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LABOUR & EMPLOYMENT LAW
DROIT DU TRAVAIL ET DE L'EMPLOI



EMOND HARNDEN



Emond Harnden Breakfast Seminar Series

**Navigating Requests for Employee
Medical Information**

December 10, 2019



As a boutique labour and employment law firm, Emond Harnden has represented the interests of management in both official languages for over 30 years.

Originally rooted in the Ottawa community, we have grown to represent employers in all provinces and territories of Canada.





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ABOUT

Jock, a partner with the firm, graduated from Queen's University Law School in 1994, and has been called to the bars of both Ontario and British Columbia.

Jock began his career with the Department of Justice, practicing as a criminal prosecutor and a labour litigator. Jock joined Emond Harnden in 2000 and has developed an extensive litigation practice since joining the firm. He has conducted hearings in the Federal, Ontario, British Columbia and Quebec courts (trial and appellate levels), before the Workplace Safety and Insurance Board, the Federal Public Sector Labour Relations and Employment Board, the Human Rights Tribunal, judicial reviews before the Divisional Court and countless arbitrations.

Fluently bilingual, Jock has been working with a diverse clientele in the private, public, municipal, education and not-for-profit sectors. He provides advice on all aspects of labour and employment law. Jock is also an engaging and experienced speaker on a wide variety of legal topics.

Jock enjoyed a 12-year career in the CFL with the Montreal Alouettes, Ottawa Rough Riders and Toronto Argonauts. Each off-season Jock attended law school until his graduation in 1994. Thereafter he practiced law in the off-season until his retirement from football in 2001. For the next 17 years, Jock continued to be a part of the CFL as an on-air analyst with the CFL on TSN panel.

Jock is very active in the community and participates in countless fundraising and charitable events.





LARISSA VOLINETS SCHIEVEN



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ABOUT

Larissa joined Emond Harnden as an Associate after completing her articles and a term as a summer student with the firm. Larissa practices in all areas of labour and employment law, including human rights matters. Larissa has experience in the unique human resources issues arising in the aviation sector and is a part of Emond Harnden's Aviation Practice Group. Larissa has been involved in litigation preparation for human rights matters, termination actions and arbitration hearings, also participating in collective bargaining. She drafts and reviews employment contracts and employment policies.

Larissa graduated Magna Cum Laude with a Juris Doctor from the University of Ottawa in 2015. During law school, Larissa took an interest in Alternative Dispute Resolution and completed an Option in Dispute Resolution and Professionalism. She was also a member of the Dean's Honour List and a recipient of the Osgoode Society Prize for Canadian Legal History.

Prior to attending law school, Larissa completed a Bachelor of Journalism with a Minor in Religion at Carleton University. Throughout her time at Carleton University, Larissa was a member of the Dean's Honour List and was awarded the K. Phyllis Wilson Scholarship in Journalism. She graduated with Highest Honours and was the recipient of the Senate Award for Outstanding Academic Achievement.

Larissa is a member of the Canadian Bar Association, the Ontario Bar Association and the County of Carleton Law Association.



When Can Employers Request Medical Information?

- To confirm absence was medically legitimate
 - If reasonable grounds to question legitimacy of absence
 - If employee required to provide evidence (e.g. statute, collective agreement, contract)
- To determine eligibility for benefits or leave
 - Paid leaves of absence or benefits available to the extent provided by statute, collective agreement, or contract



When Can Employers Request Medical Information?

- To comply with the duty to accommodate
 - Not only permitted to ask, but required (procedural duty to accommodate)
 - Employer has duty to inquire where suspicion of illness
 - Employer not required to and should not take request at face value
 - Employee has duty to cooperate
 - Employee's failure to provide medical information
 - ❖ Balance employee's right to privacy vs. employer's right to manage the workplace
 - ❖ Employee has privacy rights but refusal has consequences: may frustrate duty to accommodate and bring it to an end



What Information Can Employers Request?

- Employee must provide sufficient evidence to establish inability to attend work and/or entitlement to benefits or leave
 - Information to be requested depends on circumstances and conditions for qualification
 - ❖ For example, first instance vs. lengthy absence
 - Collective agreement, employment contract, or terms of benefit plans may outline types of information that can be requested



What Information Can Employers Request?

- Employer entitled to more detailed information for duty to accommodate
 - Prognosis, not diagnosis
 - Medical restrictions/limitations and their duration
 - Medical confirmation of necessary accommodation



General Principles

- Seek minimum information necessary to satisfy employer's legitimate work-related objective
- Determine on a case-by-case basis based on context
 - Leave request? Application for benefits? Duty to accommodate?
 - Exercise reasonable discretion
- Be mindful of contractual and statutory rights
 - Always obtain appropriate consent
- Request specific information
- Be patient
- Maintain confidentiality



If Medical Information is Inadequate

- Obtain employee consent to obtain further medical information or clarification from employee's doctor or specialist
 - For example, using a medical questionnaire
- Consult with health and medical specialists where necessary
- Requesting that employee undergo independent medical examination is usually a last resort
 - What is the reliability and accuracy of the medical information?



Independent Medical Examinations (IMEs)

- Employer does not have inherent right to demand that employee undergo IME
 - Only if reasonable and probable grounds to question fitness to work
- Need for IME assessed by considering all facts and circumstances
 - Unlikely to be reasonable if employer has not considered treating doctor's information
 - More reasonable if doctor's information incomplete, inaccurate, unreliable
- What if employee refuses IME?
 - Denial or end of benefits, leave, or accommodation



What to Do If...



Medical Note is Vague

Patient off work due to medical reasons

This is to certify that patient:

- States that they were unable to work for medical reasons on dates indicated below.
- ✓ Was unable to work for medical reasons on dates indicated below.
- ✓ Was seen at my offices today for medical reasons.
- May return to work.
- May return to work with suitable restrictions.



Medical Note is Vague

- Educate employee and doctor on the process
 - Employee's obligation to provide information
 - Doctor's responsibility to provide objective medical information
- Obtain further medical information or clarification from employee's doctor or specialist
 - Procedural duty to accommodate: obtain and appropriately consider all relevant information about employee's disability
- Potential outcomes of continued failure to provide adequate information:
 - Denial of requested accommodation, sick leave, or benefits
 - Disciplinary action for failure to substantiate absence



Employee Gives the Doctor Inaccurate/Incomplete Information

Patient has reported difficulties in the workplace, including concerns raised about her work and her placement on a performance management program, which occurred just after the end of her year-long sick leave. It is my professional opinion that her current work problems are due to her health issues and that she needs accommodation at work.



Employee Gives the Doctor Inaccurate/Incomplete Information

- Educate the doctor
 - Employee self-reporting
 - Doctor may not be fully informed of workplace or patient's job/employment (other than what patient tells them)
 - Hold doctor accountable (e.g. health and safety of the workplace)
- Provide objective information to the doctor as appropriate and request clarification of medical information



Doctor Did Not Assess Patient at Time of Illness

This is to certify that the patient, seen in our medical office on December 6, 2019, was unable to work and/or attend school due to medical reasons on the dates specified below.

From: November 18, 2019

To: November 22, 2019



Doctor Did Not Assess Patient at Time of Illness

- Doctor certifies past absence though patient was not seen on that date
- Value of note obtained after the fact can be reduced, depending on illness
- However, request for same-day note must be reasonable
 - Reasonable grounds for the request
 - Reasonable considering nature of illness
 - ❖ For example: employer knows about chronic illness
- Consider if employee has legitimate reason for not providing note before denying leave or benefits as a result
 - For example: too ill to get out of bed



Doctor is a Patient Advocate

The patient would benefit from four weeks off work.

For medical reasons, I recommend avoiding night shifts for this patient.

The patient is unable to work for medical reasons and there is no need for the employer to know the details of her illness.



Doctor is a Patient Advocate

- Doctor may be advocating for patient, rather than providing objective medical information/opinion
 - Educate doctor about requirement to provide objective medical information
- Evidence of doctors acting as advocates can be discounted by arbitrators
- Objectively scrutinize medical information received
- Consider if IME is appropriate in the circumstances
 - Usually a last resort



Doctors as Advocates

It is quite appropriate for medical health professionals to act as advocates for their patients in medical matters within their competence, but not when the advocacy extends beyond their medical expertise or matters of which they have direct knowledge, such as when they have little or no knowledge of the workplace or their patient's job or employment situation other than what their patient decides to tell them.

Arbitrator Surdykowski, *Hamilton Health Sciences v. Ontario Nurses' Association*, 2007
CanLII 73923 (ON LA)



Doctor Outlines a Specific Accommodation

Patient will need to work from home for medical reasons.

For medical reasons, patient is unable to work night shifts.



Doctor Outlines a Specific Accommodation

- Educate the doctor
 - Doctor's role to provide objective medical information
 - Employer's role to determine appropriate accommodation
- Employer not bound by doctor's recommended accommodation
- Procedural duty to accommodate
 - Obtain further information regarding employee's restrictions and limitations
 - Appropriately review and assess information received



Doctor Provides a Diagnosis

This patient has depression.



Doctor Provides a Diagnosis

- Employers are entitled to information regarding limitations and restrictions
- Typically not entitled to the employee's diagnosis
 - May be required in rare cases
- Employee has right of privacy
- Specify in requests for information that diagnostic information is not being sought
- Ensure that medical information is kept confidential (e.g. keep separate from personnel file)



Doctor Provides a Note Regarding Care for Employee's Family Member

My patient has a diagnosis that requires treatment and during which time family support is quite important. Please provide the patient's son, your employee, time to work from home two days a week to facilitate care for his mother.



Doctor Provides a Note Regarding Care for Employee's Family Member

- Some statutory leaves require medical certification regarding employee or their family members
- Others allow for reasonable evidence, and medical certificates may be reasonable depending on the circumstances

<i>Employment Standards Act, 2000</i>	<i>Canada Labour Code</i>
<ul style="list-style-type: none">• Pregnancy Leave• Family Medical Leave• Organ Donor Leave• Family Caregiver Leave• Critical Illness Leave• Sick Leave• Family Responsibility Leave	<ul style="list-style-type: none">• Medical Break• Maternity-Related Reassignment and Leave• Maternity Leave• Compassionate Care Leave• Leave Related to Critical Illness• Personal Leave• Medical Leave



Employee is Due to Return to Work

This patient has been assessed and is not fit for work from September 3 to September 30, 2019.



Employee is Due to Return to Work

- Employers often demand medical notes before allowing employees to return to work
- If last medical note indicates employee is ready to return to work by certain date, employer should allow employee to return on that date
- Employers should only require further note confirming ability to return to work if objective evidence of health and safety risk to themselves or others
- Risk of forcing employee to stay off work when they were fit to work



Employer Wants to Terminate for Frustration

The patient's prognosis is unknown and her return to work date is unknown at this time.



Employer Wants to Terminate for Frustration

- Frustration of contract: contract cannot be performed due to matters outside of parties' control
- Illness/injury can frustrate contract if no reasonable prospect of employee returning to work within a reasonable time
 - Risk is that employee returns to work after some period of time
- Should not rely on argument of frustration without clear evidence
 - Two years have elapsed and doctor confirming employee unable to return to work indefinitely, or in foreseeable future
 - Unknown prognosis not sufficient – ask for clarification



QUESTIONS?



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