DISCLOSURE OF MEDICAL INFORMATION
Employee and Employer Rights

1. What medical information is an employer entitled to?
   a) administration of benefits (medical forms/certificates–permissible questions)
   b) return to work
   c) accommodation

2. Is an employer entitled to know an employee's diagnosis?

3. Can an employer communicate directly with an employee's physician?

4. Can an employee be compelled to undergo a medical examination?

5. Can an employee be disciplined for failure to produce medical information? Is this an act of insubordination?

1. What medical information is an employer entitled to?

An employer has no right to an employee's medical information unless the collective agreement grants a right or the employee consents to the release of the information.[1]

An employer is, however, entitled to medical information for the **Administration of Benefits** (e.g. short term disability), **Return to Work** and **Accommodation**. In some instances, employers may also be entiltled to medical information where there are safety concerns/risks for an employee with a 'perceived' disability and/or their co-workers.

a) Administration of Benefits (Medical Forms)

An employer can request medical information to verify that an employee's absence is due to illness or injury. The "proof" required to determine eligibility for sick-leave benefits will typically be determined by the collective agreement.

"A document in which a qualified medical doctor certifies that an employee is away from and unable to work for a specified period due to illness or injury is *prima facie* proof sufficient to justify the absence, unless the collective agreement (or less likely, legislation) stipulates otherwise, and it will also be sufficient to qualify the employee for sick benefits."[2]

If the collective agreement language defines the amount of information required for granting entitlement to benefits, the employee must consent to the release of the information if s/he wants to receive benefits.

In one case, the STD Plan, which was incorporated into the collective agreement, required proof of total disability satisfactory to the employer such as a doctor's certificate. However, this language does not allow access to an employee's current treatment, medical details, including diagnosis or symptoms.[3]

Generally speaking, although an employee can be directed to provide enough information to justify a claim, it must be "reasonably necessary in the administration of the sick leave benefits."[4]

Moreover, a request for additional medical information should be specific to the information needed to make an informed decision, and the employer should demonstrate how the information is reasonably necessary to fulfill one of these four legitimate workplace objectives:

1. To verify the existence of a disability – generally for the administration of sick leave benefits, etc. *(**note: oftentimes confirmation that a disability related to illness or injury is sufficient);*
2. To understand an employee's capabilities and limitations in order to devise a suitable accommodation;
3. To be assured that an employee can return to work without posing a safety risk to her/himself or others; and
4. To determine whether an employee's disability still requires him or her to remain away from active employment.[5]

Medical Forms/Certificates – Permissible Questions

A balance is required between an employer's objectives and an individual's privacy. In one case, the employer's questions regarding functional and cognitive restrictions and non-medical barriers to recovery went "beyond what is reasonably required on a routine, general medical certificate.[6]

It is permissible to ask employees' doctors for the date of the employee's first visit and the latest visit, but not the frequency of visits in the absence of a reasonable or legitimate basis for knowing the frequency of visits. It is also not permissible to ask for the nature of any prescribed treatment. The authorization allowing a third party administrator to contact employees' doctors was also struck from one form as it circumvents the physician-patient relationship, and it was held that any request for additional medical info should be made in writing through the employe.[7]

Similarly, a question regarding "current treatment" in a standard sick leave form was not justified or warranted under the collective agreement, and such information was deemed not necessary for the hospital to know in order to verify entitlement to sick-leave benefits.[8]

In another case, it was held that the employer is only entitled to: a certificate from a qualified medical health professional that states s/he has assessed the employee (including the date(s) of the examination/assessment) as being incapable of working at her occupation due to illness or injury for a specified period; a statement of the 'general nature of the illness or injury' (see below for description); a statement that the employee is undergoing treatment (without disclosing the treatment or treatment plan); and the expected return to work date and any accommodation requirements likely to be required at that time.[9]

b) Return to Work

An employer is entitled to medical proof of fitness prior to returning an employee to work following a medical leave and to seek information as to any necessary restrictions on their duties. This includes analyzing whether there are any issues of safety to the employee or her/his co-workers. The nature and extent of such information would depend on the particular circumstances involved.

According to Abritrator Levinson, if the employer is not satisfied with this information based on reasonable grounds, it can request further information to address its concerns. The request for further information should be specific to the information needed to make an informed decision about the employee's fitness to work and any restrictions that may have been communicated. If an employee refuses to cooperate with the request for further information, Levinson stated that the employer may justifiably refuse to allow the employee to return to work until adequate proof of fitness to return to work is provided.[10]

In one case, an employee with a disability was not permitted to return to work until the employer had medical proof that he was fit to work, on the basis that it has an obligation to ensure a returning employee is capable of performing duties without risk to himself or to other employees or to the employer."[11] Whereas, in another case it was held that the employer is not entitled to hold an employee with a disability out of service indefinitely by demanding additional medical information. In this case, the arbitrator held that continued search for medical information could have, and should have, occurred while the employee was being accommodated at work or on a paid leave of absence. She further explained that "the medical information is not intended as a barrier to accommodation. It is intended as an aid to the development of a suitable accommodation. If no accommodation is possible until medical investigation is completed, it will be incumbent upon an employer to compensate the employee (and where appropriate to top up the weekly indemnity payment) until such time as medical evidence is available which permits accommodation to be designed, or which proves that accommodation is not possible without causing undue hardship."[12]

c) *Accommodation*

The employer has a duty to obtain all relevant information about an employee's disability, at least where it is readily available. This includes information about the employee's current medical condition, prognosis for recovery, ability to perform job duties, and capabilities for alternative work.[13] And, concomitantly, the employee has a duty to share relevant medical information that is "needed", and failure to do so constitutes failure of the employee to participate in the search for accommodation.[14]

However, while the law of accommodation requires the full cooperation of employees, that does not mean that employees are subject to unreasonable demands by employers. Furthermore, before an employer can place additional requirements on an employee to provide more detailed medical information, it must, in accordance with ordinary principles of fairness, state the grounds of its objection to the medical certificate offered by the employee and must point out to the employee what it requires before it will accommodate her/him.[15]

Employees are required to provide a minimum of information to allow her/his employer to know that the disability exists, and where accommodation is sought, the employee is required to provide a minimum of sufficient information to explain the employee's restrictions, and the nature of the accommodation sought.[16]

Where the legitimacy of a disability is being challenged by an employer, employees should follow these guidelines:

1. Disclose prognosis for recovery;
2. Identify, communicate and substantiate any medical restrictions;
3. Provide consent to your physician to discuss any *restrictions* with the company's physician (if applicable); and
4. Participate and cooperate in the accommodation process.

In one case, the employee followed these guidelines and only refused to provide medical information once the employer made unreasonable demands. As was shown in this case, employees can, in the appropriate circumstances, refuse to provide additional medical information.[17]

In another case, an employee's need for fewer hours of work was never medically confirmed and communicated to the employer. The Court held that while it was the applicant's right to limit the

amount of information provided to the employer and the medical assessor, in choosing to exercise that right, the employee "failed to co-operate with the employer in finding a reasonable accommodation for his disability." In the circumstances, the employer discharged its duty to accommodate the employee based on the medical information it was provided.[18]

Generally, the level of required medical information increases with the complexity of accommodation, and:

> *...there is a* continuum *along which an employee's obligation to provide detailed medical information increases with the length of absence and/or complexity of accommodation required upon return to work.*[19]

Recently, the Alberta Court of Queen's Bench upheld an employer's request for additional medical information, and held that it was not discriminatory to refuse accommodation until such information was provided. In cases where the employer is overly broad in its request for information, the union should be able to point to specific requests that are unreasonable or unduly onerous. Usually, the request for information comes in the form of a series of questions listed on a questionnaire. Rather than reject the entire questionnaire, unions are encouraged to provide information that it considers to be suitable.[20]

2. Is an employer entitled to know an employee's diagnosis?

Arbitrators have almost universally held that an employer is not entitled to know an employee's medical diagnosis.

Moreover, questions that solicit information about an employee's diagnosis or treatment information are deemed to unreasonably infringe workers' privacy rights, and such questions were stricken from an employer's sick leave form.[21]

An employer can request information pertaining to an employee's "nature of illness/injury". However, the nature of an illness/injury is to be distinguished from a diagnosis, and has been described as follows: *"Nature of Illness or Injury is a general statement of a person's illness or injury in plain language without any technical medical details, including diagnosis or symptoms."*[22]

In this context, another arbitrator held that the employer must be provided with enough information to determine if the illness actually affects the employee's ability to perform her/his job, and that the amount of information reasonably required is determined on a case-by-case basis.[23]

3. Can an employer communicate directly with an employee's physician?

No. However, employees may be asked for consent to communicate directly with her/his treating physician. The union should ensure that such consent is only provided where there are firstly, reasonable grounds for the request and secondly, the employer has the proper tools and training for securing the confidential information.

In Ontario, the *Personal Health Information Protection Act (PHIPA)* applies to "health information custodians" (e.g. doctors, other health care practitioners, hospitals, labs, etc.) in their collection, use or disclosure of personal health information. *PHIPA* also applies to individuals and organizations that receive personal health information from the health care system, such as insurance companies and **employers.**

In light of these statutory rights, it is appropriate to ask employers the following questions:

1. Who will be contacting the employee's physician or reviewing the confidential medical information?
2. Who, if anyone, will be given the information?
3. Where will this information be stored on the employer's premises?
4. What steps has the employer taken to ensure that the information remains confidential and is only used for the stated purposes? [24]

4. Can an employee be compelled to undergo a medical examination?

The general rule is that, in the absence of language in the collective agreement or statutory authority, the employer cannot compel an employee to undergo a medical examination by a doctor or third party of its choice.

Furthermore, the right of individual privacy includes the right not to submit to an independent medical examination except in unusual circumstances, and such a request must be based on reasonable grounds, not mere speculation. Unusual circumstances do not arise where the employer is simply not satisfied with a doctor's report.[25]

In one case, the arbitrator held that the request for a medical examination was not justified and that the request for a medical examination was premature, and unnecessarily intrusive, as the employer may have been able to obtain the information it needed from the grievor's own physician.[26]

Under limited circumstances, an arbitrator can order an employee to undergo a medical examination.[27]

5. Can an employee be disciplined for failure to produce medical information? Is this an act of insubordination?

No. The reason that it is not insubordination is that the employer is not entitled to order the employee to do it, and therefore, it is "an exception to the obey now grieve later principle".[28]

It has also been held that an employer is not entitled to take disciplinary or other steps against an employee who declines to provide more medical information than the employer is entitled to.[29]

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[1] *Vancouver Public Library Board v. Canadian Union of Public Employees, Local 291 (Gulay Grievance)*, [2008] B.C.C.A.A.A. No. 24 (S. Lanyon)

[2] *Ontario Nurses' Association v. Hamilton Health Sciences [2007], (Surdykowski); Brant Community Healthcare System v. Ontario Nurses' Assn. (Medical Form Grievance), [2008] O.L.A.A. No. 116 (Harris)*

[3] *See note 1 - Hamilton Health Sciences*

[4] *See note 1 - Brant Community Healthcare*

[5] *CUPE, Local 728 v. Surrey School District No. 36, [2006] B.C.C.A.A. No. 162 (Lanyon))*

[6] *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association [2004] B.C.C.A.A.A. No. 177 (Taylor).*

[7] *Communications, Energy & Paperworkers' Union of Canada, Local 49 v. West Coast Energy Inc. [2004], (Hall)*

[8] *See note 1 - Brant Community Healthcare*

[9] *See note 1 - Hamilton Health Sciences*

[10] *Hobart Brothers of Canada, and ITW Canada Co. v. Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 446 (Return to Work Grievance), [2006] O.L.A.A. No. 149 (Levinson)*

[11] *Public Service Alliance of Canada v. Greater Toronto Airport authority, [2004] C.L.A.D. No. 50 (QLH)*

[12] *USWA, Local 834 v. Goodyear Canada Inc., [2002], (Newman)*

[13] *R.G. v. Oak Bay Marine Management Ltd., [2004] B.C.H.R.T. No. 180 (Q.L.)*

[14] *G.T. Federated co-Operatives Limited, Alberta Human Rights Panel, January 19, 2005 (Baerge)*

[15] *Thompson Nurses MONA Local 6 v. Thompson General Hospital (1991), 20 L.A.C. (4th) 129 (Steel)*

[16] *United Steelworkers, Local 1-500 v. Dashwood Industries Ltd., [2007] O.L.A.A. No. 253 (Newman)*

[17] *Keays v. Honda Canada Inc., [2005] O.J. No. 1145 (Ont. Sup. Ct.); Ontario Superior Court of Justice, March 17, 2005*

[18] *Besner v. Canada (Correctional Services), Federal Court of Canada (2007) (Judge R. Mosley)*

[19] *See note 1 - Brant Community Healthcare; B.C.Tribunal case (Interial Health Authority) May 2007 (Neuenfeldt)*

[20] *United Nurses of Alberta, Local 33 v. Capital Health Authority (Royal Alexandra), [2008] A.J. No. 202 (Alb. Q.B.); Alberta Court of Queen's Bench, February 27, 2008*

[21] *See note 1 - Hamilton Health Sciences; Communications, Energy & Paperworkers' Union of Canada, Local 449 v. West Coast Energy Inc. [2004] (Hall)*

[22] *See note 1 - Brant Community Healthcare; Hamilton Health Sciences*

[23] *C.E.P., Local 449 v. West Coast Energy Inc, [2004] C.L.A.D. No. 504 (QL).*

[24] *See note 9 - Hobart Brothers of Canada*

[25] *International Woodworkers of America, Local 1-423 v. Pope and Talbot Ltd. (1996), 57 L.A.C. (4th) 63 (Taylor); Grover v. National Research Council of Canada, [2005] C.P.S.L.R.B. No. 132 (QL)*

[26] *Overwaitea Food Group v. United Food and Commercial Workers Union, Local 1518, [2003] B.C.C.A.A.A. No. 311 (Burke)*

[27] *Telecommunications Workers Union v. Telus Communications Inc. [Feb 2008] (Brown)*

[28] *Canadian Union of Public Employees, Local 1253 v. New Brunswick (Department of Education), 2004 (MacPherson)*

[29] *See note 1 - Hamilton Health Sciences; Canadian Association of Industrial, Mechanical & Allied Workers, Local 12 v. Shell Canada Products Ltd. (1990), 14 L.A.C. (4th) 75 (Larson)*