SPECIAL EMPLOYMENT AND LABOUR LAW REPORT

AFTER THE PANDEMIC:

A Guide to Re-Opening The Workplace in a Post COVID-19 World

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A Manual for Human Resource Personnel, Union Representatives and Labour Relations Practitioners

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ABSTRACT

Employers and their respective unions will need to re-think matters regarding the re-opening of their workplace.

This e-Guide sets forth many of the considerations necessary to effect a return to work. Included is a discussion of whether employees who are fearful of returning would be entitled to a leave of absence to permit a later return. The employer's discretion to consider such a leave is not unfettered but must be exercised in accordance with recognized principles.

Included as well is an overview of the principles governing an employee's obligation to provide medical documentation; the employer's entitlement to challenge the sufficiency of any documentation provided; and the employer's recourse when the employee refuses a reasonable request for medical information.

This e-Guide will be of particular assistance to smaller employers who may not have the resources necessary to identify or engage consultants to assist with their planning.

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About the Author

Denny is a partner emeritus with the Winnipeg law firm of Thompson Dorfman Sweatman. He was consistently named by Lexpert as a leading practitioner and has been named by that publication as being one of the leading 500 lawyers in Canada.

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Denny is the author of **Illness and Absenteeism: A Manual for Human Resource Personnel, Union Representatives and Labour Relations Practitioners**. The loose-leaf manual has been designed to assist practitioners and advocates with the challenging areas of illness, absenteeism, and the duty to accommodate. It is 864 pages in length and is augmented by an ongoing cumulative supplement that is published monthly.

Part 1: Considerations in Re-opening the Workplace

I Introduction

A new world awaits employers and employees as businesses begin to re-open following the coronavirus closures.

While this guide approaches the issues in the context of a unionized workplace, its observations and suggestions will generally have relevance to non-unionized businesses as well.

The guide has been developed for smaller entities that do not have the resources to identify or engage consultants to assist with their planning. Underlying its development is the notion that a smooth re-opening will require considerable good will on the part of all parties.

Employers and their respective unions will need to re-think matters regarding the re-opening of their workplaces. In normal circumstances, and under most collective agreements, employees who had been impacted by a plant shutdown would be called back to work once work became available. If they were not able or willing to return, then they would generally be compelled to either obtain a leave of absence, whether medical or otherwise, or forego their entitlement to recall.

The need for a "rethink" is partly attributable to the uncertainties created by the virus. Even where precautions have been taken, the virus can unknowingly be transferred from one employee to another and from employees to their family members. Even if the developing medical evidence establishes that this concern could be greatly minimized, through a vaccination or otherwise, there would undoubtedly be conflicting medical evidence that would understandably continue to fuel the anxieties of many employees and their families. In these circumstances, an employer's directive that an employee return or suffer the consequences of not doing so would likely not be sustained at arbitration. That would be particularly true where the employee suffered from crippling anxiety or her age and health placed her within the vulnerable segment of the general population. Moreover, family circumstances, including child and elder care, may thrust additional personal obligations on many employees that might insulate them from having failed to respond to a directive to return.

In this radically altered environment, and at least in the near term, employers will be expected to recognize that such concerns must be addressed in a compassionate and understanding fashion. Dictates will not be sufficient. From a self-interest perspective, employers need to recognize that it will be up to them to do all that can be done to achieve employee buy-in. The refrain that "We are all in this together" should serve as a "mantra" that informs an employer's actions.

This guide sets forth many of the matters that need to be considered in effecting a return. It also considers the extent to which the overarching issue of safety is likely to alter the balance that arbitrators have strived to achieve between an employer's right to operate its workplace and an employee's right to privacy. In that respect, arbitrators have recognized that there must be a

balance between those two values. That balancing is reflected in the principles that have evolved to limit an employer's right to require an employee to disclose personal medical information.

The existence of a pandemic will surely cause arbitrators to reconsider the extent to which the weight now being accorded to employee privacy must bend or give way to consideration of matters of personal and public safety.

Finally, this guide concludes by addressing many of the basic arbitral principles as they now exist. The selected principles are intended to provide a shared-reference point for all parties in their efforts to arrive at a common and reasoned approach to the re-opening of their workplace. Included is an extensive checklist of factors to consider when an employer is seeking medical information.

The Guide also references other helpful resources from the Government of Canada, the United States Centers for Disease Control, the United States Department of Labor (OSHA), and the World Health Organization.

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II Planning for the Re-Opening

Various commentators have suggested that the re-opening of a workplace will take a minimum of two weeks of solid planning. For many smaller employers, the issues that they face will make it difficult to adequately complete preparations within such a limited time frame. Employee and union involvement should be a given.

i) Union involvement is essential

Union involvement is crucial to an orderly return to work. Union involvement, particularly at the local level, will surely increase employee "buy-in" and will likely serve to avoid issues that might otherwise prove to be contentious. By way of suggestion, the employer should begin by scheduling an immediate planning meeting with its union(s). Although an employer might want to avoid the appearance of being overly-directive, it would be useful if it were to prepare a suggested agenda for that initial meeting. The draft agenda should then be provided to the union(s) with the request that they provide suggestions for additional agenda items.

ii) Establishing a workplace pandemic committee

A workplace committee could play a number of important roles; with its primary purpose being to ensure that potential issues are identified and dealt with in a transparent and timely manner. The committee might consist of one employer representative and one or two employee representatives who are appointed by the union(s). Given the consultative/coordinating role that the committee members would be expected to play, they should likely be scheduled to attend at the workplace during the pre-opening period. They would of course be compensated for their time.

While the choice of the employee appointees would be that of the union(s), the employer should request that consideration be given to selecting experienced employees with strong leadership skills. Thought should also be given to selecting one of the appointees from an employee group where their primary language is something other than English. The union staff representative should be entitled to attend all meetings. However, given the representative's likely time constraints, some of the Committee's meetings might need to proceed in his or her absence. The likelihood of the representative's attendance at most meetings would be enhanced if the parties initially reserved a number of potential meeting dates at the outset of the process. Additional dates could then be added as necessary.

The Committee should be provided with a budget and such other supports as are required to ensure timely access to clerical, screening and professional medical advice.

The potential role of the Committee is explored in the sections dealing with the initial and ongoing tasks of the Committee.

III Initial Role of the Committee

i) Developing an understanding or consensus regarding tentative resolutions

As the parties work their way through the process, they will be faced with the potential impact that one action may have on another. For that reason, it might be wise for the parties to agree that unless otherwise specified, decisions that are made will be considered to have been made on a without prejudice basis. In other words, a party cannot insist that what was done in one instance must govern that which is to be done in subsequent but similar circumstances. Proceeding as suggested would allow subsequent decisions regarding similar facts to be agreed or adjudicated without reference to earlier decisions.

ii) Establishing standards for employee conduct

The possibility exists that immature employees might use the "threat of infection" as a weapon to taunt or harm others. It is not difficult to imagine that a troublesome employee might take retribution against another by initiating untruthful allegations or hurtful rumours besmirching the integrity or health of that employee or her family. The Committee should at least consider whether this is an issue that needs to be addressed within their workplace. Employees should be put on notice that conduct of this nature will not be tolerated and that any such misconduct, whether maliciously intended or not, may result in significant discipline up to and including termination.

iii) Communicating with the work force

Communication is an extremely important matter, for it is essential to ensure that employees understand the issues and are committed to adopting the steps that are required to remain safe. Sound and consistent communication is required to reinforce accepted public health measures (such as continual hand cleansing, wearing of masks, maintaining appropriate distancing and avoiding unnecessary contact outside of work and home). The communication plan should include signage to reinforce these and related measures, a regular newsletter, small group meetings and Employee Bulletins as required. In workplaces where not all employees are fluent in English, the Committee may need to rely on volunteers from a cultural association to facilitate communication with such employees. The Committee should also determine whether the employer or the union(s) have previously identified similar translation resources that might be available.

iv) Adopting the use of non-medical face masks throughout the employer's operation

The issue of masks requires specific commentary, for the initial advice from Health Canada was that persons who were not ill need not wear a non-medical face mask, with the rationale being that while such masks might protect those interacting with the wearer, they did little to protect the wearer herself. That advice began to shift in early April, and by May 21, of 2020, the provinces had developed a consensus recommending the wearing of non-medical masks on a non-compulsory basis.

Health Canada has recognized that masks can be problematic for individuals with different types of disabilities, including those who are hearing impaired or asthmatic. Because a person wearing a mask is generally breathing hot and humid air, the mask could inhibit that person's ability to breathe and could possibly trigger an asthma attack. Masks can also pose difficulties for individuals who rely on lip reading to supplement their diminished hearing. And, as most all will acknowledge, masks are generally uncomfortable and often leave the wearer with a degree of irritability, thereby increasing personal discomfort and angst. Finally, despite the various remedies that are touted, many who wear glasses find that their vision is impaired because their glasses continually fog up.

Cloth masks would generally be suitable for most workplaces but the comfort and safety of a particular design may well depend on the breathability of the material used in its manufacture. Given the element of discomfort and its potential impact on employee safety, the Committee should give priority to the selection of one or two masks that might be suitable for the majority of employees. Finally, an employer should recognize that it may have to adopt different forms of accommodation for those who cannot safely wear a mask, including re-assigning such employees to a less-populated work area where the lack of a mask might not pose an increased danger of infection.

v) Re-designing the workplace to ensure safe distancing by reducing unnecessary employee interaction

It is advisable that employer's, where necessary, make reasonable modifications to their workplace and to employee scheduling in order to ensure safe distancing. Ideas in that regard might include the possibility of re-calling employee's in a staged manner, with not all employees returning at the same time. In addition, the number of employees who are present at any one time in areas such as hallways, washrooms and lunchrooms will need to be addressed. Consideration might be given to staggering the start and completion of shifts by, for example, an average of 15 minutes or more, so that there is a minimum amount of contact between employees when arriving and leaving work.

Work areas and traffic flow should be marked to ensure that safe distancing is maintained. A limit on the percentage of workers who are scheduled to work at any one time might also be considered. That could be achieved by converting a Monday to Friday day shift into a seven day per week day shift. Alternatively, additional safe distancing might be achieved by adding an evening or midnight shift. Similarly, consideration could be given to three 12 hour shifts per week. The number of employee entrances/exits could be temporarily increased, with all employees being assigned to one of several of these entrances/exits. Locker sharing should be discontinued, and where possible, the lockers should be re-located to achieve the necessary safe distancing. Additional locker benches should be made available, with the benches being sanitized after each use.

An alternative to locker sharing or crowding would be for the employer to purchase uniform gym or travel bags, with each employee being provided with one bearing an identifying number and their name. The bags could be stored between use on shelves in a secure area that was monitored by plant security (and if desirable, by a fixed security camera). Alternatively, wall pegs could be used to hang clothing, and "boxes" could be taped or painted on hallway floors to facilitate the storage of work boots. Employees could be warned that any employee who "messed" or interfered with another's property would be subject to immediate termination.

In some workplaces, lunchrooms have temporarily been closed and replaced by vending machines, while in others, microwaves have been removed to minimize the jockeying and crowding that often occur as employees vie to heat their meals.

vi) Adopting appropriate screening procedures

Consideration must be given to adopting effective self-monitoring and plant-wide screening procedures. The Committee should be authorized to assure employees that all health-related matters that are reported to the employer or the Committee would, where possible, be treated confidentially.

Employees could be required to complete an individual declaration or attestation. That document would require each employee to acknowledge that they have completed the relevant training and that they will abide by the designated safety protocols that have been implemented. It might also require the employee to immediately report, perhaps to a medical designate retained by the Committee, any suspicion that a member of their immediate household or a recent social contact had been exposed to the virus or had exhibited "virus-like" symptoms. It might also obligate an employee to undergo immediate and follow-up screening with medical personnel retained by the employer and to cooperate with any contact tracing that might be implemented.

An adequate number of external "forehead" thermometers should be purchased so that temperature monitoring of employees can be implemented if the Committee believes that such monitoring would be appropriate.

There has been considerable anecdotal evidence that in many workplaces or locations, employees who suspect that they may have been exposed to or have contracted the virus have had difficulty obtaining the testing (and timely reporting of results) that they had been promised. That just should not happen. But in the absence of a detailed protocol and strict monitoring and reporting, testing issues are likely to persist. It seems obvious that an employee who believes she is experiencing symptoms should be expected to immediately leave the workplace, and after having advised her supervisor, report to the designated testing site for a complete assessment. Every aspect of the process should be logged in a central registry maintained by the employer. That registry should be made available on request to the Committee and the union(s).

Finally, the employer should impress upon all of its supervisors and management personnel that swift action must be taken where there have been any delays in testing or reporting or in actual

or anticipated access to personal protective equipment. Such notification should be provided to the Committee, the union(s), and to a designated member of senior management.

vii) Selecting and monitoring the personal protective equipment (PPE) inventory

The Committee should be responsible for recommending purchase of any personal protective equipment that might reasonably be required. The Committee should also recommend the maintenance and monitoring of minimum inventories along with pre-defined procedures to be implemented where it appears that the employer might not be able to maintain an adequate inventory into the reasonably foreseeable future.

viii) Initial and ongoing sanitation of the workplace

A sanitation protocol should be developed and then shared with employees. Employee comfort would be increased if the protocol dictated the regular cleaning that would be done, and when. As in the case of many commercial businesses, the protocol should require that washrooms be regularly cleaned and inspected, perhaps hourly, and that the person responsible for having done so then immediately "sign off" on a sheet posted in each location.

A telephone number should be designated and posted, so that any deficiencies can be reported and rectified within a specified number of minutes. The person receiving the calls should complete a log that would be available for ongoing review.

Additional wash and hand sanitation stations should be installed as necessary, and then maintained on a continual basis. Disposable paper towels should be available as necessary to minimize any possible contamination of hands after having been cleaned.

Employees should be issued or compensated for the purchase of small containers of personal hand sanitizer that they can carry on their person as they move throughout the workplace.

Time should be set aside at the start of each shift so that the employee assuming responsibility for the operation of a machine or group of machines can thoroughly sanitize the machines that are to be cleaned, much as is often recommended for those using gym equipment. Some thought will have to be given to the equipment that will need to be readily available, as for example sanitizing sprays, disposable "shop towels", and disposable light weight gloves, with the gloves perhaps being used for both cleaning and equipment operation. Where gloves are used, employees should be trained in the proper use and disposal of such gloves.

Special procedures may need to be developed regarding the sanitization of sensitive control panels. Consideration should also be given to determining whether special procedures should be adopted for the handling of material, such as requisitions, reports, and packaging material that will ultimately be handled by more than one person.

ix) Travelling to and from work

Employees should be instructed as to steps that can be taken to protect themselves when travelling to and from work. A new publication by the United States Centers for Disease Control (referenced in the List of Additional Resources) sets forth specific considerations when using public transit, rideshares, taxis and personal vehicles. The publication also references additional information that specifically pertains to long-haul truck drivers, taxi and delivery drivers, and public transit operators.

x) Adopting an informal resolution process

Parties that are attempting to re-open their workplace are likely to experience a fast moving and dynamic environment. The process will involve significant numbers of decisions that impact the employer, the union(s) and one or more employees. Arbitration has always been available to resolve such disputes, but in many respects, the process has proven to be an unsatisfactory mechanism. It is expensive, it can be cumbersome, and it can take many months before an expedited concern is heard. That being the case, the parties should consider the temporary adoption of a two-step dispute resolution process, with the initial step having as its primary objective an informal and timely determination by a mutually selected individual. Either party could then elect to accept the decision or to challenge the determination by having the matter "heard afresh" in a formal arbitration. The adoption of informal procedures and tight timelines would likely serve to facilitate a more productive working relationship between the parties.

IV Ongoing role of the Committee

It is becoming readily apparent that there will be no "quick" resolution to the pandemic threat within our workplaces. A committee such as that suggested will have a continuing role to play. The lessons that have been learned will need to be regularly reinforced in order to counter the natural tendency to slip back into previous habits that might foster the continued spread of the virus.

i) Reporting and transparency

Regular reporting of successes and failures is likely to motivate employees and strengthen their resolve to eradicate the virus. For such reporting to be successful, it must be transparent and sustained.

ii) Avoiding complacency

The Committee should be encouraged to invite employees to redouble their efforts to achieve success. This could include events such as prize-driven poster contests, poems and short stories that could be shared in a Committee-produced newsletter that would be emailed to each employee's home. Alternatively, and depending on the size of the work force, regular on-line talent performances could be initiated. Maintaining contact with employees' families through

poster competitions and regular reporting could greatly assist in reinforcing the ongoing goals of the Committee.

iii) Ensuring permanency

As matters stabilize, responsibility for many of the Committee's functions might be transferred to a staff member who would then assume the ongoing management of this and other similar programs. The Committee could play an important role in ensuring that a proper transition occurs.

Part II: Legal Principles

I Introduction

This portion of the Guide is intended to provide an overview of several issues that may be encountered as the parties work through the task of re-opening their workplace. They include the possibility of a somewhat altered role for privacy, workable definitions for illness, disability and accommodation, and a potential response to an employee's failure to return because of a fear of infection of self or family or because of a need to provide child or parental care.

One response to many issues might be to consider a leave of absence to permit an employee to address her personal or family issues. Much to the surprise of many, an employer does not have an unfettered right to grant or withhold a leave of absence. The employer's response to such requests must be considered within the context of a broad framework. The employer must act reasonably, somewhat consistently and in accordance with the arbitral principles governing the exercise of employer discretion. The employer's decision must be made in good faith and without discrimination; the decision must be a genuine exercise of discretion as opposed to a rigid adherence to policy; the decision must consider the merits of the individual request; and the employer must consider all relevant factors while ignoring those that are irrelevant.

Finally, this Guide includes detailed reference to several medical principles. It considers the medical information that can be requested by an employer; the extent to which an employer can challenge the sufficiency of the information that has been provided: and the consequences that can be imposed by an employer where the employee fails to provide information that was reasonably requested. It also considers certain aspects of the duty to accommodate an employee's disability.

II Commentary on Principles

The principles that are discussed in the following pages reflect much of the arbitral law that has developed in the area of illness and absenteeism. As noted earlier, they generally reflect a balance between an employee's right to privacy and the employer's right to operate its workplace in a safe and proper manner.

The everyday application of such principles is often fact specific. Where there is a contest between employee privacy and employee safety, particularly in the context of the current pandemic, one would expect that any balancing exercise that is required would tilt toward individual and workplace safety. One must therefore keep that in mind when considering the potential application of any of the principles that follow.

III Discussion of Relevant Principles

i) Privacy is likely to play a diminished role in the pandemic and post-pandemic age

Arbitrators have generally accepted that employees have a right to or at least an expectation of privacy. The right to privacy has been characterized as a "fundamental right of employment law." That right however, is not paramount, but must be balanced against the employer's rights and obligations. Arbitrators have accepted that an employer's workplace interests provide the employer with the right to inquire into matters related to workplace absenteeism and qualification for sick leave or other wage replacement benefits. Arbitrators have also accepted that employers have an obligation and a duty to provide a safe working environment. Arbitrators have reconciled what are at times competing interests by requiring that employer incursions into an employee's privacy be reasonable in the circumstances. This is accomplished partially by requiring that employers adopt a staged or incremental approach to seeking medical information, with a right to resort to a more intrusive approach in cases where the employer's reasonable need for information was not satisfied by a less intrusive inquiry. Where the employer "overreaches" in its demands for medical information, the employee's refusal to comply will generally be considered to have been justified.

An employer can intrude upon an employee's privacy only if it has a legitimate business purpose for doing so. Any such intrusion must be reasonable, having regard to all the circumstances. The least intrusive approach generally requires that concerns be initially addressed or clarified through the employee's own physician. The scope of the information sought at any particular stage must be limited to that which can reasonably be required. It is only after these efforts have been exhausted that the employer can reasonably seek an examination by, or a medical certificate from, someone other than the employee's physician.

The incremental or least intrusive approach also requires that an employer give serious consideration to a union or employee proposal that may address an employer's concerns in a less intrusive fashion.

It would not be surprising if the overriding issue of safety subsequently alters the traditional balance between employee privacy and employer rights, particularly as it relates to personal or medical information that an employer can obligate an employee to provide.

ii) Preparing to recall employees

The employer should consider whether a recall, followed shortly thereafter by a further work stoppage because of a resurgence of the virus, would likely be characterized as a layoff or as a plant shutdown. Either characterization might possibly attract a pay in lieu of notice obligation if the "re-opening" could not be sustained. It would therefore be prudent for the employer and the union(s) to enter into a written agreement that would seek to obviate such an outcome.

In preparation for any recall, the employer should ensure that it has an up-to-date record of all employee addresses, primarily because the past few months are likely to have seen changes in the living arrangements of many employees. A letter should be sent to all employees, seeking confirmation of the addresses to which any re-call notices are to be sent once and if recall notices are issued.

The employer should then provide the union with a list of non-responders so that the union can make its own inquiries and advise the employer accordingly. The list should include relevant particulars, including start or seniority dates, job classification and work location, and last known contact addresses, emails and telephone numbers. If after having ascertained that the union's inquiries have proven fruitless, and after having satisfied itself that it has made a reasonable effort, the employer might send a letter to each non-responding employee, with a copy to his or her union representative, advising that the employee's employment has now been terminated. Prudence would suggest that the employer should not attempt to justify its decision on any particular provision in the collective agreement.

One might also expect that some employees will advise that they have decided that they will not return. Those individuals should be sent another letter acknowledging that intent. The letter should include the type of information that is generally provided to an employee who has resigned, along with a copy of the employee's Record of Employment. A copy of the letter should also be provided to the local union representative.

The employer should expect that some employees may come forth at a subsequent date to advise that they had never intended to resign. Where that occurs, and the employer has not been prejudiced by having by-passed the employee in its recall process, the employer, in consultation with the union, should likely agree to reinstate the employee subject to any reasonable terms that might be imposed.

An employer should also expect that some employees will advise that they intend to return, but not now. Those employees should be asked to provide a detailed letter setting forward their circumstances, along with the length of any leave that is being requested. A date should be stipulated for the employee's response, with each employee being advised that failure to provide such reasons shall be taken as a failure to respond to the notice of recall.

iii) Deferring or foregoing the right of recall: Granting a leave of absence

If an employee wishes to defer or forego her right to recall, the employer might offer her a short unpaid leave, without benefits, but for a defined period, with the purpose being preservation of the employee's recall rights while the issue is being explored. The leaves might be made conditional on the parties agreeing that if the employee ultimately elected not to accept the recall, she would be deemed to have abandoned her employment and the employment relationship would be at an end.

The employer should begin by reviewing the leave of absence provisions in the collective agreement along with the established principles governing the manner in which an employer must exercise its discretion. Those principles are considered in the commentary that follows.

Some collective agreements will be silent with respect to the granting of leaves of absence. However, even where that is the case, the employer will generally be considered to have retained its' management rights to grant such a leave.

The employer's right to grant a leave of absence is not unfettered. To begin, the employer must establish that it has exercised its discretion reasonably. In order to do so, it must have met the minimum standards set out in existing arbitral law. While arbitrators are hesitant to substitute their views for the view of the decision maker, they all agree that the proper exercise of discretion requires the following:

1. The decision must be made in good faith and without discrimination.
2. The decision must be a genuine exercise of discretion as opposed to rigid policy adherence.
3. Consideration must be given to the merits of the individual application under review.
4. All relevant facts must be considered and conversely all irrelevant considerations must be rejected.

Arbitral decisions have also established the following as it relates to an employee's application for a discretionary leave:

The employer is not required to conduct a full-blown investigation into an employee's circumstances. The onus is on the employee to provide her request in writing, laying out, in detail, the circumstances that support the request. The onus is on the employee to prove that she was entitled to consideration and that the employer failed to properly consider the merits of her request.

Where an employer requests and is provided further information, the employer must give proper consideration to the additional information that was provided by the employee.

The correct legal test has been stated to be whether the employer's decision to deny the leave was "unreasonable" on the basis of the information available to it, i.e.one that a reasonable person possessing the facts and exercising common sense would not reach (as opposed to one that was so unreasonable that it amounted to being patently unreasonable or irrational). It is not an arbitrator's function to determine whether management's decision was "correct".

The denial of a requested leave of absence where the purpose of the leave was to take temporary employment with another employer was held to be improper, partly because the employer had not weighed its operational requirements against the employee's wishes as required by the collective agreement.

An employer's exercise of discretion cannot infringe upon a collective agreement entitlement to paid sick leave. In one case, an employer was considered to have acted improperly when it offered to treat an employee's request for a paid leave of absence as a leave without pay; for the employer's willingness to grant the requested leave on an unpaid rather than on a paid basis was considered to be an improper and irrelevant consideration which, in itself, rendered the employer's exercise of discretion unreasonable. However, in another decision that denied an employee the right to paid leave to care for an ill child, the arbitrator stated that the employer's exercise of its discretion was reasonable, for it had properly turned its mind to the employee's request, considered relevant factors and not extraneous ones, and had provided the employee with a number of options – he could choose to take an unpaid leave, he could use vacation or lieu time, or he could arrange to work extra hours to lessen the impact of the lost pay.

Legislation such as the Ontario *Employment Standards Act*, contain personal emergency leave and family leave provisions, some of which entitle an employee to leave with pay in certain circumstances. Such provisions will need to be considered.

A denial of paid *child care leave* was upheld on the basis that the employee had failed to consider whether alternate child care arrangements might have been available. The arbitrator stated that he was not persuaded that when the parties negotiated a provision for discretionary paid leave to be considered, in "extenuating personal circumstances", that they had intended that the employer would be required to pay for time not worked when an employee stayed home to care for her ill children. The employee had not made any inquiries once it was determined that family members were not able to provide care. The provision's reference to the leave "being necessary" effectively amounted to a pre-condition or requirement that the employee have made a serious effort to determine the availability of alternate childcare assistance. The employee's failure to consider alternate care minders other than family members was considered fatal to the employee's claim.

In that same case, the employee had alleged that the employer's decision to deny the leave constituted discrimination on the basis of family status. The arbitrator dismissed that contention and in doing so, stated that in order for the employee to make out a *prima facie* case of discrimination, "the current state of human rights law reinforces the arbitral consensus that working parents must seek out "reasonable alternative child care arrangements". Only where such efforts have been unsuccessful, and an employee remains unable to fulfill his or her parental obligations, will a case of *prima facie* discrimination be established". The arbitrator stated:

> … in order to make out a prima facie case where workplace discrimination on the prohibited ground of family status resulting from childcare obligations is alleged, the individual advancing the claim must show (i) that a child is under his or her care and supervision; (ii) that the childcare obligation at issue engages the individual's legal responsibility for that child, as opposed to a personal choice; (iii) that he or she has made reasonable efforts to meet those childcare obligations, through reasonable alternative solutions, and that no such alternative solution is reasonably accessible, and (iv) that the

> impugned workplace rule interferes in a manner that is more than trivial or insubstantial with the fulfilment of the childcare obligation.
>
> … The third factor requires the complainant to demonstrate that reasonable efforts have been expended to meet those childcare obligations through reasonable alternative solutions, and that no such alternative solution is reasonably accessible. A complainant will, therefore, be called upon to show that neither they nor their spouse can meet their enforceable childcare obligations while continuing to work, and that an available childcare service or an alternative arrangement is not reasonably accessible to them so as to meet their work needs. In essence, the complainant must demonstrate that he or she is facing a bona fide childcare problem. This is highly fact specific, and each case will be reviewed on an individual basis in regard to all of the circumstances.

A layoff or a leave of absence has been recognized as an accommodation.

An employer cannot simply assert that operational requirements made it impossible to grant an employee's requested leave of absence. When defending the denial of a leave, the employer must present evidence to support its assertion that the requested leave would constitute an undue hardship for the employer.

By way of summary, in considering a request for a leave of absence, an employer must ensure that it properly exercises its discretion in accordance with the foregoing considerations. The employer must also ensure that it has considered the extent to which the request was wholly or partially based on a particular collective agreement provision, a statutory entitlement (such as emergency leave), a general request pursuant to the employer's discretionary powers) or some human rights entitlement. Being aware of the basis on which the leave was claimed may minimize the possibility that the employer might overlook a relevant factor. As a suggested first step, the employer should meet with the employee and the union to consider the rationale or reasons underlying the request for the leave. The employer should also advise that the employee will need to submit a formal written request detailing the facts and circumstances that support her request. Given the nature of the issue, the employer may also want to obtain the Committee's feedback on the relative merits of all such requests. Similarly, the employer should attempt to obtain the union's acknowledgement that the employer's decision with respect to any particular leave request is to be considered on its own facts, thereby potentially avoiding having to address an assertion that the employer acted improperly in not treating other requests in a like manner.

iv) Exempting employees from having to answer a notice of recall because of fear of infection or child and elder-care issues

Fear of Infection

Can an employee insist that she be exempted from or by-passed on a recall on the basis that she fears that she would become ill if she were to return to work?

The likely answer is “No”, for even where an employee suffers from a medically recognized anxiety disorder, the impact of that disorder must have clearly interfered with her ability to work.

There is little doubt that most adults who come in contact with others feel anxious about potential exposure to the virus. They may have parents, children and other family members who they fear might become afflicted. As with most other adults, they are fearful or anxious that they may contract the virus or “bring the virus” into their family. Given these concerns, it would be understandable that many might believe that the anxiety that they feel provides a justifiable basis for remaining away from the workplace.

The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, published by the American Psychiatric Association, (*the DSM 5*) recognizes several different anxiety disorders, including separation anxiety disorder, social anxiety disorder, substance/medication-induced anxiety disorder and generalized anxiety disorder. The manual distinguishes between “anxiety” and “fear”:

> Anxiety disorders include disorders that share features of excessive fear and anxiety and related behavioral disturbances. *Fear* is the emotional response to real or perceived imminent threat, whereas *anxiety* is anticipation of future threat. Obviously, these two states overlap, but they also differ, with fear most often associated with surges of autonomic arousal necessary for fight or flight, thoughts of immediate danger, and escape behaviors, and anxiety being more associated with muscle tension and vigilance in preparation for future danger and cautious or avoidant behaviors. Sometimes the level of fear or anxiety is reduced by pervasive avoidance behaviors. Panic attacks feature prominently within the anxiety disorders as a particular type of fear response. Panic attacks are not limited to anxiety disorders but rather can be seen in other mental disorders as well.

The DSM 5 defines Generalized Anxiety Disorder as being marked by the following:

A. Excessive anxiety and worry (apprehensive expectation), occurring more days than not for at least 6 months, about a number of events or activities (such as work or school performance).

B. The individual finds it difficult to control the worry.

C. The anxiety and worry are associated with three or more of six enumerated symptoms in adults (one or more in children) with at least some symptoms having been present for more days than not for the past 6 months. The listed symptoms are 1. restlessness, feeling keyed up or on edge; 2. being easily fatigued; 3. difficulty concentrating or mind going blank; 4. irritability; 5. muscle tension; and 6. sleep disturbance (difficulty falling or staying asleep, or restless, unsatisfying sleep).

D. The anxiety, worry or physical symptoms must [have caused] clinically significant distress or impairment in social, occupational, or other important areas of functioning.

E. The disturbance [must not be] attributable to the physiological effects of a substance (e.g. a drug of abuse, a medication or another medical condition (e.g. hyperthyroidism) and

F. The disturbance is not better explained [by one of several listed disorders].

In a recent arbitral decision, a working foreman of 34 years who claimed to have been harassed and was suffering from job-related stress, grieved that he should have been accommodated by being placed in an operating position rather than being suspended and demoted. That same employee had been diagnosed as suffering from anxiety some eight years earlier. On this occasion, he presented a medical note stating that he was suffering from "anxiety disorder – recent exacerbation of chronic anxious state".

On the issue of the employee's anxiety disorder, the arbitrator commented:

> What direct evidence there was about the nature and extent of the [employee's] anxiety disorder – and more importantly, the extent to which it interfered, if at all, with his ability to work – came from the [employee] himself. And this evidence was at best weak. He testified at one point that he woke up in sweats, and couldn't sleep at nights, but he did not clearly link those episodes to the suspension and demotion. Nor did he explain what it was about his anxiety disorder that was different in the period in question from the years before. After all, the [employee] had the disorder [for several years]. He was able to work, albeit with the assistance of medication and counselling from time to time. He served as a working foreman, a position that no doubt carries with it some stress … without any apparent difficulty. One may accept that the [disciplinary] meeting with his supervisors … brought with it more stress than he might normally experience in his job, but even if so, there was no evidence to support a conclusion that the increase in stress lasted for more than a day or two – and no explanation for how or why any increased stress level would have lasted only as long as he had sick leave and Employment Insurance benefits to draw upon. Nor was there any explanation for why this disciplinary episode would have so exacerbated his anxiety as to cause him to go off on sick leave for nine months when previous episodes had not.

In addressing the issue of stress, the arbitrator stated:

> … Not all conditions that have an impact on an employee's work are in and of themselves "disabilities" that trigger a duty to accommodate. Whether a mental or physical condition can be considered a "disability" will depend on the impact of that condition on an employee's ability to perform the essential duties of his or her occupation. A cold has an impact on work ability but it is not a disability. An employee's loss of their little finger may be a disability if he or she works as a violinist, but not if they work as a labourer. So, to take another example, stress, whether work-related or not, is not in and of itself necessarily a disability. Stress of some sort is a part of everyday life. However, it is also clear that at some point and in some cases the by-products of severe stress – depression, anxiety and the like – can become debilitating because of their impact on an employee's ability to reason or to act.

> … The [employee] told his Employer that he was "disabled" because of stress from performing the essential duties of his job as a working foreman. If he was in fact disabled then he was entitled, as of right, to have the Employer consider whether he could perform his own job with suitable accommodations or, if not, whether he must be transferred to some other job in order to accommodate his disability.
>
> However, triggering the duty to accommodate does not mean that the employee gets to determine as of right what the accommodation is or, more particularly, the job into which he or she might be accommodated. An employee who alleges that he or she has a disability is not entitled to self-diagnose. This is particularly true in cases involving mental or emotional conditions that by their very nature affect the employee's ability to perceive the extent and impact of their condition. An employee suffering from such a disability is not the most accurate or most objective assessor of what he or she can do. All the more reason then that in such cases the decision as to whether the condition is a disability and, if so, the nature of the accommodation that is necessary to enable the employee to work must depend upon the observations and assessments of objective observers and experts.

An employee who claims that she cannot return to work because of stress or anxiety should be required to produce a medical report that satisfies the employer that such is the case. If she produces a medical report that fails to satisfy the employer, then the employer should, perhaps with the assistance of a medical advisor, seek further medical input.

Child and elder care issues

As with "*fear of infection*", child and elder care issues, discussed somewhat in the preceding paragraphs, are unlikely to be sufficient to exempt an employee from having to answer a notice of recall.

v) A directed or self-imposed quarantine may not entitle an employee to sick leave or other income replacement - the concepts of illness and disability

The answer to the question of entitlement is pretty much an unknown and may well depend on the wording of the benefit entitlement or sick leave clause in the collective agreement. Generally, an employee must establish that she is ill or disabled to be eligible for payment of such benefits. Therefore, it is unlikely that either circumstance would entitle an employee to income replacement or sick leave. As one arbitrator has stated, the definition of illness requires a physical or emotional inability to work:

> Not all medical conditions or illnesses justify an employee's absence from work. In order to establish a justifiable illness, the employee must advance objective evidence that establishes a physical or emotional inability to perform work. The employee does not have to demonstrate total incapacity; it is enough to show that, because of illness-produced

> discomfort, weakness or pain, it would be unreasonable to expect the employee to perform the available work.

In a subsequent case, an arbitrator stated that given the nature of a claim for sick leave, one cannot categorically say which circumstances will give rise to a claim and which will not. The test that he adopted stipulated that an illness, and hence entitlement to sick leave, would be established where the objective evidence established a physical (or possibly emotional) inability to perform work.

The following constitutes a reasonable working definition of an illness in that it encompasses the essence of the foregoing:

> Illness is established where the objective evidence demonstrates a physical or emotional inability to perform work. The employee does not have to suffer total incapacity; it is enough to show that, because of illness-produced discomfort, weakness or pain, it would be unreasonable to expect the employee to perform the available work.

The Concept of Disability

The starting point in determining whether an individual is suffering from, or has suffered from, a disability, actual or perceived, is to consult the governing legislation. A comprehensive definition will be found in some jurisdictions; others have what might be considered an open-ended, or "inclusive," and perhaps, even a somewhat circuitous, definition, and still others do not contain any definition at all.

For example, the *Canadian Human Rights Act* contains an abbreviated definition: "'disability' means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug." The Ontario *Human Rights Code*, on the other hand, contains an extensive definition, and defines disability to mean:

> (a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,
>
> (b) a condition of mental impairment or a developmental disability,
>
> (c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,
>
> (d) A mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the *Workplace Safety and Insurance Act*, 1997; ("handicap")

Not all illnesses constitute a disability, for it has generally been accepted that short term illnesses such as cold or influenza or tonsillitis do not fall within the definition of disability, for they do not present “obstacles to full participation in society”.

Given the foregoing, a quarantine, whether self- imposed or not, would be unlikely to qualify for sick leave.

For practical purposes, the pertinent distinction between an illness and a disability is that the existence of a disability is a pre-condition for advancing a claim for accommodation.

While not strictly on point, there have been a limited number of health care “immunization decisions” that may be worthy of consideration. Perhaps the decision with the greatest potential relevance is that of *William Osler Health System*, 2016 CanLII 76496 (ON LA) (Hayes). There, the employer, pursuant to a centrally bargained collective agreement, agreed to arbitrate many of the outstanding grievances related to influenza policies and practices at several Ontario hospitals.

The parties had earlier arbitrated a test case (*Sault Area Hospital*, 2015 CanLII 55643 (ON LA) (Hayes)). In *William Osler,* they were able to agree on all but two aspects of the challenged Influenza Vaccination Policy. It was these two issues that were referred to arbitrator Hayes for determination.

Issue 1: The employer had proposed that staff either be vaccinated or wear a procedural mask for the duration of the influenza season. Arbitrator Hayes rejected this position on the basis that there was “scant scientific evidence of the use of masks in reducing the transmission of influenza virus to patients.” He concluded that there was no reasonable basis for requiring the wearing of masks and he directed that such reference should be deleted from the policy.

Issue 2: This issue dealt with the reassignment of unvaccinated nurses during an influenza outbreak. Arbitrator Hayes directed that this issue be resolved by melding the employer and union proposals on this issue. The clause would read as follows:

> Unvaccinated staff that are unable to receive vaccination and/or prophylaxis for reasons supported by a physician to be medically contraindicated, will be reassigned, if possible, to another area within the hospital for the duration of the outbreak. If staff, prior to being moved to another area, are exposed to patients in the outbreak unit [they] will continue to wear a mask in patient care areas until it has been determined that they are not symptomatic. If reassignment is not available the staff will be booked off with pay, until the outbreak is declared over by Infection Prevention and Control and the Public Health Unit. Physicians will not be reassigned and paid.

> Regardless of vaccination status, employees who have been exposed to influenza on an outbreak unit and are subsequently reassigned to another area of the hospital will wear a procedural mask while providing direct patient care, and/or while in areas of patient care units normally accessible to patients, until it has been determined by Infection Control Practitioners, or other competent medical professionals, that they are not symptomatic.

The foregoing decision, while not specifically answering the question of whether a quarantined employee would be entitled to sick pay, might possibly serve as a "springboard" for claims of that nature.

vi) Medical information that an employee may be obligated to provide

In cases involving a demand for medical information, arbitrators have attempted to balance the competing privacy rights of employees with the employer's legitimate business interests. In the pandemic age, the balancing involves a third but very important balancing element; that being the rights of other employees to a secure and stable workplace that is free from unnecessary risks to their health and to the health of their immediate and extended families. A fourth balancing element might be added; with that being the greater good to ultimately overcome the scourge of a very insidious disease.

In effecting this balancing, arbitrators have consistently required that an employer's request for medical information must be reasonable, given the particular set of facts at issue. For example, additional medical corroboration may be required where the issues are weighty or complex. Corroboration by way of specific medical evidence may be required to substantiate an employee's fitness to continue to work or fitness to return to work following a communicable or contagious illness.

The reasonableness of the employer's requirement and the scope of the information that can be sought are often a function of the purpose underlying the request for medical documentation. What is reasonable in one context may not be in another.

Proof of Illness Generally

An employer generally has the right to compel the production of sufficient information to determine if an employee's absence was bona fide. In instances involving sick leave and sick pay, this may include routine information as to the nature of the illness or disability (but not normally the diagnosis), the prognosis, if any, and the length of the employee's expected absence. As one arbitrator recently stated:

> Unless the collective agreement provides otherwise, it is not inordinately invasive for an employer to ask for a medical certificate which includes the reason for the absence in issue (consisting of a general statement of the nature of the disabling illness or injury, without diagnosis or symptoms), that the employee has a treatment plan and is following

that plan (but not the plan itself), the expected return to work date, and the work that the employee can or cannot be expected to perform upon his return to work. As a general matter, unless the collective agreement specifies otherwise or there is reasonable cause to doubt its bona fides, such a document completed by an appropriate medical health professional constitutes prima facie proof which satisfies the employee's first instance reporting obligations for absence and sick leave benefits purposes. Although it can ask, in the first instance, the employer cannot require an employee to consent to a release of the employee's general medical history, a diagnosis, a treatment plan (as distinct from the fact that there is one and that it is being followed), or a medical prognosis other than an expected return to work date and potential restrictions. The fact that providing the nature of [an] illness or injury may suggest a diagnosis or medical history does not excuse the employee from providing the reason in order to satisfy the onus to justify the absence or claim benefits even in the first instance.

The limits on the employer's right to confidential medical information in the first instance do not prohibit the employer from subsequently requiring further relevant and appropriate information when required in a particular case because the first instance information is insufficient or the absence is suspicious, or if accommodation is required or the employer has a reasonable concern for the safety of a returning worker or other employees. However, an employer who seeks diagnostic or other additional confidential medical information must demonstrate a legitimate need for [such specific] information on an individual case-by-case basis.

… It is permissible for an employer to ask for confirmation that the employee is unable to do his job … for the multiple purposes of confirming the legitimacy of the absence and the entitlement to sick leave benefits … It is also permissible for an employer to ask about the employee's expected return to work date and potential restrictions (i.e. the work the employee can or cannot be expected to perform upon his return to work) in a first instance medical certificate form of general application as part of a general prognosis entitlement. This is consistent with the employer's obligation to facilitate as early as possible [a] safe return to work with any necessary accommodation and provides an appropriate "heads up" to the employer in that respect.
…
[That is not to say that an] employer is never entitled to the medical diagnosis and treatment of an employee … [I]n order to determine whether or not the employer could legitimately request such information from an employee, however … the employer must show:

(a) The information is reasonably required in order to determine the validity of the claim. Before this could be established the employer should show that it has exhausted other avenues of trying to investigate the claim …

(b) If it is determined that it is reasonably necessary to obtain information regarding the diagnosis and treatment of an employee, then the employer must take appropriate

> precautions to insure that access to this information is limited on a need-to-know basis … [Some] system must be developed by this employer to control access to this type of information so that the situation does not occur where front-line supervisors sit around and chat about an employee's diagnosis as if they were discussing yesterday's baseball scores.

Additional complexity arises where the question of proof has been partially or fully addressed by the terms of the collective agreement. For example, in some collective agreements, an employee will only be required to provide a medical certificate to substantiate an absence for greater than two or three days. In such cases, an employer's entitlement to medical evidence may be limited to circumstances where there was a reasonable probability that the employee's absence was not legitimate. And in a limited number of cases, arbitrators have held that the sick-leave provisions in the collective agreement were so comprehensive as to constitute a complete code regarding proof of illness. However, even in such cases, the codification might be found to be limited to one aspect of the illness equation. For example, a codification of proof of illness generally would not limit an employer's right to seek additional medical evidence for purposes such as assessing the need for accommodation, determining modified work restrictions or determining whether an employee has recovered to the extent that she could be returned to the workforce without restriction or accommodation. To this could be added other issues such as whether the employee's condition puts the employer or other employees at risk.

Proof of Fitness to Work or Fitness to Return to Work

In the case of fitness to work or fitness to return to work, it is reasonable to require a medical certificate or other medical documentation where the employee's circumstances or actions raise a reasonable question as to whether the employee can perform the functions of the position in a safe manner.

An employer is generally entitled to require that an employee provide a medical certificate when returning to work from an illness or injury that may have affected the employee's ability to perform the requirements of the position safely.

In a classic 1960's case, the employee had declined to undergo an employer-directed medical evaluation to assist in the company's assessment of his ability to return to work. In finding that the employer was entitled to require such an evaluation in the circumstances of that case, the arbitrator stated:

> If there is reasonable and probable ground for believing that an employee has become physically impaired during the course of his employment, the company surely must have the right to require a medical opinion with respect to such condition, and to suspend employment pending a favourable report.
>
> Such a requirement may result in delays of employment for an employee pending a medical examination and clearance, but the basic right is so important to the company,

> and the fulfillment of the obligation so important to other employees, any necessary delays or inconvenience caused an employee thereby must be accepted with as good grace as possible.
>
> It might be observed that an employee as well has some obligation towards his employer to ensure his own physical fitness and in the case in question here, the [employee] if he did not want to clear with the company's medical department, could have seen his own doctor at once and obtained a clearance from him. If such a clearance had been presented, the company would have been obliged to employ him from the date of its presentation until some evidence to the contrary as to his fitness was obtained from its own medical advisors.
>
> In my opinion, there was reasonable and probable ground for the company to query the physical fitness of the [employee] to do the work of a stock handler and there is no evidence that management acted capriciously in requiring a medical clearance before he undertook such work. The company has the right and obligation under the circumstances to check on the physical fitness of the [employee] to do the work of a stock handler. The fact that some delays occurred in his employment cannot defeat this right and this is particularly true because had the [employee] co-operated at the very beginning, or had [he] presented a medical certificate from his own doctor, he could have been returned to work at a much earlier date than was actually the case.

vii) The consequences of refusing to provide reasonably required medical information

An employee who improperly refuses to consent to the release of medical information potentially faces the same consequences as one who improperly refuses to submit to a medical examination by a physician not of his own choosing. Progressive discipline may be imposed in either case, provided the employee's obligation arises pursuant to either a statutory provision or an express contractual term in the collective agreement. However, where, as is more frequently the case, the requirement to provide medical information has been found by an arbitrator to be implied in the collective agreement, the employer cannot discipline an employee for refusing to consent to the release of such information. However, there may be "administrative consequences" for such refusal.

The current state of the law was captured in an arbitral decision that issued in 2000:

> … It is difficult to imagine circumstances in which an employee could be disciplined for not granting consent. The very notion of consent would, indeed, be undermined by any such conclusion. There may be administrative consequences of refusal of consent, including being placed on leave, paid or unpaid depending upon the circumstances, but I am unable to envision circumstances in which discipline for, for example, insubordination could ever be justified by a refusal to provide information or to undergo an examination which has no statutory or collective agreement authorization, and which would amount to a serious invasion of personal privacy or integrity.

> … I cannot imagine that it would ever be justified for the Employer to use threats of disciplinary action to compel an employee to consent to disclosure of medical information or to a medical examination.

Subsequent decisions have established that the administrative consequences for failing to provide reasonably required medical information have included withholding sick pay, placement of the employee on paid or unpaid administrative leave, holding the employee out of service until the employer's valid concerns had been addressed, and running the risk that the medical record would be incomplete or unpersuasive.

viii) Challenging the sufficiency of an employee's medical information

An employer who is not prepared to accept the sufficiency of an employee-tendered medical certificate must advise the employee why it is rejecting the certificate. The employee must be given timely notice so that she can consider whether to address those concerns by providing additional medical information. Where an employer fails to do so, the arbitrator is likely to conclude that the employee's medical evidence, although limited or cursory, must, in the circumstances, be found to justify the employee's position.

An employer may also be entitled to question and challenge an employee's reliance on her doctor's recommendation to take time off work, with the issue then becoming whether the employee acted reasonably in accepting that recommendation. The decision, in the first instance is that of the employer, with the employee generally retaining the right to grieve that decision:

> … It is not a doctor's function to grant a leave of absence from work since that is the prerogative of management. It is trite to say that a medical leave of absence cannot be unreasonably denied. However, an employer has a right to determine on the basis of evidence presented whether the medical leave of absence is justified, subject of course to the right to grieve if the leave is refused. [The relevant article] of the collective agreement clearly contemplates that it is the employer's right to "grant" sick leave. In my view, a doctor should be very circumspect when issuing medical certificates which he knows will be used as justification for absences from work. While many doctors seem to take the position that their sole responsibility is to their patients, I am of the view that they are also responsible to the employer who will act on the medical certificates that the doctor provides …

ix) Entitlement to Accommodation

The duty to accommodate arises only where an employee has been subject to discrimination under provincial or federal legislation. The duty to accommodate is a multi-party obligation that extends to the employer, the affected employee(s), and in certain circumstances, the affected union. The duty to accommodate has realistic limits, in that the obligation to accommodate extends only to the point of undue hardship.

The question of undue hardship must be determined in the circumstances of each case. An accommodation that does not constitute an undue hardship for one employer may constitute an undue hardship for another. Similarly, an accommodation that did not constitute an undue hardship may constitute an undue hardship at a later time because of changed circumstances.

An employee will generally be obligated to accept a reasonable as opposed to a perfect accommodation.

Despite legislated differences among various jurisdictions, courts have taken a unified approach to defining the concept of disability. A disability has been distinguished from a transitory illness that has little impact on an employee's ability to participate productively in employment or other aspects of life.

The duty to accommodate is not a free-standing obligation, so that an employer will not be obligated to accommodate an employee if she cannot establish that the employer had subjected her to a statutorily prohibited form of discrimination. The duty to accommodate does not obligate an employer to accommodate work condition preferences (such as work location, time off, or hours and type of work) unless the employee can establish that what appeared to be an expressed preference went beyond preference and was a factor that needed to be addressed in effecting her reasonable accommodation.

Part III: Checklist of Factors to Consider When Seeking Medical Information

This checklist[1] will assist in assessing the facts that may or may not justify a demand for an employee to provide medical documentation. It also will assist a union in exploring relevant aspects of the issue with a grieving member.

A. Are There Specific Limitations Governing the Employer's Right to Seek Medical Documentation?

Is the employer's right to request medical documentation partly governed by either a statutory provision or by the terms of a collective agreement? If so, do the circumstances fall neatly within the terms of either? Is there any possibility that the provision may be circumscribed by other factors, including other clauses in the collective agreement?[2]

If the collective agreement provides the employer with discretion to require medical documentation, has the employer undertaken a proper exercise of that discretion? [3]

Are there any medical documentation provisions in the collective agreement that could be said to constitute a complete code dealing with certain aspects of proof of illness?[4] If so, do the provisions govern the specific circumstances that give rise to the employer's request? (Recognize that a provision that limits the requirement to provide medical documentation to justify an absence will not necessarily relieve an employee of having to provide medical documentation to address issues such as the employee's ability to work safely, the need for accommodation, and the likelihood or prognosis for regular future attendance in cases involving excessive but innocent absenteeism.).[5]

If there are conditions stipulating when a medical certificate may be required, does their inclusion limit the employer's right to require a medical certificate in the specific circumstances under consideration?[6]

If there are collective agreement provisions governing the matter, are they subject to an express or an implied term of reasonableness?[7]

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[1] The checklist references specific sections of the *Illness and Absenteeism* manual where the specific principle is discussed.

[2] See Section 7:202, commencing at page 103 of the *Illness and Absenteeism* manual.

[3] See, for example, Section 7:304, commencing at page 132 of the *Illness and Absenteeism* manual.

[4] See Section 7:204, commencing at page 112 of the *Illness and Absenteeism* manual.

[5] See Section 7:205, commencing at page 115 of the *Illness and Absenteeism* manual.

[6] See Section 7:202, commencing at page 103 of the *Illness and Absenteeism* manual.

[7] Reasonableness generally will not be a precondition where the collective agreement stipulates that a medical certificate will be required at a certain point, such as after an absence of three days. The matter may be different however, where the clause is discretionary, as, for example, the employer may request a medical certificate after an absence of three days. An express or statutorily implied provision that requires the employer to act reasonably may also have an impact on such determination. See also Section 7:304, commencing at page 132 of the Illness and Absenteeism manual.

Is the matter addressed by a policy governing the requirement for production of medical documentation? Is the employer's policy defensible? If not, are the circumstances such that the employer may nevertheless be entitled to require the requested documentation, based on the arbitral principles that would apply in the absence of a policy having been adopted?

Is there a workplace practice that governs when medical information is required? Is there a defensible rationale for departing from that practice? Is this a case where advance notice should have been given so that the employee could consult with the physician at the time of illness rather than after receiving the employer's request following conclusion of the illness?[8]

Regardless of any limitations imposed by the collective agreement, is there a reasonable basis for suspecting that the employee's absenteeism was not legitimate, thereby possibly entitling the employer to insist on the provision of medical documentation in the particular circumstances?[9]

B. Do Reasonable Grounds Exist to Require Production of Medical Documentation?

(i) In a case dealing with absence due to illness, can the issue be characterized as one of onus, where the employee must establish that she was entitled to payment of sick pay? If so, the question of reasonableness is generally not a primary consideration. However, reasonableness may play a greater role where the employer is questioning the sufficiency of the employee's medical evidence or the request is based on the employee's pattern or frequency of absences, for such a challenge may raise a reasonable question as to whether (a) a particular absence was justified; (b) whether the employee was making every reasonable effort to attend at work; or (c) there was some other justifiable reason for being concerned about the employee's health or ongoing attendance?[10]

Where medical documentation is being requested to corroborate an absence, did the employee know or should the employee have known that medical corroboration would likely have been requested given the circumstances of the matter? If not, would some form of corroboration, whether medical or otherwise, have been available when the employee was advised of the need to produce corroboration? Even where the employee was aware that medical corroboration was required, are the circumstances such that an arbitrator might relieve the employee from having failed to fulfill that expectation?[11]

(ii) In a case involving fitness to work or fitness to return to work, do the employee's circumstances or actions raise a reasonable question as to whether the employee can safely perform the functions of the position in question?[12]

Included in the considerations will be the nature of the injury and its impact on safety. The length of absence also may be a factor, in that an employer may not be entitled to seize upon a short

[8] See Section 7:203, commencing at page 109 of the *Illness and Absenteeism* manual.
[9] See Section 7:202, commencing at page 103 of the *Illness and Absenteeism* manual.
[10] See sections 7:302(a) and 7:203 commencing at page 118 of the *Illness and Absenteeism* manual.
[11] See sections 6:302 and 6:303 commencing at pages 75 and 77 of the *Illness and Absenteeism* manual.
[12] See section 7:302(b) commencing at page 119 of the *Illness and Absenteeism* manual.

absence to justify medical proof of fitness where the employee had been performing at a somewhat reduced capacity for some time prior to the most recent absence. Related to these issues is whether the employer's expectations regarding fitness are reasonable and defensible. Could steps be taken to accommodate the employee's return, either through a short-term "work hardening" process or by way of longer-term accommodative measures?

An employer will not generally be entitled to refuse to return an employee to the workplace on the basis of a concern that there is a high probability that the injury or medical condition is likely to reoccur [13]

(iii) In a case involving potential accommodation or modified duties, is the medical documentation reasonably required to facilitate the employer's assessment of these issues?[14]

(iv) In a case involving the sufficiency of a medical certificate or other information that has been provided, is the information deficient in one or more essential respects?[15]

C. Is the Documentation Being Sought Proper or Reasonable in the Circumstances?

Has the employer adopted an incremental approach to minimize unnecessary intrusions upon the employee's privacy?[16]

Has the employer adopted appropriate precautions to ensure that the medical information is handled in a confidential manner?[17]

Has the employer reviewed its present form of medical certificate, if one exists, to ascertain whether any of the information sought on that document is inappropriate, and, as such, might justify the employee's refusal to have the physician respond to the queries that are properly addressed on that form?

Is the information that is being sought reasonably necessary in the circumstances of the case?[18] Consider the specific points that can be advanced to justify such a contention.

If the employer is seeking to have the employee provide medical documentation from a specialist (for example, a report from a psychiatrist), are the circumstances such that a requirement of this nature would be considered to be justified at this stage?[19]

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[13] See Section 6:403 commencing at page 89 of the *Illness and Absenteeism* manual.
[14] See Section 7:302(c) commencing at page 127 of the *Illness and Absenteeism* manual.
[15] See Section 7:302(d) commencing at page 128 of the *Illness and Absenteeism* manual along with Section E of this checklist.
[16] See Chapter 5, commencing at page 53 of the Illness and Absenteeism manual.
[17] See Section 7:602, commencing at page 155 of the *Illness and Absenteeism* manual.
[18] See Sections 7:301 to 7:304 commencing at page 116 of the *Illness and Absenteeism* manual.
[19] See Chapter 5 of the *Illness and Absenteeism* manual regarding the need to adopt an incremental approach.

Do the circumstances underlying the request for medical documentation raise the potential for imposition of discipline? Medical information may not be compellable for the sole purpose of attempting to substantiate that an employee had lied about the reason for her absence, or to consider whether the employee's conduct was affected by health considerations in circumstances where the employee had not raised a health issue to explain what might be disciplinable conduct.[20]

Is the employer asking that the employee provide either a diagnosis or particulars of treatment? If so, is that requirement defensible in the circumstances? [21] Are there any factors (such as a medical issue of an extremely sensitive or embarrassing nature) that might tilt the balance against the employer being able to seek generally accepted, routine, information, such as the nature of the illness or disability (as opposed to the diagnosis), the prognosis, if any, and the length of the employee's expected absence?[22]

D. Is the Medical Consent or Release Limited to Information that is Reasonably Required?

Is the consent that has been prepared by the employer limited to releasing information that is responsive to those questions that were properly advanced in the employer's request for medical information? Does the consent extend to authorizing the physician to provide additional information at some future point without the employee's further authorization or knowledge?[23] Where an employee refuses to execute a proper consent or withdraws a consent that had been executed previously, the employer must generally consider a non-disciplinary response. In such instances, consider whether the employee has been advised of the consequences likely to flow as a result of a refusal or withdrawal of consent.[24]

E. Is the Employer Seeking Additional Information to Supplement or Clarify Medical Information that Has Been Provided by the Employee?

In considering whether such a request is justifiable:

(i) Can the employer substantiate that there are reasonable concerns raised on the face of the document?

Does the medical certification cover the entire period of the absence? Is there a legitimate concern that the physician did not see the employee until sometime after the absence commenced? Does the certification reasonably attest to the employee's being under the physician's care for the entire period of the absence? Is the certificate subject to question on the

[20] See, for example, the discussion by arbitrator Christie in the Canada Post case referenced in Section 8:300 at page 221 of the *Illness and Absenteeism* manual.
[21] See Section 7:602 commencing at page 155 of the *Illness and Absenteeism* manual.
[22] See Section 7:601, commencing at page 152 of the *Illness and Absenteeism* manual.
[23] See Section 4:201, commencing at page 40 of the *Illness and Absenteeism* manual.
[24] See Section 4:203, commencing at page 49 of the *Illness and Absenteeism* manual.

basis that the physician did not schedule a timely follow-up when such might be expected in the circumstances?

Does the certificate disclose that the physician's certification was based on objective evidence (for example, a physical examination and possibly test results), or was the opinion based on subjective information (i.e., primarily a recitation by the employee as to the nature of her complaints)?

Does the certificate appear to have been altered in any way? Is it all in one person's handwriting? Is it signed by the physician? Is it an original, or a photocopy? Where there is a concern regarding the legitimacy of the certificate (for example, the possibility of a suspected forgery), is it possible to compare the certificate with any earlier certificates provided by the same physician?

(ii) Is there reason to question the probative value of the medical certificate on the basis of answers to questions put to the employee when the certificate was provided? Where appropriate, these questions might include the following:

When did the employee visit the physician in relation to the onset of the illness? Did the physician physically examine the employee or did the physician rely primarily on the symptoms the employee had communicated to the physician? Were any tests ordered or medication prescribed, as opposed to the particular type ordered or prescribed? If medication was prescribed, did the employee fill the prescription in a timely manner, and has the medication been taken as prescribed? Was the employee referred to a specialist for a further consultation? Was the employee advised to schedule a subsequent appointment and, if so, how long after the initial appointment? Did the employee attend the subsequent appointment? If not, why not?

If the absence followed upon a workplace conflict (either with management or fellow employees), what exactly did the employee communicate to the physician in that regard? If the employee was known to have participated in recreational or other physical activities during the period of her certified absence, what exactly did she tell the physician, if anything, about her intended activity, and what, if anything, did the physician say in return?

Was the physician the employee's regular physician, and had the physician been treating the employee for the condition prior to this particular absence?

If the employee's absence extended beyond a few days, could the employee have been accommodated by provision of alternate duties, on a short-term basis? Would the employee have known that alternate duties might be made available, and did the employee advise the physician of that possibility?

What input did the employee have in determining the length of the absence recommended by the physician? Did the employee request that the physician authorize a period of absence? Did the employee do anything, other than convalesce at home, during the period of the absence?

(iii) If the employer is to be requesting further medical information, has it advised the employee, in a timely manner, why the medical information received is inadequate or subject to question, as well as advising what further information is required? Has the employer prepared a letter to the employee, as well as to the employee's physician (with a copy to the union where appropriate), setting forth additional information that should be provided to the physician, and requesting that the physician address its concerns as set forth in the letter? Does the letter advise that the employer reserves the right to request further information (including possibly an employer-initiated medical examination) if it is not satisfied with the additional information received?

Part IV: List of Additional Resources

i) Government of Canada

Risk-informed decision making guidelines for workplaces and businesses during the COVID-19 pandemic (Government of Canada)

Physical distancing: Actions for reducing the spread of COVID-19 (Government of Canada)

Advice for essential retailers during COVID-19 pandemic (Government of Canada)

Cleaning and disinfecting public spaces during COVID-19 (Government of Canada)

Preventing COVID-19 in the workplace: Employers, employees and essential service workers (Government of Canada)

Coronavirus disease (COVID-19): Guidance Documents: A Listing of Technical Guidance Documents for all Aspects of the Disease (for businesses, industry and other groups) (Government of Canada)

ii) Canadian Manufacturers and Exporters Association

Guidelines for Health and Safe Operations during COVID-19 Pandemic

iii) United States Centers for Disease Control

Interim Guidance for Businesses and Employers Responding to Coronavirus Disease (COVID-19), May 2020 (United States Centers for Disease Control and Prevention)

Protect Yourself When Using Transportation (COVID-19) (United States Centers for Disease Control and Prevention)

Reopening Guidance for Cleaning and Disinfecting Public Spaces, Workplaces, Businesses, Schools and Homes (COVID-19) (United States Centers for Disease Control and Prevention)

Manufacturing Workers and Employees (COVID-19) (United States Centers for Disease Control and Prevention)

iv) United States Department of Labour (OSHA)

COVID-19: Control and Prevention (with references to other related publications) (United States Department of Labour: OSHA)

Guidance on Preparing Workplaces for COVID-19 (United States Department of Labour: OSHA)

v) World Health Organization

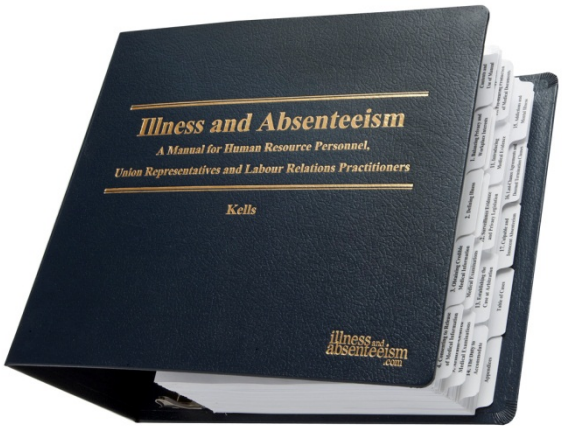
WHO/Europe advice for gradual easing of COVID-19 measures (WHO/Europe)

vi) Information Posters

COVID-19: Help prevent the spread information posters (Government of Alberta)

COVID-19: Signs and other Products to Stay Connected: Vistaprint (online)

About Illness and Absenteeism



The *Illness and Absenteeism* manual provides comprehensive coverage of all aspects of the law related to illness, absenteeism and accommodation. It contains more than 200 distinct principles and is organized into 17 chapters covering 864 pages of content. The manual is available in hard copy and online format and is updated monthly by way of a comprehensive supplement that is available to subscribers online. The manual is also supported by a complimentary monthly newsletter that highlights recent cases addressing matters considered in the manual.

The manual's unique format identifies each of the governing principles and then provides the reader with discussion and case excerpts that inform the principles. The manual addresses all aspects of illness and absenteeism. It also includes an extensive chapter focusing on the duty to accommodate employees absent because of illness or injury. Included as well are chapters dealing with pre-hearing production of medical documentation, introducing medical evidence at arbitration, arbitrator-ordered medical examinations, overview of federal and provincial privacy legislation (including the Charter, *PIPEDA* and similar statutory provisions), the admissibility of surveillance evidence, establishing the case at arbitration, assessing credibility and weighing conflicting medical opinions, addictions and mental illness, last-chance agreements and deemed termination provisions, culpable or blameworthy absenteeism and circumstances justifying termination for non-culpable or innocent absenteeism. Some chapters are supported by a checklist designed to assist in assessing the workplace issue in the context of the stated principles.

To purchase the manual, including one year of online access to the manual supplement, or to subscribe to the complimentary newsletter, go to Illnessandabsenteeism.com. An in-depth Table of Contents and a sample chapter are also available on that website.