

EMPLOYERS HAVE OPTIONS TO ADDRESS QUESTIONABLE MEDICAL CERTIFICATES

By Ronald M. Snyder

The Problem

- An employee presents a medical certificate that states that the employee is to be off work for a designated period of time. No additional information is provided.
- An employee presents a medical certificate that states that the employee is stressed or is anxious and must be off work for a lengthy period. No additional information is provided.
- An employee, over the course of several months, has been on and off work based on the serial presentation of medical certificates stating the employee is unfit and then subsequently fit to return to work. This recurring theme proves disruptive. So are the questionable recommended accommodations specified in the certificates.



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Do the above scenarios sound familiar?

Many employers feel helpless when confronted with medical certificates. Though their instincts suggest that some of these medical certificates ought to be challenged, there is an inhibition to do so for fear that this would intrude on the employee's privacy and/or human rights. Employers should be aware that in adopting a fair and balanced approach to this issue, demands may be made of the employee for the provision of additional non-medical information to justify the employee's absence from work or return to work.

The Background

Historically, the bulk of medical certificates presented were those to address 'physical pathologies' such as a broken leg, arthritis or an eye disorder. Challenges to those certificates were fairly uncommon and generally unnecessary. But now, employers are increasingly faced with certificates that appear to address an employee's mental health, a significantly more difficult pathology to qualify. And if the reports are true, employers can expect, going forward, to be increasingly presented with such certificates.

According to a recent Globe and Mail article, more than 500,000 Canadians are absent from work each day because of mental health related issues, "making it the number one cause for short and long-term disability". The annual Canadian economic burden tied to workplace losses due to mental health problems or illness is \$20 billion.

Two questions commonly arise in the minds of front-line managers when presented with such certificates: (1) Was the physician's certificate rendered simply at the patient's request; and/or (2) Can additional information be obtained to better plan for the employee's absence and return to work. In either case, solutions exist.

The Law

The law does permit an employer's limited incursion into an employee's privacy interests to request non-medical information (or where appropriate, medical information) that is reasonably necessary to validate an employee's continued absence from the workplace or to permit an employee's return to work. An employee who refuses to cooperate in providing the additional reasonably requested information does so at his or her own peril that could ultimately result in their discharge.

The law further confirms that while physicians have a role in establishing restrictions or limitations for their patients, they do not, by the issuance of a medical note, determine the nature of accommodation to be provided at work. Rather, it is the employer that is responsible to make decisions about workplace adjustments.

Avenues of Resolution

The law is nuanced concerning the management of employees who are absent for health reasons and the challenging of medical certificates. Employers should thus be aware of their legal rights, responsibilities and limitations in respect of these issues. The following core principles are applicable:

- Where an employee's fitness is at issue, the employer is entitled to deal directly with the employee although it may wish to engage the employee's union or counsel to facilitate a resolution;
- An employer may withhold an employee's leave benefits who refuses to provide a validly requested medical certificate to substantiate an absence;
- Generally, limited information set out in certificates that are provided for leaves of brief duration is sufficient but may not be acceptable in the case of lengthy absences;
- In the absence of demonstrating a legitimate need in a particular case, the employer is not entitled to secure an employee's medical information including their medical history, diagnosis, or treatment plan. It may, however, secure non-medical information including the employee's functionalities, limitations to perform the job and a return-to-work prognosis;
- Where an employer is not reasonably satisfied that the content of a medical certificate validates an employee's work absence or return to work, the employer, with the consent of the employee, may obtain further non-medical clarification from the employee's physician;
- Where an employee does not grant such consent or where a physician's further clarifications fall short of reasonably addressing the inquiries made by the employer, a request may be made of the employee to participate in an independent medical examination (IME). These instances occur where the employer continues to have legitimate doubt, serious concerns or has a substantive basis to justify an IME;

- An employee on leave who does not consent to their physician's provision of further information to validate a previously issued medical certificate or who further refuses to participate in a validly requested IME may not only be denied leave benefits, but ultimately may be discharged; and
- Legislation in all provinces and federally require employers to ensure the safety and health of their employees which includes confirmation that their employees are medically fit to return to the workplace safely and pose no hazard to others:
 - An employee who refuses to grant physician access to the employer in respect of a fit-to-return-to-work medical certificate that is legitimately questioned (and who may further refuse to participate in a validly requested IME) may be precluded from returning to work and thus be administratively suspended on a 'pay' or 'without pay' basis and ultimately dismissed; and
 - Although preventing the employee from returning to return my give rise to a constructive dismissal allegation, the courts recognize the reconciliation of competing rights of permitting an employee the right to be allowed to continue to work and make a living and the employer's obligation to take reasonable steps to ensure its employees are fit to perform their job.

Bottom Line

When presented with questionable or vague medical certificates, employers have options!