

Compliance Briefing: Are You Allowed to Ask Sick Employees for a Doctor's Note?



Asking employees who call in sick for a doctor's note is tricky business, especially during a pandemic. Bottom Line: You are allowed to request a doctor's note as long as you don't get too nosy about an employee's medical condition and get just the information you need to verify that an employee is really ill and needs to miss work

Doctor's Note Controversy & Misconception

There's a common misconception that employers aren't allowed to ask an employee for a doctor's note. The myth gained strength from a controversy involving the Ontario Medical Association (OMA) that happened in 2014 but is still highly relevant to the current coronavirus situation. It began when the OMA issued what was supposed to be a fairly innocuous press release advising people to stay home when they get the flu. But the part of the release that got all the attention was the paragraph addressing employers. Some of the notable headlines:

- "Ontario Medical Group Calls for No More Sick Notes from Doctors"—*Ottawa Citizen*;
- "Bosses Shouldn't Ask Sick Workers for Doctor's Notes: OMA"—*The Star.com*;
- "Stop Asking Employees for Sick Notes, OMA Head Urges"—*The Globe and Mail*;
- "Employers Shouldn't Demand Sick Notes, OMA Says"—*ca*.

The headlines made it sound like the OMA was telling employers to stop asking for doctor's notes. But it was much more subtle than that. Here's what the press actually said:

"The flu is highly contagious. Most cold and flu viruses are spread because people touch surfaces and then touch their faces, other objects and other people. Employers should encourage workers to stay home when sick – not require sick notes which has a discouraging effect and forces patients into the doctor's office when they are sick, which only encourages the spread of germs to those in the waiting room, who in some cases are more vulnerable."

Notice that the release is not talking about all illnesses but one specific kind: "the flu." There are 3 important characteristics about the flu:

1. It usually only lasts a few days;
2. It's best treated by staying in bed; and
3. It's highly contagious.

These same characteristics largely apply to coronavirus. Although it lasts longer than a few days, COVID-19 is extremely contagious and needs to be contained via quarantine or isolation. And while it can be lethal to the elderly or patients with compromised immune systems, the majority of coronavirus cases (81% according to the latest figures I've seen) are mild and non-life-threatening. In these cases, going to the doctor may do more harm than good. So, by asking an employee to see a doctor and get a doctor's note, employers may be contributing to the spread of the disease.

What *Should* Employers Do about Doctor's Notes?

The OMA is 100% right about one thing: Asking employees for a doctor's note when they get sick is a big deal and something that you shouldn't do as a matter of routine. In addition to the medical damage cited by the OMA notice, such a policy can also violate the employee's privacy rights.

Explanation: The medical information about the employee that the doctor puts in the note may be considered personal information protected by privacy laws. By the same token, employers may legitimately need this information to carry out important employment-related and business functions.

Rule of Thumb: You can only ask an employee for a doctor's note when you need it to perform a legitimate employment function.

When You Can and Can't Ask for a Doctor's Note

The most common reason to ask employees for a doctor's note is to verify that they're really sick, which is considered to be a legitimate employment function. Examples of other legitimate functions justifying requests for a doctor's note:

- To enforce an attendance management or other probationary arrangement requiring employees to improve their attendance;
- To confirm if employees qualify for sick pay, workers' comp, disability, and other employment benefits;
- To determine what staffing arrangements you need to make to cover for the absent employee; and
- To gather the medical information about an ill or injured employee's capabilities you need to make reasonable accommodations so he can return to work.

What you *can't* do is ask for a doctor's note:

- Automatically and immediately any time an employee calls in sick as a matter of principle;
- To harass or dig up dirt on the employee; and
- To find out about suspected illnesses or injuries that have no impact on their job duties, e.g., whether an office receptionist at a church has HIV.

What Information You Can & Can't Ask for

Once you establish that the purpose of requesting the doctor's note is legitimate, you must clear another hurdle. The rule: You're only allowed to ask the doctor for the information you need to carry out that purpose.

Explanation: Employers don't generally need to know what illnesses an employee has, what drugs they're taking, or other personal details about the employee's medical case. What the employer is really interested in is how the medical situation affects the employee's ability to do the job, when he/she can return, what his/her capabilities he/she will have upon returning, etc. So be careful to phrase your requests to the doctor so that you ask only for the latter and not the former kind of information.

Example 1: Verifying that Employee Is Really Sick

Information You Need: Official verification from a medical source who's seen the employee that he/she is ill and needs to stay home:

WHAT YOU CAN'T ASK	WHAT YOU CAN ASK
<ul style="list-style-type: none">• "What's wrong with the employee?"• "Does the employee have coronavirus?"	"Does the employee have an illness or medical problem that requires him/her to be absent from work?"

Example 2: Determining How Long the Employee Will Be Absent

Information You Need: The expected duration of the absence so you can make alternative staffing arrangements.

WHAT YOU CAN'T ASK	WHAT YOU CAN ASK
"What's the employee's diagnosis?"	"What's the employee's prognosis?"

Example 3: To Determine If the Employee Is Contagious

Information You Need: Whether the employee will pose a danger to others upon returning and if so, what precautions are necessary.

WHAT YOU CAN'T ASK	WHAT YOU CAN ASK
<ul style="list-style-type: none">• "Does the employee have coronavirus or another contagious illness?"• "Is he/she contagious?"	<ul style="list-style-type: none">• "Does the employee's condition pose a hazard to others at the workplace?"• "What measures are appropriate to protect the employee's co-workers from contracting what the employee has?"

Bottom Line: Back Off on Doctor's Notes on Day 1

While the press might have overstated it, the OMA message to employers to give employees some slack on doctors' notes is one employers should heed, especially during the coronavirus crisis. The last thing you want to do in these times is force employees who are ailing to leave their house, spread their germs and tax

already overworked doctors. So, back off and trust employees to decide for themselves whether they need to see a doctor without feeling you're forcing them to do so.

For More Help:

- Model Policy on Asking Employees for Doctor's Notes; and
- Model Medical Absence Form to verify the need for absences without invading an employee's privacy.