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A photograph of a clear glass containing a small amount of amber liquid, likely whiskey, sitting on a white surface. To the right of the glass, a wooden gavel lies horizontally. The background is dark and out of focus.

LEGAL & COMPLIANCE ISSUE

Supreme Court Rejects Alcohol Testing Policy



WELCOME BACK: HOW TO HANDLE BENEFITS DURING DISABILITY LEAVE AND RETURN-TO-WORK

BY YAFA SAKKEJHA

If your company has long-term disability (LTD) benefits, failing to create written policies about employee-on-leave employment and benefits could result in headaches and/or lawsuits.

Here are some tips in the event of an LTD claimant returning to work.

ALWAYS MAINTAIN THEIR POSITION DURING THE LEAVE

It's practically gospel that a sick employee cannot be terminated. However, they can be, if they have frustrated their contract.

Frustration of contract refers to when "both parties are relieved of their contractual obligation to perform when there is an unforeseen change in circumstances that renders further performance impossible, impracticable or radically different," according to Malcolm MacKillop from Shields O'Donnell MacKillop LLP.

In the first few years of sick leave, before the employee frustrates his or her contract, here is when an employer is at risk:

- The employer eliminated or significantly changed the job.
- The employer gave the job to someone else.

According to common law, below are the criteria to decide whether it is reasonable that the employee has frustrated the contract, and can therefore be terminated:

- The employee has been on sick leave for two to three years.
- The employee is likely never returning due to permanent disability.
- The employer offered to accommodate, but the employee declined.

- The employer accommodated the individual employee to the point of undue hardship.
- The employee refused to provide sufficient medical information to the LTD claim adjudicator.
- The insurer and/or CPP disability have rejected the disability claim, yet the employee still refuses to return to work.

In these cases, the courts have found that it is reasonable for the employer to terminate the employee's employment and benefits. Note that you must provide severance upon termination, depending upon your payroll and jurisdiction.

HAVE A POLICY STATING HOW LONG BENEFITS LAST DURING SICK LEAVE

Many employers do not have a written benefits policy for employees who are on LTD. It is not unheard of to have a company with an employee who is on LTD, hasn't worked in years, but is still on the benefit plan. This affects the company's premiums, since a sick employee might claim a large amount in drug costs.

If an employee is on an expensive drug, and the employer wishes to terminate them due to their impact on premiums, it could invite a constructive dismissal lawsuit. However, there is no law mandating that benefits must be provided.

Employers should write a policy that they will allow participation on the plan for a set amount of time while on LTD—one year is reasonable—after which, the employee's health and dental benefits will be discontinued.

If you don't have one, write one immediately and circulate it to all employees. Send a separate letter to any employee who is on LTD notifying them of the policy.

If your plan has an employee contribution portion, your letter can inform them that they have accidentally been receiving benefits at no cost, and to please pay what they owe retroactive to their last day worked. If they refuse, notify them that benefits will end in 30 days. If your plan has no contributions, send a letter indicating that the policy provides benefits for one year post-disability, and that they have exceeded this timeframe. Educate them on their options to convert their benefits to an individual plan.

If they have a large drug claim, educate them on their options for drug subsidies: their provincial drug plan, drug manufacturer assistance or hospital subsidies.

The risk of lawsuit here is low, since the maximum loss would be a few thousand dollars.

RESPECT THEIR PRIVACY

Privacy laws prevent employers from releasing medical information to an insurer if the employee has not provided written consent. However, privacy laws do not prevent employers or insurers from conducting video surveillance on an employee without consent to determine if their disability claim is genuine.

Keith Edwards, SVP of SCM Insurance Services, advises that "there is an exception to PIPEDA where collection without consent is

benefits

allowed if there is reason to believe that a law is or may be breached. Fraud would qualify.”

Further, Shane Swinson, VP of Forensic Investigators Canada, says, “PIPEDA regulates the commercial collection of personal information in the private sector. An employer-employee relationship is not a commercial relationship.”

However, note that one insurer was reprimanded when they submitted 140 hours of surveillance that ended up being dismissible (see *Fernandes v. PennCorp*).

BE WELCOMING ON THE FIRST DAY BACK

Rebecca McAfee, manager of Rehab Services in Disability Claims with

The Co-operators Life, encourages employers to co-operate with the insurer. If the carrier asks for information, supply it—they are trying to assess what the employee’s baseline performance was before the disability, so they know how much rehabilitation is required.

“The employers who allow us to intervene earlier get a swifter return-to-work date,” says McAfee. She suggests having strong communication between all parties, having no surprises and providing a positive atmosphere when they welcome them back.

“We recommend that they have a loved one drive them to work on their first day back. Treat them like you would treat a brand-new employee: pair them with a mentor, don’t have too many expectations and allow them time to ramp-up. Create a welcome as you would someone who was on maternity,” she advises.

TAKE-AWAYS

1. Write a policy stating the amount of time off your company considers to be frustration of contract.
2. Put a reminder in your calendar when the employee has reached this date.
3. Continue to communicate with employees on sick leave to determine what accommodation is needed for their return.
4. Write a policy stating the amount of time an employee is allowed benefits while on disability. If any monetary contributions are required, share it with the employee.
5. Discuss the status of the “life waiver” with your insurer.
6. Do not share medical information unless you have written consent.
7. If you are going to conduct surveillance, be reasonable.
8. Always act in good faith. ●

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