Canadian HR Reporter
THE NATIONAL JOURNAL OF HUMAN RESOURCE MANAGEMENT www.hrreporter.com
REPRINT

Medical documentation policy clarified

Ontario's move clears up confusion surrounding accommodation requests: Experts

BY MARCEL VANDER WIER

THE Ontario Human Rights Commission (OHRC) has moved to clear up any lingering confusion around the type of medical documents required to support a request for accommodation at work.

In February, it released a policy clarification identifying what medical documentation is to be provided when disability-related accommodation requests are made. Under Ontario human rights law, employers have a legal duty to accommodate to the point of undue hardship.

The commission has provided more clear information on something that has been causing confusion, said Cherie Robertson, senior policy analyst at the OHRC in Toronto.

"We're hoping that putting out this statement offers clarification for everybody involved and makes the process smoother for people requesting accommodation and for HR people who are dealing with accommodation requests."

Background

The original 2001 "Policy on ableism and discrimination based on disability" was focused on employers and unions while the updated version published by the OHRC last year added service and housing providers to those bearing a legal duty to accommodate, said Stefanie Di Francesco, employment lawyer at McMillan in Toronto.

"I certainly think it's a helpful update," she said. "It's an update of where the law is now, taking into consideration the case law and what the commission and tribunal have seen in the past 15 years."

The clarified policy released in February sets out detailed guidance regarding the type and scope of medical information that can be provided to support an accommodation request.

This information should include:

- that the person has a disability
- the limitations or needs associated with the disability
- whether the person can perform the essential duties or requirements of the job, with or without accommodation
- the type of accommodations that may be needed to allow the person to fulfill the essential duties or requirements of the job
- regular updates about when the person expects to come back to work, if she is on leave.

Currently, requests for accommodation are often accompanied by insufficient information from employees or excessive data requests by employers, said Stuart Rudner, employment lawyer at Toronto's Rudner MacDonald.

"There is a lot of confusion in this area," he said. "There's always a struggle to balance privacy rights and the right to accommodate."

Legal advice provided to employers has always been focused on the limitations of the employee to carry out her job functions, but not diagnosis or other medical information, said Rudner.

"This clarification is quite helpful because this is almost a constant battle," he said. "It makes it very clear that employers are entitled to whatever information is necessary to allow them to assess the need for accommodation, but no more."

"At the same time, it confirms to employees that they need to be a part of the process. The process of accommodation is supposed to be a two-way dialogue… so hopefully this will remind both sides of what their obligations are."

Striking a balance

Confusion leading to overbroad requests was undermining the dignity and privacy of people with disabilities, said Robertson.

"Employers, much like universities and colleges, were under the impression or had never been questioned on the practice that many of them have participated in asking for what we think is intrusive medical documentation, including things like a person's treatment plan or their prognosis," she said. "Mainly, the hot spot is the request for a person's diagnosis."

Diagnoses are off limits because "the focus should always be on a person's functional limitations," said Robertson.

"That requires an individual assessment. A diagnosis can label somebody but, as we know, a person can share a diagnosis with many other people and yet their disability-related needs can be completely different."

"The diagnosis, in and of itself, seems to be something of a red herring and a distraction from what the accommodation process ought to be, and that is an individual assessment of what that person's disability-related needs and functional limitations in their job are."

Essentially, what the policy strives for is limiting the accommodator's focus to the functional limitations associated with the disability, rather than the diagnosis, she said.

Stigmas still exist, especially around mental health, said Robertson.

Resultingly, if an employee knows his employer will require diagnosis documentation, he could be deterred from seeking the accommodations he is legally entitled to, she said.

That's certainly the aim of the policy — to provide clarification and guidance so accommodation can be individual to the particular employee in particular circumstances, said Di Francesco.

"It's basically providing employers and employees with a guideline of what they could expect, generally, to ask for and to receive," she said.

"But it does leave open the door to more broad requests for information from employees when a situa-

tion is particularly complicated or diagnostic information is relevant."

Meanwhile, employees desiring accommodation cannot simply withhold all data while citing privacy, said Rudner.

"You can't have it both ways," he said. "If you want to be accommodated, you need to provide sufficient information so that the employer can, first of all, assess whether there is a need for accommodation and then, second of all, if there is one, assess what the options are."

Review policies

The OHRC's updated policy could have national implications, as it is now the most comprehensive of its kind in the country and will be considered by human rights tribunals and other decision-makers adjudicating over disability cases, said Robertson.

"In terms of what the law requires across the country, it is evolving," she said. "We are definitely making a statement in the effort to try to resolve conflict that we know is happening on the ground when people go to make these accommodation requests. It's considered a progressive statement on something that we know is a confusing issue for people across the country."

That means all Canadian HR practitioners should proactively review their company policies, as tribunals typically attempt to maintain consistency across the country, said Di Francesco.

"It's a great opportunity for employers to look back at what their policies are and ensure that they aren't asking for more (than what) is necessary," she said.

"It is a focus still on individual accommodation but I think the tribunal is trying to clarify that if it's straightforward what the person needs — and you don't need to know their diagnosis and their treatment and their outlook — then that's not appropriate information to ask for."

Companies should work with legal counsel to establish accommodation policies that comply with OHRC regulations, said Di Francesco.

Internal policies and procedures should outline guidelines of what information is appropriate to ask for, and when.

"I think employers will welcome the additional guidance," she said.

"Employers and employees will still have to, on an individual basis, grapple with what is appropriate documentation in each individual case."

"So the guidance will be helpful, but in no way will it be an all-encompassing answer to what an employer will have to do on a case-by-case basis."

A review of this nature could potentially reduce future claims regarding breaches of privacy rights or stalemates leading to claims over lost wages, said Rudner.

Role of doctors

As part of the process, the OHRC circulated the policy to the College of Physicians and Surgeons in Ontario and the Ontario Medical Association in hopes of achieving systemic change, said Robertson.

"They are key players in ensuring that this process works smoothly," she said.

"The human rights system is a complaints-driven system so it's not as though we can mandate that they do this, but it is definitely a best practice and it's now become much more commonly understood that this is the expectation and that it causes all kinds of problems when they aren't fulfilling the expectations set out in the guidelines."

To date, HR professionals have been frustrated in receiving "very ambiguous notes that were lacking in detail" needed to tailor appropriate accommodation, subsequently delaying the process, said Robertson.

Vague doctors' notes often state an employee will be away for a certain amount of time for "medical reasons," said Rudner.

"I hate to say it, but it does seem like if you want a doctor to write you a note, you can pretty easily find one to do so," he said.

"We always tell our employer clients that 'You're entitled to more information than that. You're not entitled to the diagnosis, but you're entitled to know what the limitations are on their ability to their job.'"

Doctors are strapped for time as it is, but providing a Functional Abilities Form is an efficient way to request more information, said Rudner.

"Essentially, it's a fairly detailed form where the doctor can check off boxes of what the individual is, and is not, able to do."

But in order for the employer to contact the doctor, it needs authorization from the employee in question, he said. Typically, the request is sent to that employee indicating more information is required in terms of workplace limitations.

"Employers and other people responsible for accommodation have the right to request clarification or more information if what they've initially been given doesn't allow them to be able to fulfill the obligation to accommodate," said Robertson.

A doctor will certainly represent their patient's best interest, said Di Francesco, "and usually a doctor is completing a Functional Abilities Form and will fill it out appropriately."