



Medical Leaves Made Simple:

Managing Legal and
Human Resources Stressors

Today's Speakers



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Agenda

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Legal Framework

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Managing Absences

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Understanding the
Risks

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Legal Framework

Legal Framework

- *Human Rights Code*

5 (1) Every person has a right to equal treatment with respect to employment without discrimination because of...disability.

Harassment in employment

(2) Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer...disability

Legal Framework

- *Human Rights Code*

“disability” means,

(a) any degree of physical disability, infirmity, malformation or disfigurement that is caused by bodily injury, birth defect or illness and, without limiting the generality of the foregoing, includes diabetes mellitus, epilepsy, a brain injury, any degree of paralysis, amputation, lack of physical co-ordination, blindness or visual impediment, deafness or hearing impediment, muteness or speech impediment, or physical reliance on a guide dog or other animal or on a wheelchair or other remedial appliance or device,

Legal Framework

- *Human Rights Code*

“**disability**” means,

(b) a condition of mental impairment or a developmental disability,

(c) a learning disability, or a dysfunction in one or more of the processes involved in understanding or using symbols or spoken language,

(d) a mental disorder, or

(e) an injury or disability for which benefits were claimed or received under the insurance plan established under the Workplace Safety and Insurance Act, 1997; (“handicap”)

Legal Framework

- *Workplace Safety and Insurance Act, 1997*
 - Section 40 – Duty to Co-operate
 - Section 41 – Duty to Re-employ
- Certain industries have additional legal framework to consider, e.g. specific accommodation and retirement protocols under the *Community Safety and Policing Act, 2019*

Legal Framework

- *Employment Standards Act, 2000* provides for various and sundry leaves of absence on medical grounds with particular rules and protections which need to be observed.
- Sick Leave: up to 3 days of unpaid job-protected leave each calendar year due to a personal illness, injury or medical emergency. Employees need only work an employer for at least 2 consecutive weeks (not pro-rated).
 - > Effective October 28, 2024, employers cannot require employees to provide a medical note from a qualified health practitioner to take a sick leave under the ESA.
- Employer may still require an employee to provide evidence “**reasonable in the circumstances**” that they are eligible for sick leave (and all other ESA leaves).

Legal Framework

- Other ESA Leaves include:
 - Sick leave, family responsibility leave, infectious disease emergency leave, bereavement leave, family caregiver leave, family medical leave, domestic or sexual violence leave, critical illness leave, child death leave and crime-related child disappearance leave.
 - Again, subject to requirement for evidence reasonable in the circumstances.

2

Managing Absences

Managing Absences (and the Person)

- Entitled to request medical documentation
- Subject to the ESA restrictions and collective agreement limits (if any)
- Not required to accept the contents of the medical provided
- On accommodation the greater the burden on other employees, or potential health and safety risks, the more demanding substantiation requests can be

Managing Absences (and the Person)

- Cryptic Medical Notes?
- Ask for further information
- Detailed Functional Abilities Evaluation (FAE)
- Independent Medical Examinations (IME)
- Case-by-case approach always required
- Consider the context and circumstances applicable to the employee (recent performance review, pending termination?)

Managing Absences (and the Person)

- Ensure employer and adjudicator policies and protocols are current and comprehensive
- Identify and account for any stressors in the workplace (may affect type of claim and/or management of claim)
- Consider base line training key for managers on mental health issues and addiction issues
- Treat any accommodation plan as a living, evolving document
- Either driving towards ESRTW; or
- Termination for Frustration

Managing Absences (and the Person)

What are you entitled to?

- nature of the illness (not a diagnosis);
- expected date of return;
- restrictions and limitations;
- were the physician's findings based on examination, testing, or self-reporting
- prognosis;
- confirmation of compliance with treatment plan; and
- may require a specialist opinion

Managing Absences (and the Person)

- The longer the absence (or the more extensive an accommodation might be), the more information you can demand
- Employer's role to determine the scope of what amounts to reasonable accommodation to the point of undue hardship on any ESRTW

Managing Absences (and the Person)

- To maintain an absence (or work from home request, reduced hours or other forms of accommodation) on human rights grounds, such as disability the employee needs to follow and participate in a process:
 - The employee must advise employer of underlying basis for ongoing absence or request for accommodation.
 - The employee must substantiate the claimed limitations and restrictions requiring the absence or request for accommodation.

Managing Absences (and the Person)

- Employee's reciprocal duty to cooperate with absence or accommodation management includes duty to provide sufficient medical or other information to facilitate accommodation process, and to update the information from time to time
- Employee is only entitled to “reasonable” not “perfect” or preferred accommodation.
- Watch for “evolving” restrictions and limitations to “job shop”

3

Understanding the
Risks

Accommodation Challenges

TP v. Ontario (Correctional Services) 2016 HRTO 1481 (CanLII)

- Tribunal ordered \$27,000 in damages for injury to dignity as a result of aggressive disability management
 - Aggressive and repeated requests for further medical information about absence
 - Threatening to cut off benefits
 - Demeaning remarks to employee

Accommodation Challenges

- *Bottiglia v. Ottawa Catholic School Board*, 2017
 - Court of Appeal denied leave to appeal a judicial review of a Human Rights Tribunal decision that found an employer is justified in requesting an independent medical examination as part of duty to accommodate.
 - Available when there is a reasonable basis for questioning whether or not information provided by the employee is adequate or consistent

WSIB - Penalties Non-Cooperation

- Employees – Failure to cooperate with ESRTW process may result in benefit reductions
- Employer – Additional penalty equal to worker's benefits
- Triggered by Written Notice from WSIB
- Likely verbal notice from WSIB first

Limits on the Duty to Accommodate

- No obligation to remove essential duties, or render the job substantially different
- Reasonable performance and productivity standards must be maintained
- Displacement of other employees is within the realm of options
 - Subject to fundamental interference with seniority rights

Limits on the Duty to Accommodate

- Duty to accommodate ends where employee is no longer able to fulfill the basic obligations associated with the employment relationship in the foreseeable future
- Decision to dismiss based on assessment of entire situation
 - (1) past absences
 - (2) accommodations previously provided
 - (3) medical at time of dismissal

HYDRO-QUEBEC [2008] 2 S.C.R. 561

Limits on the Duty to Accommodate

- Poor past attendance record (or significant restrictions and limitations)
- No expectation of reasonable attendance (or return to essential duties) in the foreseeable future
- Appropriate counselling has been provided that employment may be terminated (without cause or due to frustration)
- Onus is on employer to prove that employment contract has become frustrated

Limits on the Duty to Accommodate

- Participation vs. Compensation important distinction
- Safety - will accommodation create “real and not insignificant” safety risk to other employees?
- Not required to top up wages or “keep whole” if permanent
- Eventual termination for frustration (subject to HRC)
- Last chance agreements

Limits on the Duty to Accommodate

- Employer may terminate employee's contract due to "frustration"
 - When A situation has arisen for which the parties made no provision in the contract; and
 - Where performance of the contract therefore becomes radically different from what the parties intended
- Typically occurs when prolonged illness or disability prevents an employee from carrying out the requirements of his or her employment
 - May occur earlier where there is a permanent impairment
- does frustration of contract apply?

Final word...

- Ensure timely and ongoing RTW contact
- Obtain Functional / Psychological Abilities Information
- Review available work
- Review employee's skills
- Meet with Employee (and Union if applicable)
- Document everything, process is critical to defend future claims (case notes)
- Ensure all offers documented in writing
- Proactive and ongoing contact with Insurer (LTD carrier or WSIB)

Disability, ESA leave, and accommodation management becomes more complex every day.

Contact us today to learn more about Return to Health[®] customized wellness and disability solutions for your organization.



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