Out of sight, out of mind not a winning strategy

Ignoring an employee on long-term medical leave can be unnecessarily costly for employers

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Some employers believe that if an employee is absent from the workplace for medical reasons, there comes a point when their employment effectively ends and no further action is required. This is not only a mistaken belief, but it can prove extremely costly.

In most disability insurance contracts, an employee must meet certain requirements to receive benefits. For a period, often two years, the employee must show they are medically unable to perform the duties of their own occupation (“Own Occ” coverage). Thereafter, most policies change the definition of “disabled” and the employee must show they are medically unable to perform the duties of any occupation to continue to receive disability benefits (“Any Occ” coverage).

A common error made by many employers is believing an employee who qualifies for Any Occ coverage ceases to be employed and there are no steps required from the employer to end the employment relationship. Moreover, many believe no payment to the employee

is required to formally terminate employment.

This can be a very costly error.

Absent employee continues to accrue service

When an employee is off work and in receipt of disability benefits, they remain employed and continue to accrue service until they either resign (rare, as there is no incentive to do so), or the employer terminates their employment. Put another way, even if an employee is medically unable to perform their job (or any job), the employee continues to accrue service until the employment relationship formally ends.

In the event the employee is unable to return to work the employment relationship is often considered “frustrated.” That is, due to an unforeseen event, the employee is unable to hold up their end of the employment bargain - provide work to their employer. This is one of the few scenarios in which an employer is not required to provide common law notice (or pay in lieu of notice) when employment is terminated.

However, this does not mean the employer is entirely off the hook. Separate and apart from the employer’s common law obligations, the Ontario Employment Standards Act, 2000 (ESA) - unlike the employment standards legislation in other Canadian provinces - still requires the employer to provide notice (or pay in lieu of notice) and, if the employee qualifies, severance pay. Although there is an exception in the case of frustration, this does not apply if employment is frustrated due to illness or injury.

Disability leave considerations

Consider a scenario where an employee with one year of service goes off work due to a disability, meets the Own Occ and Any Occ disability definitions, and the employer opts not to address their employment status. It is not only possible, but common, for an employee to accrue several years of service while in receipt of disability benefits before the employer realizes they have an accruing liability. At that point, if the employer is a severance pay employer, that employee could be owed several months of combined notice and severance pay. Under the ESA, the maximum combined amount of notice and severance pay is 34 weeks, so the longer the employer ignores the employee on leave, the closer the employee is to receiving eight months of wages.

You may ask, “Don’t we solve that problem by just never terminating the absent employee?”

If only it was that simple. The question of whether an employment relationship has been frustrated is a question of fact (the relationship is either frustrated or it’s not). This means an employee can trigger their own termination for frustration, giving rise to an employer’s obligation to pay ESA entitlements.

Some employers have been led to believe that, if an insurance company is involved, an employer is not permitted to ask the employee or their doctor for medical information in relation to the employee’s absence and must rely on the meagre information provided by the insurer. This is inaccurate. In fact, adjudicators expect an employer to seek information from the employee’s own doctor, and not rely only on information from the insurer.

Managing long-term absences and reducing liability

First, actively manage absent employees, including requiring them to provide updated medical information. This will mean different things in different circumstances. For instance, if an employee is expected to be off work for an extended period, updates every few months may be sufficient, whereas more frequent updates should be required if a period of expected absence hasn’t been provided.

Second, don’t accept a medical note saying “Harley is absent for medical reasons” to substantiate an ongoing absence. Although it’s generally not permissible to request a diagnosis, an employer is entitled to receive sufficient information to understand the general nature of the medical issue, its expected duration, prognosis, and relevant restrictions.

Finally, review the status of employees on medical leave on a regular basis. If it appears there is no reasonable prospect of the employee’s return to work in the foreseeable future, with or without accommodation, consult counsel to determine whether the

employment relationship has been frustrated and it's time to formally end the relationship.

Bottom line: While it's easy to ignore an employee on a long-term medical leave, an employer does so at its peril and, ultimately, its cost.