



# Tipping Point: Balancing an Employer's Right to Medical Information with an Employee's Right to Privacy

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October 15, 2009



# Outline

## Requesting an Employee's medical information

- 1) When?
- 2) What types?
- 3) How much?
- 4) How to get it?
- 5) What can we do with it?
- 6) Storage
- 7) The differences: OH&S Nurses, Third Party Administrators, Self-Insured Employers



# Introduction

## Balancing Interests:

Employer's right to manage the workplace

versus

Employee's right to privacy



## Introduction (cont'd)

- **The rules are established by:**
  - Common Law
  - Insurance policy requirements
  - Arbitral jurisprudence
    - » The Collective Agreement, General Arbitral Principles
  - Human rights jurisprudence
  - Privacy legislation
    - » **Private sector** – *Personal Information Protection Act* (AB and B.C.), *Personal Information Protection and Electronic Documents Act* (Federal)
    - » **Public sector** – *Freedom of Information and Protection of Privacy Act* (FOIP)
    - » **Health service providers** – *Health Information Act* (AB), *FIPPA*, *E-Health Act* and *Personal Information Protection Act* (B.C.)



## 1) When can Employers request medical information?

- Confirming medical reasons for short-term absences
  - Typically absences over a certain length of time
  - Have a policy
  - May be appropriate for every absence in certain circumstances but not generally
  - Suspicions as to reason for absence
    - Pattern of absenteeism, Verifiable allegations of fraud
  - Typically only looking for confirmation that absence was medically justified



## 1) When can Employers request medical information?

- Confirming medical reasons for extended absence and prognosis for return to work
  - Medical note lacking specifics and advising of extended absence
  - Reason to doubt veracity: i.e. certificate is back dated, doctor did not actually see employee, evidence that doctor has been misled
  - Need to know when Employee might be returning



# 1) When can Employers request medical information?

- Returning to work after an extended absence or following an injury or illness
  - **Employee is required to show that they are fit to return to work**
    - Either modified duties or regular duties
  - **When can you ask for more medical information?**
    - If limitations or restrictions are not detailed enough
    - If you want to know if modified work or alternative duties you are considering are appropriate
    - If you want to know if restrictions are temporary or permanent
    - If you are concerned doctor does not appreciate true nature of employee's duties
    - If you have a specific question with respect to certain duties or tasks



## 1) When can Employers request medical information?

- When faced with a request from an Employee for accommodation
  - **Employee:**
    - Must establish he/she actually suffers from a disability
    - Has a duty to cooperate in the search for accommodation by:
      - Advising that accommodation is required
      - Providing reasonable medical information when requested



# 1) When can Employers request medical information?

- When faced with a request from an Employee for accommodation (cont'd)
  - **When can you ask for more medical information?**
    - If limitations or restrictions are not detailed enough
    - If you want to know if modified work or alternative duties you are considering are appropriate
    - If you want to know if restrictions are temporary or permanent
    - If you are concerned doctors does not appreciate true nature of employee's duties
    - If you are concerned the Employee is “self-diagnosing” or the doctor is simply reiterating requests made by the employee



## 1) When can Employers request medical information?

- To confirm an Employee in a safety-sensitive industry is fit to perform required duties
  - **When can you ask for more medical information?**
    - There must be a genuine reason to believe otherwise
      - Example: Employee is using prescription medication which may affect motor skills



## 2) What information can Employers ask for?

- Always depends on the circumstances
  - **Governing principle: Reasonableness**
  - **Generally:**
    - Information which the Employee consents to giving the Employer
    - Information relating to the nature of the illness but not diagnosis
    - Prognosis for returning to work
      - Is the situation temporary or permanent
      - If temporary, what is the estimated time frame for improvement?
    - Date of next appointment
    - Ability to return to work/modified work/alternative duties



## 2) What information can Employers ask for?

- Employers cannot ask for:
  - Generally information regarding:
    - Specific diagnosis
    - Symptoms
    - Treatment plan
    - Medication (unless Employee is working and medication might affect performance)
    - Therapy
    - Consultation referrals



## 2) What information can Employers ask for?

- Employers cannot require Employees to consent to providing unreasonable information
- Employers cannot talk to the Employee's doctor without the proper consent
- Employers cannot require information regarding treatment on drug reimbursement forms (when self-insured)



## 2) What information can Employers ask for?

- Can you talk to an Employee's doctor?
  - ONLY if you have the required consents
    - Do you have the consents you need?
    - Are they too broad?
    - Do they outline the purpose of collecting or disclosing the information?
    - Do they have expiry dates?
    - Do they allow you to collect or disclose the information you are collecting or disclosing?
  - Preference of decision-makers appears to be to make requests for information through the Employee
    - The Employee has the chance to object to possibly unreasonable requests



### 3) How much medical information can Employers get?

- Accommodation versus Absenteeism
- Absenteeism:
  - Shorter absences do not generally require medical explanations in the form of physician's notes
  - Employer is entitled to a medical explanation for an Employee's extended absence



### 3) How much medical information can Employers get?

- Accommodation versus Absenteeism (cont'd)
- Accommodation:
  - Legal obligation to accommodate arises only if Employee suffers a disability
    - Employer can request medical information confirming disability
  - Employer has a positive duty to obtain all relevant and updated medical information regarding Employee's disability
  - Duty on Employee to provide reasonably requested medical information to facilitate the accommodation



### **3) How much medical information can Employers get?**

- Accommodation versus Absenteeism (cont'd)
- **During accommodation process the Employer can reasonably require:**
  - Nature of the illness
  - Whether illness is temporary or permanent
  - Restrictions and limitations
  - How medical conclusions were reached (Objective vs. Subjective testing)
  - Treatment plan or medication that impacts accommodation or Employee's ability to perform



### 3) How much medical information can Employers get?

- Accommodation versus Absenteeism (cont'd)
- Can Employer require an Employee to see the “company” doctor?
  - **Generally NO unless:**
    - Employee voluntarily consents
    - Collective Agreement provides otherwise
    - Disability policy provides otherwise
    - Arbitrator orders it
      - If reasonable and necessary in all of the circumstances
        - » Example: medical evidence is conflicting and other methods of clarification have been exhausted



## 4) How should Employers obtain medical information?

- Use the least intrusive method possible
- Ask Employee to ask doctor and provide answers in writing
- Provide Employee with a letter or form requesting the information
- Obtain consent from the Employee
  - Tell Employee why you need the information – Be clear
- Be reasonable - if you don't need what you are requesting don't ask for it
- Keep in mind that this information is confidential, keep it that way
  - Not every manager needs to see it



## 5) What can Employers do with medical information?

- Access to the information is determined by “who needs to know” and by workplace policies and procedures
  - Direct supervisor/owner?
  - Human resources?
  - Occupational Health and Safety nurse?
  - Health services department?
  - Are you self-insured?
- Ensure consistent application of policies and procedures



## 5) What can Employers do with medical information?

- Can only be used for the purposes for which it was collected
- Generally, can only be released to third parties with the employee's consent



## 6) How should Employers store and manage Employees' medical information?

- Make sure appropriate safeguards are in place
  - storage and access
- Encrypt and password protect
- Clearly label records
- Properly destroy records
  - wiping or shredding
- **Bottom line: Have policies in place**



## 7) Differences: OH&S Nurses, Third Party Administrators, Self-Insured Employers

- Should Employers use OH&S nurses to manage medical absences and disabilities?
- Advantages:
  - A health care professional evaluates medical information
    - Can offer expertise and assistance in accommodation
  - Offers reassurance to Employees
  - Ensures confidentiality
  - Nurses are governed by a Code of Ethics
    - Supplements privacy legislation



## 7) Differences: OH&S Nurses, Third Party Administrators, Self-Insured Employers

- Disadvantages:
  - Can become advocates for Employees
  - Does not always understand how much information they can share
    - Problematic when there is doubt as to the veracity of the information being provided
    - May not understand ability to release medical information to legal counsel when legal action is commenced against the Employer
    - May be a barrier to accommodation and result in inappropriate termination of an employee
  - Employers cannot have an OH&S nurse obtain medical information without an Employee's consent



## **7) Differences: OH&S Nurses, Third Party Administrators, Self-Insured Employers**

- What happens when a third party administers disability benefits?
  - Employers cannot require disability benefit applications to be submitted to it
    - Must be submitted directly to the insurance company
  - Physician cannot release records to the Employer
    - Must only be released to insurer
  - Limited in information to which entitled
  - Be careful when insurers deny benefits



## **7) Differences: OH&S Nurses, Third Party Administrators, Self-Insured Employers**

- What if an Employer is self-insured?
  - Probably entitled to more information than when a third party administrator is involved
    - But not as much as a third party administrator would be entitled to
  - It is essential to ensure strict policies and procedures are in place
  - Be cautious if you are both an Employer and a custodian under health information legislation
    - Don't cross the line which gives you easy access to medical information



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**THANK YOU!**