Hot Topics in Education:

Sick Leave & Accommodation
Union Representatives Rights & Responsibilities

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Sick Leave 101

- Q: Where do you start when you have any type of question on:
  - Sick Leave Entitlements
  - Sick notes
  - Independent Medical Examination (IMEs)?
- First: Your collective agreement!
- Then: Employer policies, directives, etc.
- Then: Case law



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Sick Leave 101

- If an employee is going to be sick, they must notify the employer of their absence
- The onus is on the employee to establish the entitlement to paid sick leave
  - This may mean providing sufficient evidence to substantiate the illness or injury

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Sick Leave 101

- When providing medical info there is a balance between employee privacy vs. employer's legitimate interests
  - Generally speaking, the earlier in the process the less information about the employee's health the employer is entitled to
  - More information may be required though if there is a legitimate need, and on a case-by-case basis

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Pop Quiz!

One of your members calls in sick to their principal. They tell her they will be off work Wednesday, Thursday, and Friday. The principal tells the teacher to get a sick note from their doctor. **Can the employer do that?**

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Pop Quiz: Answer

- First place to look is your collective agreement:

L38.5 A Teacher's absence for illness for a period:

L38.6 of five consecutive working days or less may be certified by the school principal or by the official of the Board in charge of the appropriate department;

L38.7 of over five consecutive working days must be certified by a licensed medical practitioner. In special cases, there may be exemption at the discretion of the Executive Superintendent of Employee Services or designate;

L38.8 of over 20 consecutive working days may in the discretion of the Executive Superintendent or designate be required to be certified by a such medical practitioner before the Teacher shall be entitled to payment under this Agreement.

L38.9 The Executive Superintendent of Employee Services or designate may at any time require that a certificate be submitted by such a medical practitioner or Doctor of Dental Surgery appointed by the Board at the Board's expense.

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Medical Documentation: What are the employer's legitimate interests?

- For sick leave:
  - Confirmation that the employee is unable to work due to illness or injury
  - Confirmation that the absence is legitimate
  - *Maybe*: how long the employee will be absent (to address staffing needs)
  - *Maybe*: whether the employee could come back sooner with accommodation
- For return to work:
  - Confirmation that the employee can return to work safely
  - Whether the employee has any accommodation needs
- For accommodation:
  - What are the employee's limitations and restrictions so that the employer can put in place reasonable accommodation
  - Information necessary to confirm the *bona fides* of those limitations and restrictions

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Sick leave: What information needs to be shared with the employer?

- At first instance, the employer is entitled to what is reasonably necessary information to establish that the employee was or is unable to work because they were or are ill or injured.

- Typically does not include diagnosis, details of treatment plan, or prognosis

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Sick Leave: When can the employer demand further medical evidence?

- If an employer has reasonable grounds to question the medical note provided or has additional questions, e.g.
  - Absence is suspicious
  - Conflicting or unclear medical information
  - Doctor shopping

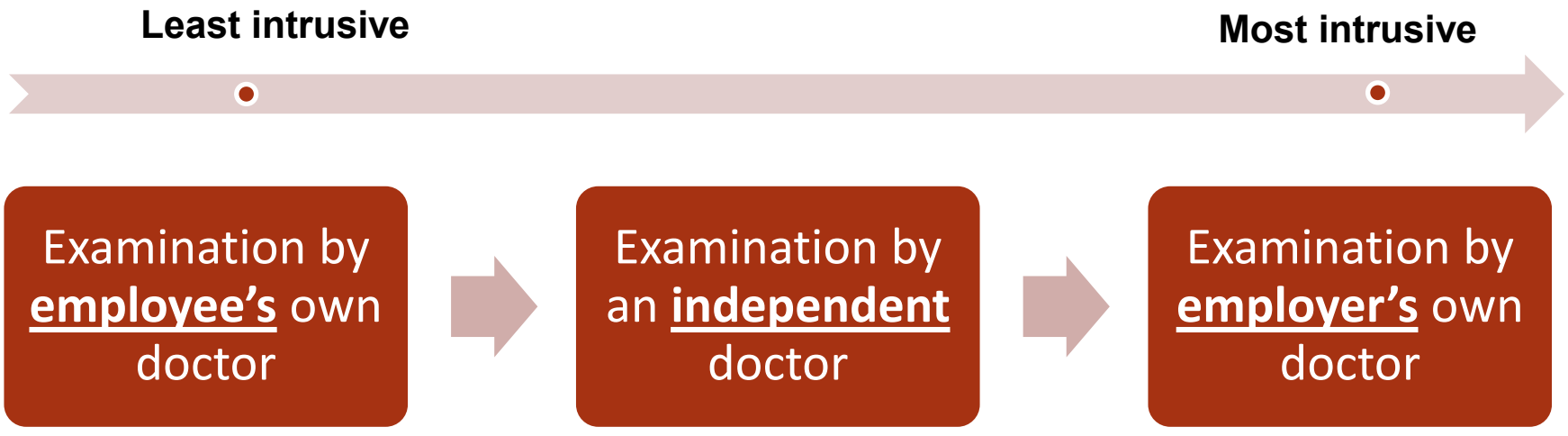
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Medical Examinations

- Sometimes, employers will want to hear (more) about an employee's condition from the employee's own doctor or another doctor
- There are a variety of options that are on a spectrum of least intrusive to most intrusive

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Demands for further medical evidence



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Independent Medical Examination

- First step: check your collective agreement
- When are IMEs typically requested?
  - complex accommodation needs
  - need for a psych assessment
  - employee's own doctor is unclear or uncooperative
  - conflicting medical evidence (or medical conflicts with observable facts)
  - long term disability where employee's ability to work is unclear
  - concerns about substance abuse



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Return to work: What information needs to be shared with the employer?

- The employer is entitled/required to be satisfied that an employee who seeks to return to work after an illness or injury can do so safely
  - This includes information about any limitations or restrictions (including functional abilities)

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Accommodation: What information needs to be shared with the employer?

- More information may be required for accommodation than at any other stage
  - The employer can ask for information to ensure that the employee can work without jeopardizing their own safety or that of others
  - This *might* include information not typically disclosed for a short-term absence/sick leave

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Accommodation: What information can the employer ask for?

- Info necessary to assess possible accommodation:
  - The employee's limitations and restrictions
  - Whether any treatment, including medications, might impact the employee’s ability to perform the job
  - Whether the disability is permanent or temporary
  - The nature of the illness/injury (possibly the diagnosis)
  - The basis for the medical conclusions (i.e. self-reported, based on exams or test performed)

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Accommodation: What is the doctor's role?

- An employee with a disability is not entitled to receive their preferred accommodation
- The medical practitioner's role in the accommodation process:
  - **is not** to identify the specific job in which an employee is to be accommodated
  - **is** to identify the employee's disability-related needs and restrictions

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Consent to medical records/doctor-doctor consult

- Must have a legitimate need for this information
  - (e.g. doctor notes are unclear, sparse or vague)
- Must be focused on the particular purpose and limited to the particular medical professional
- The employee should have the ability to consent to each and every instance of contact between the employer and the employee's health professional

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Union Officers - Rights & Obligations

Obligations to members

Labour Relations Act, 1995

Duty of fair representation by trade union, etc.

74 A trade union or council of trade unions, so long as it continues to be entitled to represent employees in a bargaining unit, shall not act in a manner that is **arbitrary, discriminatory or in bad faith** in the representation of any of the employees in the unit, whether or not members of the trade union or of any constituent union of the council of trade unions, as the case may be.

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The OLRB's Interpretation

"[A] union **cannot be held to a standard of perfection**. So long as it acts honestly, objectively and gives due consideration to matters which fall within the ambit of its responsibility as exclusive bargaining agent, a union will not be held to account if it makes a mistake or a simple error in judgment. A union has a sort of limited "**right to be wrong"…** To constitute a breach of the Act, a union's conduct must be **more than just wrong**. It must be arbitrary, discriminatory, or in bad faith."

Switzer, 1999 CanLII 20145 (ON LRB)

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ABDs of duty of fair representation

- **Arbitrary** – displaying an indifferent, capricious or non-caring attitude
  - e.g. Union's failure to direct its mind to a situation, failure to conduct a proper investigation, etc.
  - Higher standard than just negligence

- **Discriminatory** – treating employees differently without good reason (other than for relevant labour relations purposes e.g. seniority, part-time vs. full-time workers)

- **Bad faith** – motivated by hostility, ill will, or dishonesty
  - Must be based on objective evidence, not speculation

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How to avoid a DFR complaint

The Union must:

- Consider the merits of the case
- Consider its impact & consequences for the member
  - E.g. discharge grievances attract a higher standard
- Investigate the issue properly
- Make its decision in good faith
  - E.g. what has been the union's practice in similar cases?
- Follow any policies it has in place

Talk to your EO!

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Rights of union officers

- Generally speaking, arbitrators have given wide latitude to union officials, “sphere of immunity”
  - Grievance procedure is “not a tea party” (*Scarborough Firefighters*)
  - Employers cannot intervene in union rep from carrying out their duties (*CUPE Local 1750*)

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Statutory Protection

- Where union officials have published criticism of the employer, statutory provisions like s. 70 of the *LRA* have protected them from discipline:
  - Desfossés c. Société de transport de Sherbooke, 2011 QCCA
  - *Canadian Broadcasting Corp. v. Canada (Labour Relations Board)*, [1995] SCR 157

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However…

- The “sphere of immunity” does not extend to representations:
  - That are made outside the context of union duties
  - That are illegal (i.e. defamation, calling for/threatening illegal strike)
  - That are malicious/reckless/false

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Things to keep in mind

1. Understand what context you are working within (are you operating as a union rep or an employee?)
2. Are the statements you are making directed at an individual or the employer?
3. Have you spoken to your EO about what is going on?
4. Work now, grieve later.

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Questions?



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