Obtaining Medical Information to Verify Safe Return to Work: Workers' Privacy Rights vs. an Employer's Need to Know

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OHS laws require employers to ensure the safety, health and welfare of all of their workers. Given this onerous obligation, it's not surprising that employers want to know any medical issues or restrictions that may impact a worker's ability to do a job safely upon his or her return to work from a medical leave due to illness or injury. An employer must ensure not only that there are no lingering effects that would impact the worker's ability to perform the duties of his or her job safely, but also that no other workers will be put at a risk by his or her return. This issue is particularly important when a worker needs some sort of accommodated position or a gradual return to work in light of any lingering medical issues.

Although an employer's safety interest is a legitimate one, it must be balanced against a worker's desire—and arguably, the right—to have sensitive medical information remain private.

What Information Can an Employer Request’

Many labour boards, human rights tribunals and courts have analyzed and commented on the relationship between an employer’s right to be satisfied that workers, upon their return to work, are fit to do so without presenting a safety hazard to either themselves or their co-workers and their right to privacy in relation to their medical information.

There appears to be much consensus in the cases that employers are entitled to confirmation by a qualified medical practitioner that a worker is fit to return to work. It’s seen as a legitimate interest for an employer to ensure workers’ fitness to perform their assigned work to ensure their safety and the safety of others.

When a worker has provided basic information certifying his or her fitness to return to work, an employer must have reasonable grounds before it can demand further or “better” medical information to verify fitness to return to work. Typically, an employer will have to demonstrate a business interest arising out of a health and safety concern before it can demand additional information. In this regard, employers must be prepared to demonstrate that the risk is above average and immediate, and must relate the need for additional medical information specifically to their ability to assess whether the worker will be able to perform his or her job effectively and safely.

Note that requiring information to determine fitness to return to work must also be considered in the context of the duty to accommodate to the point of undue hardship. If workers can’t satisfy the employer of their fitness to return to their original assigned position, they may request a graduated return to their prior position or an accommodation, such as another position for a period of time. Sometimes additional medical information is necessary so the employer can substantiate the accommodation request and determine that the

situation is, in fact, one where the duty to accommodate arises. Or the employer may need the information to determine *how* to accommodate the worker safely. In both instances, courts and tribunals have considered it reasonable to collect medical information for these purposes.

Regardless of the situation, the cases are quite clear that, to the extent the employer's request is reasonable and legitimate in relation to assessing safe return to work, a worker will likely be required to provide *some* medical information to the employer. If an employer can establish reasonable grounds to demand more medical information from a worker and he or she refuses, the employer's remedy is to continue to hold the worker off work until satisfactory medical evidence has been provided. To the extent that a worker asserts privacy as the basis not to provide reasonably required medical information, courts and arbitrators have held that the worker does so at his or her own peril—and may even risk termination from employment. That's because workers have a duty to cooperate in the return to work/accommodation process and refusing to provide such medical information may be considered a failure to cooperate.

How Much Is Too Much'

There are certain types of medical information that are beyond an employer's reach. For example, there are very few circumstances in which an employer would be entitled to a diagnosis or information about the nature of ongoing medical treatment. Typically, the cases have held that employers are entitled to confirmation that the worker is fit to return to normal duties or, in a graduated return or accommodation situation, an explanation of the worker's limitations and a prognosis for recovery, such as an expected date that he or she would be able to resume regular duties. To obtain more detailed information, the employer would have to demonstrate significant concerns about safety, return-to-work issues that

necessitate knowing the diagnosis or treatment or that a communicable disease is involved, which could affect the entire workplace. The onus on an employer to demonstrate the need for this information is very stringent and the reasons will have to be extremely compelling, as they're being weighed against the worker's right to keep sensitive medical information private.

Note as well that any information requested must only relate to the specific area of concern that the employer has. For example, if an employer has a reasonable concern about a returning worker's ability to lift heavy objects safely, it likely wouldn't be entitled to information regarding that worker's mental health.

A Balanced Approach

Employers should rest assured that they can likely discharge their OHS responsibilities by requesting basic medical information from the worker regarding restrictions and prognosis. If this information confirms that the worker's fit to return and there's nothing about the situation that otherwise would raise red flags regarding safety-related issues in the workplace, the employer has likely satisfied its due diligence requirements under the OHS laws.

However, if the basic information provided *does* raise some reasonable safety concerns, then the employer is entitled to seek further medical information, limited only to the specific area of concern, in order to fully satisfy itself that in returning the worker to work, it isn't knowingly compromising safety.

Always remember that the key factor in relation to obtaining medical information is *reasonableness*. When an employer is seeking information and documentation that infringes on a worker's privacy, the question that an employer must ask

itself is whether the request is reasonable, which will of course depend on the circumstances of each case. (For more on balancing human rights with workplace safety, Pro members should watch this recorded webinar by Jurczak.)

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OHS Resources

The OHS Insider has various resources on return to work, including:

- A Return to Work Contact Log
- A Model Return to Work Weekly Assessment Form
- **Information on** how to comply with return to work requirements
- **How to explain to senior management how far return-to-work programs must go to accommodate injured workers**.