MEDICAL ISSUES

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INTRODUCTION

The protection of an employee's personal medical information continues to raise controversial issues in the workplace. Employers demand employee medical information when employees are sick or injured, or when employee absenteeism reaches certain levels. Some Employers demand employee medical information in their written attendance policies. At times, Employers demand that employees go to a doctor (often a doctor chosen by the Employer) for assessment. Further, insurance adjudicators demand medical information before disability benefits are paid, and Employers sometimes demand medical information before they will allow a return to work and/or assign modified duties. Some Employers even want medical information before considering an employee for a promotion.

These demands are countered by employees' rights to privacy. Privacy has been defined by the Supreme Court of Canada as "the right of the individual to determine for himself when, how, and to what extent he will release personal information about himself" (***Duarte v. The Queen,*** 1990). The right to privacy of medical information is almost absolute - no one can be forced to release their medical information to an Employer or Insurer against their will. But the consequences of not releasing information are obvious: you may be denied work or be terminated, or be denied sick leave or disability benefits.

Arbitrators attempt to balance Employer rights to information with individual privacy rights. While the law on privacy of medical information continually evolves and each situation must be assessed on its own facts, there are discernable rules. This paper will outline the rules surrounding the release of personal medical information in a variety of circumstances.

Medical Notes for Absences or Return to Work

What information is an Employer entitled to when an employee calls in sick or refuses certain tasks? What information is an Employer entitled to when an employee who has been sick or injured returns to work?

When an employee cannot attend work as scheduled, this may affect the Employer's operations. Further, the Employer may be paying sick pay or other benefits. The Employer usually has the limited right to confirm that the employee cannot attend work, or cannot perform the requested tasks.

When an employee returns to work following sick leave or returns to full duties following a medical absence, the Employer has the right to confirm that the employee is fit for duty. This flows from an Employer's obligation to maintain a workplace that is safe for the returning employee, for other employees, and for the public.

It may even be acceptable for an Employer to require medical information prior to awarding a posting where there are reasonable grounds to believe that due to a medical condition, the job applicant would be a danger to himself or others, or would be unfit to perform the posted job (***HBM&S v. CEP 819,*** 2001).

Employer Rights Under the Collective Agreement

The Collective Agreement is the starting point that determines the extent of the Employer's right to impinge upon an employee's privacy. Many Collective Agreements contain provisions allowing the Employer to require employees to produce specified medical information. Often the issue becomes what degree of information must be disclosed pursuant to the Collective Agreement or at Common Law.

Any unilateral Employer policies regarding the disclosure of medical information must be consistent with the Collective Agreement, reasonable and respectful of privacy rights in general.

Rights granted under the Collective Agreement are interpreted restrictively and in favour of employee privacy. The following examples illustrate this concept:

- If the Collective Agreement grants the Employer the discretion to request employee medical information, an Employer policy requiring such information automatically violates the Collective Agreement (***Nav Canada*** (2000).

- If the Collective Agreement allows the Employer to request a medical certificate (doctor's note), the Employer is not therefore also entitled to a diagnosis (***Ottawa Citizen***, 1996).

- Where a Collective Agreement requires employees to provide proof of illness, the Employer does not thereby gain the right to schedule a medical examination using a doctor of the Employer's choosing, and does not gain the right to demand access to the employee's doctor (***Nav Canada*** 1998).

- If the Collective Agreement allows the Employer to require a medical certificate after a certain amount of sick days, the Employer does not

automatically gain the right to request a certificate for a lesser number of days (***Women's Christian Association***, 1983).

- Where the Collective Agreement sets out the procedure for verifying illness, it is probably improper for the Employer to implement a different method (***City of London***, 1983)

- In the context of sick/disability leave, absent a relevant collective agreement clause, the employer is entitled to no more than what is reasonably necessary in order to establish that the employee was unable to work. However, if there is a collective agreement or legislation, such will be strictly construed in that respect (***Canadian Bank Note Co. and IUOE, Local 772 (Re)****, 2012)*

Other Sources of Employer Rights

Absent specific provisions in the Collective Agreement, arbitrators have held that Employers may, in certain circumstances and within certain limits, intrude upon the privacy of an employee. An Employer may be able to require medical information from an employee if the Employer has reasonable and probable grounds to suspect that an employee is a safety risk to him or herself, company property or others, or is unfit for work; or if the Employer has reasonable grounds for questioning the employee's reasons for being absent. In deciding whether, and how much, medical information should be disclosed, arbitrators balance the Employer's right to efficiently manage and have a safe workplace against the employee's interest in maintaining the confidentiality of the medical information.

A Case by Case Approach

Each request for medical information must be reasonable, must go only so far as is reasonably necessary in terms of managing safety and operations, and must be assessed on its own facts.

As a general rule, when an absence first arises, an Employer may be entitled to minimal medical information (i.e. a doctor's note). As an absence becomes longer, more detailed information may be warranted. It may also be reasonable for an Employer to demand medical information sooner where an employee has a history of attendance problems, or where there is a suspicion of sick leave abuse:

> In some situations, determined by an objective and reasonable assessment of individual cases, the employer may be entitled to further information.

> Follow-up requests for further medical information is not prohibited; indeed, in some cases it will be necessary and entirely justified. Quite clearly, there is a continuum of appropriate medical information in which the obligation to provide more detailed medical information will increase, for example, as absences increase.
>
> The test in all cases, as accepted in the authorities, is "objective reasonableness." But whether that test has been met will depend on the circumstances of individual cases. (***CUPE 148 v. Greater Sudbury***, 2010)

An Employer can require medical information after just one day of absence if that is reasonable in the circumstances. In ***Union of Northern Workers v. Northwest Territories*** (2002), the Employer was suspicious about the legitimacy of the employee's illness. She had called in sick two hours before her shift and had requested the day off, but was denied. Although the Union argued that none of the conditions outlined in the Collective Agreement that would allow the Employer to request a medical certificate were present, the arbitrator found that the Employer retained the discretion to request a certificate where there is concern that sick leave was being abused.

An Employer likely cannot establish a policy that automatically requires a doctor's note from the first day of absence for each and every employee (***Winnipeg Free Press v. MUM 191***, 2001).

The Extent of the Information – Prognosis vs. Diagnosis

In almost all cases, arbitrators will find it reasonable that an Employer is entitled to a general statement on the employee's condition, a statement on the expected duration of the illness, and information on the employee's work restrictions. Arbitrators have shown a great reluctance, however, to permit the Employer to require employees to disclose diagnosis of their condition, or to demand medical history, symptoms, or a treatment plan *unless it is relevant to the Employer's right to manage and to provide a safe workplace*. The approach in these cases is not that disclosure of the diagnosis can *never* be required, but that it cannot be required automatically, regardless of the circumstances. Even in cases of accommodation, Employers will not always be entitled to a full diagnosis. The caveat will always be that confidential medical information may be required to the extent that it is necessary and sufficient for the Employer to fulfil its duty to accommodate to the point of undue hardship.

In *Rocktenn Co. of Canada Inc. and USW, Local 1-830 (Weekly Indemnity Benefits), Re*, 2015 CarswellMan 547, a medical form seeking information on diagnoses was found to be overly intrusive and the arbitrator held that it was to be replaced with "an inquiry as to the general nature of the illness or disability".

What Should the Medical Form Look Like

We have chosen to include this section because it is our experience that Unions frequently do not even know what type of form the Employers are giving to their members. These types of forms, which are usually an "authority to release medical information" are drafted by the Employer and often presented to the employee for signing in the absence of a union representative.

In a recent decision (***OPSEU v. Ontario (Treasury Board Secretariat)***, 2017), an arbitrator noted that such a form should advise the employee what health information would be requested, for whom, and for what purpose:

> In order to be able to provide informed and knowledgeable consent, the employee must be informed of what I will call the three "w's", as precisely as possible. That is the who, what, and why. First, the particular medical professional from whom health information would be requested, and anyone with whom the information would be shared must be identified. Second, the employee must be informed clearly, what health information would be requested. And finally, there must be an explanation of the purpose or purposes for which the information is required. If, and only if, applicable at the time, more than one purpose may be set out in the same form, provided the purposes are clearly identified.
>
> The employer may use a consent only for the purpose or purposes specifically identified in the consent form. If it becomes necessary to use health information for any other purpose, a new consent would be required. It is inappropriate to use "and/or" in describing the purposes. The employer is not entitled to seek prospective consent because of the possibility that information may become necessary for an additional purpose in the future. At the time of consenting the employee must know the present purpose or purposes.

We recommend that you inform yourselves as to the exact type of form used by the Employer and obtain a copy of same. Often, you will find that the Release goes far beyond the permissible levels of medical information and may include:

- request for diagnosis
- test results
- background medical history
- extensive information regarding treatment plans
- Employer access to medical records
- ability of the Employer's chosen medical practitioner to have access to medical records and to be able to communicate directly with the employee's doctor
- ability of a third party health information/management firm (hired by the Employer) to have access to medical records and to be able to communicate directly with the employee's doctor
- ability to refer the employee to an Employer chosen doctor or third party health information/management firm

Unions must understand that while their members may have already signed such intrusive forms of Release of medical information, they can immediately cancel these Releases by contacting their medical practitioners directly. The medical practitioner is bound by strict internal professional rules to immediately comply with the patient's direction. We wish to emphasize that this is not a process that involves the Employer, and the employee is not required to negotiate or discuss the cancellation of the Release with the Employer.

However, since the Employer is allowed to have certain limited information, we are recommending a form of Release which is attached as ***Appendix A*** to this paper. Obviously, it would be helpful to have the Employer's agreement to this type of form. Failing agreement, it is acceptable for employees to use the attached form instead of the one proposed by the Employer. Since "knowledge is key", it is extremely important for a Union to communicate quite clearly to employees what their rights are, and to circulate a suggested form of Release.

It has been our experience that in many workplaces, once the Union begins to inform itself in a proactive fashion, it is common to find that many employees have unilaterally divulged extremely sensitive medical information without first consulting with their union representatives. Of course, it goes without saying that your front line Shop Stewards should be forthwith informed of the steps you wish to take to ensure the protection of your members' confidential medical information.

Independent Medical Examinations (IMEs)

Employers occasionally demand that an employee attend to an independent medical examination (IME). Often, Employers state that their concerns include:

- The employee has applied for disability benefits
- The employee has provided medical documentation for any reason, and the Employer disputes its accuracy
- The Employer is concerned for the safety or well-being of an employee, perhaps because of perceived symptoms of physical or mental illness
- An employee requests a return to work after an illness or injury
- An employee requests an accommodation on medical grounds
- There is evidence that an employee cannot perform his/her regular duties
- There are safety concerns arising out of an employee's abilities
- There is an upcoming arbitration and the employee grievor has put his/her health in issue

Of course, employees still have the right to their personal medical privacy and may refuse to attend to a doctor on demand. But where the Employer's demand is reasonable under the circumstances, the refusing employee may suffer the consequences, namely non-culpable suspension (***Masterfeeds v. UFCW 1518***, 2000). The refusing employee cannot, however, be disciplined for insubordination (***Shell Canada v. CAIMAW***, 1990).

When is it appropriate for an Employer to demand that an employee attend an IME with a doctor of the Employer's choosing? Arbitrators have described the requirement to attend to an IME as "drastic action", which must have a "substantial basis", and which will be warranted only in "rare cases". Again, the first step is to determine whether IMEs are covered in your Collective Agreement.

In ***Grover*** (2007), the Federal Court confirmed that an Employer is not able to demand an IME unless the Employer can legitimately question the available medical evidence. Where the employee continued to fulfill the majority of his duties, where there were no legitimate safety concerns, and where the Employer had failed to exercise all other options to obtain further medical confirmation, there was no right to an IME.

In ***Teamsters 987 v. Federated Cooperatives*** (2010), an Alberta Arbitrator quashed an Employer's policy that required injured employees to attend to an assessment at a third party medical clinic specializing in workplace injuries. The policy was "an unreasonable intrusion into the employees' privacy and must be set aside". In the interests of "minimal impairment to privacy", employees must first be given an opportunity to provide necessary information from their own health care provider.

In ***Lafarge v. Teamsters Local 979*** (1999) the Collective Agreement sets out in detail a procedure of how an IME is supposed to work. However, absent from the language was a clause whereby the Employer could require an IME. The Employer argued an unrestricted right to compel an IME and the Union opposed this intrusion on an employee's privacy rights. Arbitrator Peltz agreed with the Union, noting "An individual's right to personal, physical integrity is well established in common law, … and should only be displaced by clear and unambiguous language. The grievor does not leave his/her common law rights at the plant gate - that is, unless the Union on his behalf clearly bargains them away in exchange for other rights and benefits in the Collective Agreement."

In ***TWU v. Telus*** (2010), an arbitrator determined that while a short term disability plan gave the Employer the contractual right to demand an IME ("if required"), this was informed by the reasonableness of the request under the circumstances. The arbitrator determined that the legitimacy of a claim for benefits should be proven first by a family physician. If this is insufficient or contradictory, the Employer may demand additional information from the employee's family physician, perhaps bolstered by the opinion of a specialist of the employee's choosing. Then, on the rare cases that this information is insufficient, an IME should be conducted by a physician who is agreeable to both parties. Finally, if the employee refuses to agree to a physician, or refuses to attend an IME, the Employer may demand an IME by a doctor of its choosing.

In ***Bottiglia v. Ottawa Catholic School Board*** (2017), the Ontario Superior Court of Justice held that a Human Rights Tribunal member's determination that the employer had reasonable and probable grounds to seek an independent examination was reasonable, in light of an abrupt change in the employee's psychiatrist's opinion as to the employee's readiness to return to work, and the timing of the request, which coincided with the end of his paid leave.

Accommodation and Medical Information

When an employee requires an accommodation such as modified duties, the Employer may argue that it must alter its methods of production and may incur an expense. The Employer also has duties to ensure the worker will not injure himself/herself further. The Employer has the right to confirm that the accommodation is reasonably necessary.

Employers are obligated to accommodate workers with disabilities to the point of undue hardship. An employee seeking an accommodation (modified duties or work schedule) has an obligation to advise the Employer that he or she has a disability and that an accommodation is required. The employee must provide the following, usually from a health care professional:

- A prognosis for recovery
- A clear opinion regarding the employee's ability to return to work
- An opinion regarding the employee's ability to perform unmodified duties
- Information (including expected duration) regarding restrictions and limitations relevant to the employee's duties
- A description of the job duties in order to assist in providing an opinion

Employees seeking accommodation must also reasonably participate in accommodation efforts, and must participate in treatment for the disability. Of course, the Union must also participate in accommodation efforts and should be part of the process from the start.

Employers may be entitled to more detailed medical information when arranging an accommodation than when verifying absence. The Employer must show that the information is reasonably necessary, such as when the available information is unclear or where there is an issue surrounding the performance of specific duties.

In ***PSAC v. GTAA*** (2004), a grievor had been off work for many months following heart trouble. He was reluctant to pass medical information to the Employer and would not allow the Employer unrestricted access to communicate with his doctor. After many months, the Employer was able to return the grievor to modified duties. The grievor claimed the Employer wrongly laid him off while sick, and also claimed the Employer deliberately delayed his return to work.

Arbitrator Simmons took a fairly hard line on the grievor, upholding the Employer's right to access the grievor's own doctor when arranging a return to work:

> *"One may admire the grievor for his strong feelings about divulging medical information but there is a price that goes along with it. The grievor had undergone serious surgery. His specialist informed the Employer he could return to modified duties. Arbitrators have generally acknowledged that Employers have a right, indeed an obligation, to ensure a returning employee from medical leave is capable of performing duties without risk to himself or to other employees or to the Employer. In order to satisfy this obligation the Employer must not be prevented from communicating with the Employer's physician so as to prevent it from sufficiently satisfying its concerns about the employee's capabilities of performing work assigned to him. Of course, the Employer must act reasonably in seeking pertinent information related to the grievor's capabilities of performing his assigned duties, modified or without restrictions. It would not be reasonable for an Employer to insist on receiving the medical history of an employee which was completely unrelated to the performance of his duties. There is no evidence the Employer was attempting to obtain medical information about the grievor other than that which was necessary in the performance of his duties."*

We wish to emphasize that the requirement for additional medical information is dependent upon a number of factors, including the nature of the disability/condition of the employee and the nature of the job duties. Obviously the danger to returning employees and their co-workers will depend on whether, by way of example, the employee performs sedentary office work, or at the other end of the spectrum, operates an overhead crane in a crowded work area.

Restricting Access to Certain Employer Representatives

Obviously, once an Employer gains the right to access confidential medical information, there is a secondary concern as to how the information is used. Unions are advised to insist that this classified information be viewed only by an identifiable restricted group within the Employer's management. In other words, access should be on a "need to know" basis, and the Union should obtain in writing an acknowledgement that only certain identified individuals will be allowed to access that information. Moreover, this written acknowledge should stipulate the method of storage of the information so as to guarantee that only those limited individuals have access.

Employer Policies: Attendance Management Policies (AMPs) and Medical Information

An attendance management policy is an Employer's attempt to establish consistent rules for attendance, to raise awareness of attendance issues, and to prevent attendance problems from escalating.

Employers argue that they need AMPs because absenteeism has the potential to cause lost productivity, poorer quality of product/service, decreased customer/client satisfaction, a negative effect on the performance/morale of other employees, increased workload for co-workers, and greater financial costs for Employers. Attendance management policies or programs are Employer responses to the impact of absenteeism in the workplace.

Typical elements of an AMP include:

- Definitions of absence
- Thresholds that say what will happen after a set number of days off, or after a number of absences in a year, or after an employee's absenteeism exceeds a plant average
- Rules that use the thresholds to bring an employee within the program
- Rules for communication between Employer and employee
- Rules for recognition of improvement and removal from the program
- Escalating Employer involvement
- Requirements for medical disclosure

Typically, an AMP establishes a series of steps, involving meetings with management, which reflect the escalating seriousness with which the employer views the problem, and which may result in warnings that the employee may face dismissal unless their attendance improves.

AMPs are (usually) a unilateral management rule. As such, they must meet certain criteria (the *KVP criteria*) in order to be valid. Of interest in terms of medical disclosure, an AMP must not conflict with the Collective Agreement and must not be unreasonable or breach employees' privacy rights. As such, rules under an AMP requiring medical disclosure will be governed by the same principles applying to requests for medical information in the absence of an AMP.

In ***Health Sciences Centre and I.U.O.E. 987*** (2003) the Union grieved the Employer's AMP, which required a medical certificate for each absence due to illness taken by any employee who has six or more such absences in the preceding 12 months. The Union argued that the AMP conflicted with the Collective Agreement, which only required production of a medical certificate in specific and limited circumstances. The Employer argued that it had the inherent right to require medical certificates wherever reasonable, and that this policy was a reasonable one.

Arbitrator Spivak determined that the Collective Agreement did not prevent the Employer from demanding medical certificates in circumstances other than those specified, and therefore, the AMP did not conflict with the Collective Agreement. However, the automatic requirement for medical certification of all absences, regardless of the circumstances of those absences, was not reasonable and conflicted with the Collective Agreement. Parts of the AMP were struck.

As is the case when there is no AMP, a case-by-case approach to the requirement for medical documentation is appropriate.

AMPs: Triggers/Thresholds/Targets

Regarding triggers or thresholds in AMPs, the employer is not obligated to choose one that is equal to or higher than the corporate average. The employer may choose a lower number so long as it is reasonable and there is a rational explanation. ***North Bay (City) v. North Bay Professional Fire Fighters Assn*** (2010) recently confirmed that an employer is not required to choose a trigger that is equal to or higher than the corporate average, the test is one of reasonableness.

Choosing a reasonable target also means taking into account the unique characteristics of both the workplace and the workforce. In ***ONA v. St. Joseph's General Hospital, Elliott Lake*** (2006), it was held that the average rate of absences in the hospital should not have applied to a nurse. The arbitrator held that nurses have substantially different duties and levels of exposure to diseases and conditions than other hospital workers which could impact their level of absenteeism. The hospital failed to show that the attendance standard against which it measured the grievor's absences was reasonable or that her absences were excessive when measured against the actual absenteeism level for nurses in her unit or the workplace as a whole.

AMPs: Distinguishing Between Culpable and Non-Culpable Absences

AMPs often give rise to human rights issues where non-culpable absences related to a disability or family status are included in absences considered under the AMP.
In a recent case, ***Canada (Attorney General) v. Bodnar****,* (2017) *("**Bodnar**")*, 2017 FCA 171, the Federal Court of Appeal held that no *prima facie* case of discrimination was made out in including absences for disability or family-related leave in calculating the number of absences under the AMP, as the program's response to accommodation-related absences was non-disciplinary:

> all that was to transpire, once the threshold was exceeded, was that the supervisor was required to be satisfied as to the legitimacy of the absences and to identify, where possible, situations where an accommodation was required, as would be the case if the absences were occasioned by a disability or if the employee were entitled to leave to address family-related responsibilities accorded protection under the *CHRA*. If accommodations were required, the employee was to be removed from the NAMP.

Generally, however, arbitrators have held that culpable and non-culpable absences should not be mixed. In ***Scarborough Fire Fighters Association, Local 626 v. City of Scarborough*** (1995), the arbitrator distilled the following general principles from the case law regarding the propriety of an attendance management policy:

1. If the policy purports to rely on purely objective or numerical criteria, that is, the number of days or incidents of absence, it must not mix culpable absences with non-culpable absences.
2. Such objective criteria cannot be arbitrary, and must be defensible as a reasonable indicator of a problem with a particular employee's level of attendance.
3. The various steps of the monitoring or counselling program must not be applied mechanically, that is, without due consideration of the explanation put forward for the employee's unusually high level of absenteeism.
4. Notwithstanding the appropriateness of the program and the employer's compliance with its obligations at every step, the employer's right to invoke the final step of dismissal remains subject to the duty to accommodate a recognized disability to the point of undue hardship.

In another case, ***Coast Mountain Bus Company Ltd.*** (2010), the B.C. Court of Appeal upheld the B.C. Human Rights Tribunal's finding that the company's attendance management policy was discriminatory when it included absences attributable to an employee's disability to calculate the standard for moving employees to the next level of the attendance management program, as it resulted in employees with disabilities

becoming subject to the program, and ultimately to termination, at an accelerated rate in comparison with their non-disabled co-workers.

Other cases have emphasized that AMPs must be flexible and designed to allow for discretionary, individualized treatment of employees. Absences that are the result of a disability must be taken into account and before terminating an employee the employer must consider its duty to accommodate.

While the mere inclusion of disability-related absences in calculating the employee's absence rate under an attendance management program may not in itself give rise to a finding of *prima facie* discrimination, as was held in ***Bodnar***, the reliance on those incidents to support an adverse action under the policy may give rise to a finding that the termination or other action was discriminatory and unjustified, where undue hardship is not established.

CONCLUSION

The issue of access to medical information is a very sensitive subject, given that the rights to this information belong to the employee. The Union may negotiate away some of those rights in the Collective Agreement, but even then, arbitrators will interpret those clauses narrowly, and give the benefit of the doubt to individual employees and their privacy rights.

As with any such issue, knowledge is of the utmost importance. Unions are wise to inform themselves, on a pro-active basis, of the methods currently being used by their Employers to access medical information and seek immediate changes when needed. This is always preferable to dealing with the issue on a reactive basis when an employee is being denied a return to work for refusing to provide requested medical information.

This is a complex area of Labour Law for many reasons, including the fact that many of the relevant principles and rules depend greatly on the circumstances of each particular case. In closing, we provide you with certain key points to remember:

1. By virtue of the employer/employee relationship, the Employer has the right to seek confirmation of illness, whether or not there is any wording in the Collective Agreement concerning the provision of medical notes or certificates. The key is that the Employer is only entitled to medical information to sufficiently answer the question as to whether or not the individual should be away from work, and nothing more. This concept comes from the principle that an Employer can only intrude

upon the privacy of an employee if it has a legitimate business purpose tied to the employer/employee relationship which justified the intrusion.

2. Broadly speaking, there are three circumstances under which an Employer is entitled to medical information about an employee:

   (a) To verify that time away from the workplace was due to illness;
   (b) To prove eligibility conditions are satisfied for disability benefits (including sickness benefits);
   (c) To facilitate accommodation of a disability.

3. The Employer is entitled to a general statement as to the nature of the illness from the doctor, but the doctor is not required to provide a specific diagnosis. For example, the doctor should say “stress related leave” and not “patient suffers from depression with suicidal ideation”.

4. The Employer is entitled to know whether a treatment plan has been prescribed by the doctor and whether the patient is following it.

5. The Employer is entitled to ask and be advised as to the doctor’s prognosis for assessing when the employee may return to work.

6. Where it is contemplated that the employee may have some restrictions on return to work, either temporarily or permanently, then the duty to accommodate requires the employee to disclose medical information in order to allow the Employer to assess the employee’s ability to assume job duties, or to allow the Employer to modify job duties to accommodate any ongoing disability.

7. When an Employer receives medical information about an employee, there is an implied obligation that the Employer shares that information with only those on a “need to know basis”.

8. The Union’s role in the duty to accommodate process may require it to get involved in the provision of, and sharing of the employee’s medical information to determine such questions as extent of disability, length of disability, restrictions on job duties, etc.

9. The right of an Employer to an IME requires a substantial basis and is warranted only in rare cases.

10. The employee should never let the Employer have direct access to their doctor/health practitioner in writing or by telephone. The Union can be of assistance to the employee in channelling the appropriate questions to the doctor, and asking for a report.

11. Whether or not the Employer is using an outside consultant to manage its sick program, the information that the employee must provide is the same.

12. If, however, the sick leave is being paid by an insurance carrier, there may be provisions in the insurance contract that require greater disclosure to the insurance carrier. Beware, however, that the insurance carrier does not obtain the employee's consent to provide all of that extra information to the Employer.

13. As to who pays for the medical certificate, look to the Collective Agreement. If there is nothing in the Collective Agreement, then Unions should try to negotiate something requiring the Employer to pay when it seeks a medical certificate.

14. An Employer who demands that a particular employee provide sickness notes or medical certificates "for all future absences from work" may be discriminating against the employee, and/or imposing discipline without just cause.

15. AMP thresholds must be reasonable and take into account the unique characteristics of the workplace and workforce.

16. AMPs must allow for flexible, discretionary treatment of employees and must take absences attributable to disability into account.

APPENDIX A

MEDICAL CERTIFICATE

The form of this document has been approved for use by ***add Union name here***

The contents of this certificate are to be used by the Employer and distributed only as required for the employee to access leave and/or benefits due to illness or injury, and are subject to strict confidentiality and privacy rights.

PART 1 – Authorization for Release of Medical Information (to be completed by the employee)

I _____ hereby authorize my physician to complete the Physician's Statement below and to release this medical certificate to (circle one)

me
my union/lawyer
my employer
insurance company

I understand this information is required for _____ purposes only and my consent is limited to that use.

If additional information is required, additional consent must be sought and obtained.

Date _____ _____
Day Month Year Signature of Employee

PART 2 – Physician's Statement (to be completed by the attending physician)

Please clearly fill in all pertinent areas and sign the completed certificate. By signing this certificate, you agree that the information provided is complete and accurate, to the best of your knowledge.

1. The employee's date(s) of examination regarding this illness/injury was on _____

2. Is medical leave required by the employee? Yes ☐ No ☐

3. Without giving a specific diagnosis, state the general nature of the employee's illness/injury requiring medical leave?

_____
_____
_____
_____

4. a) Has a treatment/remedy plan been prescribed to the employee? Yes ☐ No ☐

b) If yes, is the employee fulfilling the treatment/remedy plan? Yes ☐ No ☐

5. What medical follow-ups, if any, are occurring relating to the employee's illness/injury?

_____

_____

_____

_____

6. Have you referred the employee to a specialist or other healthcare practitioner regarding their illness/injury? Yes ☐ No ☐ If yes, who? _____

7. What is the estimated date that the employee will be able to return to work _____.

8. a) Do you anticipate any restrictions on the employee upon their return to work?
Yes ☐ No ☐

b) If yes to a), explain the restrictions:

_____

_____

_____

_____

c) The anticipated duration of these restrictions will be _____.

Date _____
Day Month Year

_____
Signature of Physician

_____
Name of Physician (Please Print)