

How Can We Accommodate You When We Don't Know What's Wrong?!



One of the major challenges facing employers in Canada today is the management of employee disabilities. More and more, it seems, employers are required by human rights and workers compensation legislation to deal with and accommodate an ever-growing array of physical and mental disabilities suffered by workers. Canadian courts, human rights tribunals and workers compensation boards have recognized that the employee, no less than the employer, has a role to play in the accommodation effort. The employee's duties include:

- informing the employer of the need for accommodation;
- co-operating with the employer's accommodation plans;
- co-operating with the treatment plans developed by treating physicians;
- making reasonable efforts to improve health; and
- providing medical information that is reasonable and necessary in the circumstances.

In almost every case where an employee claims to be unable to perform her job duties due to a disability, the employer will need to obtain medical information. The employer requires this information in order to determine whether the employee requires accommodation, what the appropriate form of accommodation may be, and whether the employer will incur undue hardship in providing such accommodation. Accommodation, after all, encompasses a broad range of employer responses and obligations, including providing time off from work, sick pay, modified duties, graduated return to work plans, and adaptive devices. Since the vast majority of employers do not have "in-house" medical expertise, employers must obtain medical information from the medical professionals who treat the employee claiming to be ill or injured.

The development of privacy law in a number of jurisdictions in Canada has added a layer of complication to the task of obtaining medical information about employees. Clearly, medical information about an individual is "personal" information, and privacy law is designed to protect "personal" information. Indeed, medical information tends to rank among the most sensitive personal information, and is generally afforded a great deal of protection under privacy laws. Medical professionals are obligated by legislation to protect their patients' privacy.

In this paper, we will review the sources of an employee's right to privacy in Ontario in regards to medical documentation, both in legislation and at common law,

and how this right has been balanced against the employer's need for information in order to accommodate the needs of employees and maintain a safe work environment. We will also explore what an employer can do to obtain the necessary medical information about an employee's alleged disability that is required to manage the employee's disability claims and the accommodation process.

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