages for mental distress. In that case the employer knew the communication with the employee was extremely upsetting; the employer ignored a request that all communication should be directed to the employee's legal counsel and despite knowing that the employee's physician had not authorized her return to work threatened consequences if the employee did not return.

¹ Honda Canada Inc. v. Keays, 2008 SCC 39.

² Prinzo v. Baycrest Centre for Geriatric Care (2002), 60 O.R. (3d) 474 (C.A.).

The lessons are clear: be polite and understanding in your communication with employees on medical leave. Only ask for the information that is necessary and only as often as is necessary. Only react with consequences for the employee when all other legitimate options for soliciting appropriate information from the employee have failed.

The duty to accommodate

If the absence looks long term then the employer needs to turn its attention to the duty to accommodate under The Human Rights Code. Employers are required to start the accommodation process, but employees and, where applicable, unions are obligated to participate. The duty at its essence requires participation in a consultative process regarding the employee's current medical status and the prognosis for recovery and/or return to alternative work. There can be no accommodation without an examination of the employee's current medical condition, the prognosis for recovery and the employee's capability for alternative work.³ Employers are routinely criticized in the case law because they do not investigate thoroughly enough the possibility for accommodation, including understanding the employee's disability and obtaining sufficient medical information.⁴

Closing

Employee medical absence is complex, but employers are entitled to ask for the information necessary to manage the absence and for the duty to accommodate information sufficient to understand the employee's capabilities for alternative work.

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³ Conte v. Rogers Cable Systems Ltd. (2000), 36 C.H.R.R. D/403 (C.H.R.T.) at paragraph 77.

⁴ Gordy v. Oak Bay Marina Ltd. (2004), 51 C.H.R.R. D/68 (B.C.H.R.T.)