**TODAY’S TOPICS**

- Entitlements to a leave of absence for illness or injury under:
  - The Human Rights Code
  - The Employment Standards Act
  - An Employer’s Sick Leave Policy

- Independent Medical Examinations

**TODAY’S TOPICS**

- Protecting an Employee’s Confidential Medical Information
- Sources of Illness and Disability Benefits
- The Risks and Liabilities of Providing Illness and Disability Insurance
- Making Changes to an Employee’s Job while on Medical Leave
- Dismissing an Employee on Medical Leave
SICK LEAVE ENTITLEMENT: THE HUMAN RIGHTS CODE

• Employers have a duty to accommodate an employee’s illness or injury if it qualifies as a disability.

• Employees may be required to provide employers with otherwise confidential medical information in order to assist the employer’s accommodation efforts.

• Employers are entitled to refuse to allow any employee who refuses to provide sufficient medical information to return to work.

SICK LEAVE ENTITLEMENT: THE HUMAN RIGHTS CODE

Complex Services v. O.P.S.E.U., Local 278 (2012, Ontario)

• Employers are entitled to request the following information to accommodate an employee:
  – The nature of the illness (may include a diagnosis), and how it manifests as a disability;
  – Whether the disability is permanent or temporary;
  – The restrictions or limitations that flow from the disability;
  – The basis for the medical conclusions reached, including the prognosis; and
  – The treatment, including any medication that may impact an employee’s ability to perform his or her job.

SICK LEAVE ENTITLEMENT: THE EMPLOYMENT STANDARDS ACT

• Personal emergency leave – 10 days unpaid leave of absence for a personal or family illness, injury or medical emergency.

• Family medical leave – 8 weeks unpaid leave where significant risk of death of a family member within 26 weeks.

• NEW Family caregiver leave – 8 weeks unpaid leave to care for family member with serious medical condition.
SICK LEAVE ENTITLEMENT:
THE EMPLOYMENT STANDARDS ACT

• NEW Critically Ill Child Care Leave – 37 weeks unpaid leave to care for a critically ill child.

• Employees are prohibited from taking family medical / caregiver / critically ill child care leave unless they obtain a certificate from a qualified medical practitioner stating that the illness of the family member meets the requirements of the leave.

SICK LEAVE ENTITLEMENT:
THE EMPLOYMENT STANDARDS ACT

• Employers must continue to make contributions to the benefit plans the employee is entitled to during ESA leaves.

• When an employee returns from an ESA leave, the employee is entitled to be returned to the position he or she held before the leave.

• If an employment contract contains a greater right or benefit than those provided in the ESA, employees are entitled to the greater right or benefit contained in the contract.

SICK LEAVE ENTITLEMENT:
THE EMPLOYMENT STANDARDS ACT

• Employees must provide evidence that is reasonable in the circumstances to prove eligibility for a leave.
  – Evidence may include certificates from qualified health practitioners, other doctor’s notes, and death certificates.
  – Tillbury Assembly Ltd. v. UAW, Local 251 (2004, Ontario): a note from a pharmacist and a receipt for Tylenol was sufficient evidence for a leave due to a migraine.

• Employees must provide evidence within a reasonable timeline:
  – MLSE v. Teamsters, Local Union 847 (2010, Ontario): delivering a doctor’s note 3 months after the absence is not reasonable
SICK LEAVE ENTITLEMENT:
THE EMPLOYMENT STANDARDS ACT

- An employee is entitled to the same rate of pay he or she received before the leave.
  - If the employee was scheduled to receive a wage increase that would have inevitably been given to him or her if the employee had been working during the time that the employee was on leave, the employee is entitled to the increase.
  - If the employee may have received an entirely speculative wage increase (i.e. a merit increase), the employer must schedule a performance review and use the results of the review to determine the employee’s entitlement to the increase.

SICK LEAVE ENTITLEMENT:
EMPLOYER’S SICK LEAVE POLICY

- Many employers have policies that provide employees with a paid leave of absence of up to three days without the need to provide a doctor’s note.
- If an employee misses work under suspicious circumstances, the employer may nonetheless request a note.
  - Sault Area Hospital v. Ontario Nurses’ Assn. (2011, Ontario)
  - The employee called in sick after her request for vacation days was denied.
  - The employer was entitled to request a doctor’s note be obtained that same day.
  - The employee instead obtained a note 4 days later.
  - The employee's symptoms were mild, so she should have obtained the note right away.
  - The employee was therefore denied sick benefits.

INDEPENDENT MEDICAL EXAMINATIONS

- You ask the employee to prove the medical reasons for his or her absence
- What you get:
  
  “John was off work for medical reasons.” – Dr. Oz
INDEPENDENT MEDICAL EXAMINATIONS

- What additional information you require will depend on the circumstances.

- To substantiate that there was an illness, a further doctor's note may be sufficient. *It is a prudent first step to ask for this.*

- Where the absence is of a longer term, or where it is repeating consistently, an employer may be entitled to have the employee submit to an independent medical examination.

- In the interim - employers are in the position where they can withhold benefits for absences that they believe are unjustified.

INDEPENDENT MEDICAL EXAMINATIONS

- Employers are not automatically entitled to a second opinion through an Independent Medical Examination ("IME").

Telus Communications co. v. T.W.U. (2010, Federal)

- Union brought a policy grievance challenging the employer’s right to require an employee to submit to an IME. Used employer’s treatment of Sandy Catala’s Short-Term Disability (STD) claim as “test case”.

- Under the terms of the collective agreement, the employer was entitled to an IME “if required”. The Arbitrator undertook an analysis to determine whether privacy concerns were outweighed by the employer’s need to have the IME.

INDEPENDENT MEDICAL EXAMINATIONS

- The Arbitrator starts from the proposition that IMEs are rare and exceptional and that an employer is not automatically entitled to demand a second opinion.

- However, he also notes that the employer is always able to challenge medical evidence “if it has reasonable grounds to do so; for example, if the information is insufficient or contradictory”.

- The 47 Performance Assessment Forms (PAF) that the employee’s doctor had completed were inconsistent and contradictory. The last PAF suddenly said that Ms. Catala was totally disabled!

- Therefore, the employer was entitled to question the medical evidence.
INDEPENDENT MEDICAL EXAMINATIONS

Telus Communications co. v. T.W.U. (2010, Federal)

• However, the employer had to turn to the employee’s own physician first as this process is consistent with the principle of applying the “least intrusive measure.” If this doesn’t work, the need for an IME arises.

• “First, such an Independent Medical Examination should be conducted by a physician that is agreeable to both parties. It is only after this route has been attempted, or where an employee refuses to attend an IME, that the employer should have the right to demand an IME of its choice.”

• Since Ms. Catala would not attend an IME by a mutually agreed-to physician, the employer had the right to demand she attend an IME conducted by a physician of its choice.

• When she refused to attend this latter IME, her benefits were discontinued.

PROTECTING AN EMPLOYEE’S CONFIDENTIAL MEDICAL INFORMATION

• An employee’s doctor is prohibited from disclosing the employee’s medical information without the employee’s written consent.

• Employers are not permitted to share employee medical information with a third party insurer without the employee’s written consent.

• An employer must ensure that a third party insurer protects the confidentiality of an employee’s medical information.

• Employers are not permitted to share employee medical information with the Workplace Safety and Insurance Board (“WSIB”) without a request for the information from the WSIB.
SOURCES OF ILLNESS AND DISABILITY BENEFITS

- Short-term disability: provided by the employer or a third party insurer; maintains a portion of income for a period of several months.
- Long-term disability: provided by a third party insurer; maintains a portion of income for a longer period if the employee is totally disabled.
- WSIB: provides income protection for employees who are unable to work due to work-related illnesses or injuries.
- Canada Pension Plan ("CPP"): provides long-term income protection for totally disabled contributors.

ILLNESS AND DISABILITY INSURANCE: RISKS AND LIABILITIES

- Employers have three options for providing illness and disability insurance:
  - Employer pays full cost of premiums;
  - Employee contributes to cost of premiums; or
  - Administrative Services Only ("ASO").
- Risk of Double Recovery: compensation for the same injury from two different sources. May arise when an employee receives insurance benefits and damages for wrongful dismissal.

ILLNESS AND DISABILITY INSURANCE: EMPLOYER PAYS PREMIUMS

- The employer pays the premium, and the insurance provider pays employee benefits.
  - Double Recovery: employers are entitled to deduct insurance benefits from an award of damages for wrongful dismissal.
  - Sylvester v. British Columbia (SCC): an employee's right to damages for wrongful dismissal rests on the assumption that the employee would have worked during the notice period; an employee's right to insurance benefits rests on the assumption that the employee was incapable of working during the notice period.
ILLNESS AND DISABILITY INSURANCE:
EMPLOYEE CONTRIBUTES TO PREMIUMS

- The employee pays the full cost of the premium, or contributes a portion of the cost.
  - Double Recovery: employees are entitled to receive both illness and disability benefits and damages for wrongful dismissal.
    - Sills v. Children's Aid Society of the City of Belleville (ONCA): the employer should not be permitted to benefit from the sacrifices made by the employee in obtaining insurance coverage, especially where the employer has wrongfully dismissed the employee.

- Employees may contribute to insurance premiums in indirect ways in order to obtain double recovery.
  - Sills v. Children's Aid Society of the City of Belleville (ONCA): the employer received a deduction of 37 cents for every $100 of EI premiums paid, 15 cents of which was attributable to employee contributions. Instead of remitting this 15 cents to its employees, the employer redirected it to an employee benefits plan, one element of which was illness and disability insurance. This small and indirect “contribution” by the employee was sufficient to allow double recovery.
  - McNamara v. Alexander Centre Industries Ltd. (ONCA): the employee agreed to take a job at a lower salary instead of another higher paying job with a different employer in order to obtain illness and disability benefits.

ILLNESS AND DISABILITY INSURANCE:
ADMINISTRATIVE SERVICES ONLY

- The insurance provider determines the amount payable and pays employees with employer funds.
  - Double Recovery: employers are entitled to deduct insurance benefits from an award of damages for wrongful dismissal.
    - Fedorowicz v. Pace Marathon Motor Lines Inc. (ONSC): deductibility is permitted as the employer is ultimately responsible for the payment of benefits.
ILLNESS AND DISABILITY INSURANCE: OTHER BENEFITS

- **WSIB**: loss of earnings benefits are deductible from an award of damages for wrongful dismissal.
  - Employees do not contribute to the WSIB insurance fund.
  - The major purpose of the fund is to provide no-fault insurance to injured employees. This purpose would be undermined if employers had to pay both WSIB insurance premiums and wrongful dismissal damages.

- **CPP-Disability**: benefits are not deductible from an award of damages for wrongful dismissal.
  - The CPP is an exact substitute for a private insurance plan under which both the employer and the employee make contributions.

CHANGING JOB OF AN EMPLOYEE ON MEDICAL LEAVE

- Unilateral and fundamental changes made to an employee’s job while that employee is on medical leave may result in a finding that the employee has been constructively dismissed.
  - *Farber v. Royal Trust* (SCC): test for constructive dismissal is whether a reasonable person in the same situation as the employee would have felt that the essential terms of employment had been substantially changed.

- Abolishing an employee’s former position and demoting that employee to a position with a lower salary may result in a finding of constructive dismissal: *Sedgwick v. 1164182 Alberta Inc.* (2011, Federal)

DISMISSING AN EMPLOYEE ON MEDICAL LEAVE

- An employer who dismisses an employee on medical leave must provide the employee with notice or pay in lieu thereof.

- Frustration of Contract: both parties are relieved of their contractual obligation to perform when there is an unforeseen change in circumstances that renders further performance impossible, impracticable or radically different.

- If the employer can prove that the employment contract has been frustrated, the employer only needs to provide ESA notice and severance.
• To prove frustration of contract, the employer must first accommodate the employee to the point of undue hardship. It must then appear that the disability prevents the employee from returning to work, even with accommodation, for the foreseeable future.

  – Duong v. Linamar Corp. (2011, ONCA): the employment contract was frustrated when the employee had failed to report to work for three years after being diagnosed with fibromyalgia.

  – Altman v. Steve’s Music Store (2011, ONSC): the employment contract was not frustrated because there was insufficient evidence that the employee would be unable to report to work in the foreseeable future (Altman had been off work for cancer treatment for only 6 months).

• The provision of disability benefits may require that an employer tolerate a longer period of absence before declaring an employment contract to be frustrated.

  – Dragone v. Riva Plumbing Limited (2007, ONSC): due to the provision of long-term disability insurance, a "much longer period than 14 months" was required before it could be said that the employment contract had been frustrated.

• Employers are not required to employ absent employees indefinitely, but must ensure that it appears that the disability prevents the employee from returning to work, even with accommodation, for the "foreseeable future."

Summary

• Entitlements to leaves of absence
  – Human Rights Code
    – Employers must accommodate disabled employees, including by allowing time off work in some circumstances
    – Employers have the right to ask for otherwise confidential medical information if it is required in order to appropriately accommodate the employee
  – Employment Standards Act
    – Employees are entitled to leaves for various reasons, including to care for sick or dying family members, or for personal reasons such as illness or doctor’s appointments
    – ESA leaves are unpaid, and employers may ask for reasonable evidence to support a leave
  – Employer’s Sick Leave Policy
    – Many employers have policies whereby employees may take three consecutive sick days without providing a note
    – Employers may still ask for a note if an employee takes sick leave under the employer’s policy in suspicious circumstances
**Summary**

- Independent Medical Examinations
  - May be sought if required to substantiate employee illness
  - Other steps should be taken first, such as seeking further information from family doctor
- Protecting an employee's confidential medical information
  - Employers must obtain written consent to share confidential medical information
  - Employers should ensure those to whom they provide such information (i.e. third party insurers) also keep it confidential
- Types of Illness and Disability Benefits
  - Short-term/long-term-disability insurance; WSIB; CPP
- Types of Illness and Disability Insurance
  - Employer pays premiums (No double recovery)
  - Employee contributes to premiums (Yes double recovery)
  - Administrative Services Only (No Double Recovery)

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**Summary**

- Changing Job of Employee on Medical Leave
  - May result in finding of constructive dismissal
- Dismissing Employee on Medical Leave
  - Employers must provide reasonable notice or pay in lieu thereof unless contract is frustrated
  - Frustration of contract: where employee is unable to return to work, even with reasonable accommodation, in foreseeable future due to disability

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**MANAGING EMPLOYEE ABSENCES DUE TO ILLNESS**

**Thank you!**

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