

# CAUT Legal Advisory

## Responding to Requests for a Member's Medical Information

The following information is meant to provide a starting point for academic staff associations when assisting members who require a workplace accommodation or leave from work for medical/health reasons. This information may be useful to distribute amongst the executive, to grievance officers, or to the membership, with appropriate editing.

For questions involving specific circumstances or for more detailed advice, associations are encouraged to consult with legal counsel or CAUT.

### General framework governing such requests

A request for a workplace accommodation or medical/health leave from work will require Employees to divulge some amount of health information to the Employer.

Any request for accommodation at work or absence from work for medical/health reasons is protected by provincial human rights legislation. Therefore, the Employer cannot categorically refuse any request without examining the request and the impact it may have on the work or workplace. The Employer is required by law to accommodate to the point of undue hardship.

Since a leave from work for medical/health reasons will contain health-related information, it is protected under the provincial privacy and health information legislation.

The ability to be off from work for medical/health reasons or to request a workplace accommodation is a right that is either expressly a part of your collective agreement, or incorporated by function of law. This means that the terms of the collective agreement about when and how one can access a medical leave govern the process, including the extent of information that has to be provided. Any rights to pay and benefits while on leave will be found in the collective agreement.

### What information can an employer request when a member is absent for medical reasons?

Generally, the shorter the absence, the less detailed the information required.

For short absences, Employers may ask for documentation from a medical practitioner confirming the absence is due to *bona fide* medical reasons, in accordance with the terms allowed in the collective agreement. This is always done through the member, and not directly to the medical practitioner. At this stage, no diagnosis should be necessary.

For longer or more frequent absences, an Employer or third party is not automatically entitled to the diagnosis, but can ask about the expected length of absence (prognosis for recovery); whether it is a temporary or permanent absence; and whether there will be a need to accommodate the employee when they return to work (it is advisable to avoid discussing information about return to work until the health professional and member agree that it is time to return to work).

After a certain length of absence, the diagnosis or injury may be necessary to disclose, but even for a longer absence there is no requirement to divulge one's entire medical history or file.

If the Employer or third party requests that a detailed form be filled out by a doctor, consult with your legal counsel about which portions or questions should be filled and what is not required. It is likely that not every section will be necessary to answer.

Many Employers are trying to use "one size fits all" forms for absences and workplace accommodations. These may not be appropriate for the purposes of a particular absence or accommodation. There is no legal requirement that a specific form be used. Information can come from a doctor's letter instead of from a form that contains irrelevant or overly detailed questions.

The Employer may request further information from the member, but the request should be about specific concerns with the information already provided, and about relevant information for the particular absence.

### What information can an employer or a third party request when a member returns to work or requires accommodation?

Third party agencies (usually insurance companies) act as agents of the Employer and have the same rights and responsibilities regarding the member's medical information.

- Information directly related to the illness and how it interferes with the actual tasks and responsibilities of the employee (legally referred to as the limitations and restrictions).

- The nature of the illness (but not the diagnosis), as described by the doctor or health professional.
- Whether the illness is temporary or permanent and the estimated time frame for improvement (prognosis).
- How the medical conclusions were reached, including examinations or tests performed (but not normally the results).
- The results of any tests or examinations (only if the results provide information that sets out the limitations and restrictions that will be part of an accommodation).
- Whether any treatment or medication (including any possible side effects) might affect the member's ability to perform the job.
- Whether or not there is a further medical appointment scheduled, or an indication that treatment is being continued and monitored.

Only if the information provided by the member is inadequate can the Employer seek further information from the member. The Employer should specify what information is needed in order to devise an appropriate accommodation. Members should not consent to a blanket authorization for the Employer or third party to contact their doctor on an ongoing basis, or for an unspecified purpose.

### Employers are not permitted to:

- Request medical information that is not related to the employee's ability to perform their duties (e.g. ask a series of questions about the member's ability to lift weight or bend, when the member's job is teaching and scholarship)
- Contact a member's medical practitioner without the consent of the member. Wherever possible, the communication should go through the member.
- Terminate or suspend the member because of the medical leave or accommodation. This prohibition is subject to where undue hardship can be demonstrated.
- Ask to know the employee's medical diagnosis (except in exceptional circumstances).

- Share medical information beyond those who need to know it for purposes of accommodation or handling work while the member is away on leave.
- Repeatedly contact the member while on leave (to the point of harassment), or pressure the member into cutting short their leave. The length of the leave should be determined by the member and their health professional, and any refusal or pressure to cut short the leave may be grievable under the collective agreement.

### What are the rights and obligations of members?

- Right to control how and what information is divulged from their health professionals to the Employer.
- Right to consult with and be represented by the association (associations should be kept informed and advise the member at all times).
- Right to privacy of their medical information.
- Obligation to disclose information that is reasonable and necessary, and in a timely manner.
- Obligation to permit an independent medical review of their medical information for the specified purpose of accommodation, where appropriate under the collective agreement and at law.
- Obligation to facilitate any reasonable accommodation.