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## **OHRC POSITION ON MEDICAL DOCUMENTATION**

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*By Barry W. Kwasniewski\**

### **A. INTRODUCTION**

The proper management of employee medical absences is one of the most challenging human resource issues employers, including charities and not-for-profits, often face. One aspect of leave management (e.g. paid or unpaid time off for medical or other reasons) relates to the extent of medical documentation employers can require from their employees (and their health practitioners) in cases where disability related requests for workplace accommodation are made. In this regard, requests for information will have human rights implications.

On February 1, 2017, the Ontario Human Rights Commission (“OHRC”) released, the “OHRC policy position on medical documentation to be provided when a disability-related accommodation request is made” (the “Policy Position”).<sup>1</sup> The OHRC is the body within the Ontario human rights system that “works to promote, protect and advance human rights through research, education, targeted legal action and policy development.”<sup>2</sup> Confusion about what documentation is required to support a request for accommodation led the OHRC to create this Policy Position. The new Policy Position clarifies what documentation a person seeking a disability related accommodation can be required to provide employers or other persons with a duty to accommodate under the *Ontario Human Rights Code* (the “Code”).<sup>3</sup>

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<sup>1</sup> Ontario Human Rights Commission, “OHRC policy position on medical documentation to be provided when a disability-related accommodation request is made”, (Toronto: OHRC, 1 February 2017), online: Ontario Human Rights Commission <[http://ohrc.on.ca/en/ohrc-policy-position-medical-documentation-be-provided-when-disability-related-accommodation-request#overlay-context=en/news\\_centre/ohrc-calls-end-sexualized-workplace-dress-codes-discriminate](http://ohrc.on.ca/en/ohrc-policy-position-medical-documentation-be-provided-when-disability-related-accommodation-request#overlay-context=en/news_centre/ohrc-calls-end-sexualized-workplace-dress-codes-discriminate)>.

<sup>2</sup> Ontario Human Rights Commission, “Human rights in Ontario”, (Toronto: OHRC, accessed 9 February 2017), online Ontario Human Rights Commission <<http://ohrc.on.ca/en>>.

<sup>3</sup> *Human Rights Code*, RSO 1990, c H.19, online: e-Laws <<https://www.ontario.ca/laws/statute/90h19>>.

Detailed information concerning the duty to accommodate can be found in the OHRC's recently posted "Policy on ableism and discrimination based on disability".<sup>4</sup>

## B. TYPE AND SCOPE OF INFORMATION

The Policy Position is intended to not only cover employment situations in cases where an employee is seeking reasonable accommodation pursuant to rights under the Code, but also applies when a person is requesting Code-related accommodation in the areas of housing and services (such as education).

The Policy Position draws directly from OHRC's new "Policy on ableism and discrimination based on disability" section 8.7 "Medical Information to be provided".<sup>5</sup> The medical information to be provided in order to support an accommodation request should include:

- that the person seeking the accommodation has a disability<sup>6</sup>;
- the limitations or needs associated with the disability;
- whether the person can perform the essential duties or requirements of the job, of being a tenant, or of being a service user, with or without accommodation;
- the type of accommodation(s) that may be needed to allow the person to fulfill the essential duties or requirements of the job, of being a tenant, or of being a service user, etc.; and
- in employment, regular updates about when the person expects to come back to work, if they are on leave.<sup>7</sup>

If more information is needed, then the request should be respectful of the individual's privacy, while still allowing the organization to make an "informed decision about the accommodation."<sup>8</sup> The focus of the accommodation process should be on the functional limitations of the individual rather than their diagnosis.<sup>9</sup> The accommodation provider does not have a right to all private medical information of the

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<sup>4</sup> Ontario Human Rights Commission, "Policy on ableism and discrimination based on disability", (Toronto: OHRC, 27 June 2016) at s 8.7, online Ontario Human Rights Commission <<http://www.ohrc.on.ca/en/policy-ableism-and-discrimination-based-disability/8-duty-accommodate>>.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Supra*, note 3 ("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, (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*").

<sup>7</sup> *Supra*, note 1.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

person seeking accommodation. Information which is not within the accommodation providers' right to know includes: "the cause of the disability, diagnosis, symptoms or treatment, unless these clearly relate to the accommodation being sought, or the person's needs are complex, challenging or unclear and more information is needed."<sup>10</sup>

## C. CONCLUSION

In making requests for medical information from employees seeking Code-related accommodation, charities and not-for-profits should be aware of the Policy Position and remember to limit requests for medical documentation to what is reasonably required to facilitate the accommodation. The failure to do so may expose the organization to claims that it did not take appropriate steps to respond to the accommodation request, and therefore breached the employee's privacy rights, both of which could result in costly claims against the organization, and potentially its directors and officers.

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<sup>10</sup> *Ibid.*