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Diagnosing the need for doctors' notes

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"Stop asking employees for sick notes, OMA head urges." That was the recent headline in the *Globe and Mail* that prompted confusion and controversy among both employers and employees. In response to the Ontario Medical Association press release, public opinion has ranged from the notion that employers should be free to require doctor's notes for every absence, to the position that employers should never do so.

The press release, read in its entirety and context, should not be taken as a blanket prohibition on employers asking for doctor's notes; it was explicitly made in the context of flu season and references the highly contagious nature of the flu. The point seems to be that it is not in the public interest to force an individual with a highly contagious illness to attend at a medical office where they might infect others.

Legally, the OMA statement opened a fresh debate on how employers are to control employee absences due to illness. Like every legal issue, there is no right or wrong. Not all employees abuse their entitlement to sick days, and not all employers harass employees when they call in sick. However, absenteeism is a legitimate issue for employers; the fundamental basis of the employment contract is that the employee agrees to attend at work, for which they will be paid. Unfortunately, we have all heard of employees that take "mental health days" when they don't feel like working, or call in sick to get a head start on the long weekend.

A few years ago, I was fortunate enough to represent the Human Resources Professionals Association (HRPA) when they sought intervener status before the Supreme Court of Canada in the landmark case of *Keays v. Honda Canada Inc.* In his judgment, the trial judge was highly critical of Honda's requirement that Keays provide doctors' notes to justify his absences from work, and he awarded $500,000 in punitive damages. The wording of the trial decision suggested that requiring an employee with a disability to provide a doctor's note was prima facie unlawful.

On behalf of the HRPA, I sought clarity from the Supreme Court with respect to when employers can require medical documentation in support of workplace absences. We put forward the position that not all of a disabled employee's absences will be disability-related, and that employers need to be able to identify those which are in order to accommodate them. Conversely, those absences which are unrelated to disability are not entitled to accommodation and should be treated in the same manner as absences of employees without disabilities.

Our submissions included the following:

- Absenteeism results in substantial cost to employers.
- Absences from work that are not pre-authorized can be divided into two broad categories: innocent or non-culpable absences (e.g., disability-related


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absences as a form of accommodation); and blameworthy or culpable absences (e.g., unauthorized or unexplained absences due to factors within the employee's control).

- Culpable absenteeism may be grounds for discipline, up to and including termination.
- Employers are not doctors and cannot necessarily assess the legitimacy of a medical absence on their own.
- Canadian arbitrators and courts have recognized the right of employers to establish bona fide measures to ensure employee's regular attendance.

Our request was a moderate one, as set out in our factum: "Rather than an absolute and over-inclusive rule, either always precluding or always permitting the requirement of doctors' notes, [the requirement for doctors' notes] should be based upon the specific circumstances of each case, so that there can be a proper balancing of the rights and duties of all parties involved."

Though the court's decision is largely known for other reasons, including its impact on what I refer to as *The Damages Formerly Known as Wallace*, the court affirmed that "the need to monitor the absences of employees who are regularly absent from work is a *bona fide* work requirement in light of the very nature of the employment contract and responsibility of the employer for the management of its workforce." The court went on to hold that Honda's doctor's-note requirement was part of its accommodation process, essentially allowing it to identify disability-related absences and exempt them from discipline.

Ultimately, every situation must be assessed based upon its own particular facts. The rights of both parties have to be respected, so that employers are not short-changed by dishonest employees and sick employees are not harassed by their employer. In *Keays*, the Supreme Court accepted our moderate request and confirmed that employers in Canada have a legitimate right to manage absenteeism. In so doing, employers should adopt and disseminate clear policies in this regard, so that everyone understands their rights and obligations. Employers should not unduly limit their rights; many organizations have policies which require doctor's notes for "absences of three or more consecutive days." As I often say, what about the employee that routinely calls in sick on Fridays before long weekends, or is "suddenly" ill on a day that had been requested but denied as a day off? If the employer-drafted policy only allows them to require medical documentation for absences of three days or more, then their recourse may be restricted. Whatever the policy, employers should ensure that their employees are aware of the terms and that they are routinely and fairly enforced.

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