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ILLNESS AND DISABILITY IN THE WORKPLACE

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What's New in This Update:

This release includes updates to Chapter 5 (Short- and Long-Term Disability Insurance) and Appendix A1 (Sample Letters from Employers to Employees). A new Appendix A7 (Checklists and Other Forms for Employers) was also added.

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Highlights

- **Short- and Long-Term Disability Insurance—Overview—Generally—**Several jurisdictions provide for statutory sick leaves. Some of these are paid, some are unpaid, and others are a mixture of the two. For example, in British Columbia, eligible employees are entitled to up to five paid days and three unpaid days of job-protected sick leave per calendar year (also referred to as injury or illness leave). Employees in federally regulated industries are entitled to up to 10 days of paid sick leave per year under the Canada Labour Code. In Ontario, employees are entitled to up to three days of unpaid sick leave after two weeks' consecutive service, a new long-term illness leave is available for employees up to 27 weeks for employees with at least 13 weeks of service. Similar provisions exist in other jurisdictions. As with most employment standards provisions, employers are free to provide a greater right or benefit. This includes short- and long-term disability programs. While some employers incorporate employment standards minimums for sick leave into their short-term disability programs, most begin to apply STD after sick leave has been exhausted for the year. While sick days are meant to last only a few days, short-term disability programs (STD) typically begin after sick days have been taken. STD normally applies to non-work related injuries or illnesses and lasts between 17 and 26 weeks and will cover 60-80% of an employee's salary, with some plans providing 100% of wage replacement for a limited period. EI sickness benefits are typically only available to employees whose employers do not provide a STD program, or where STD benefits have run out. The EI Premium Reduction Program (PRP) allows employers with eligible STD plans to pay lower EI premiums by providing benefits first. EI sickness benefits are available for up to 26 weeks, but employers with qualifying STD plans receive a premium reduction because the private plan serves as the "first payer," reducing the use of the of Employment Insurance program. Eligible STD plans are required to provide at least 55% of the employee's salary, up to the weekly maximum, in order to be eligible for PRP. Long-term disability programs (LTD), where applicable, begin after that and provide 60-70% of the employee's regular salary, subject to offsets for CPP disability benefits or other payments identified in the plan documentation. The taxation of LTD programs depends on whether the employer or the employee pays for them, with employer-paid benefits resulting in benefits being taxed in the hands of the employee and employee-paid premiums resulting in tax-free payments. Benefits payable under LTD programs are usually reduced by CPP disability benefits and sometimes by EI sickness benefits if both are payable for the same period.

- **Short- and Long-Term Disability Insurance—Burden of Proof—Power to Compel Medical Examination—**While insurers can request independent medical examinations or require a note from a physician to substantiate an employee's absence due to illness or disability, legislation now exists in some provinces prohibiting employers from requiring a doctor's note for a short absence, for example, due to a cold or flu. An example is found in Ontario, under s. 50(6.1) of the *Employment Standards Act, 2000*, which provides that employers are prohibited from requiring an employee to provide a certificate from a health practitioner for absences of three days or less within the calendar year. Nevertheless, employers can request other types of evidence from employees in such circumstances. The objectives for these types of provisions are to avoid overburdening the healthcare system and help prevent needlessly exposing others to communicable illnesses of a mild nature.
- **Short- and Long-Term Disability Insurance—Burden of Proof—Insurer's Duty—**The contract of insurance is often said to be one of "utmost good faith," meaning that both parties are required to deal fairly and in good faith with one another. See for example *RBC General Insurance Co. v. Field*, 2016 CarswellOnt 15039, 2016 ONSC 5584 (Ont. S.C.J.), where Emery J. commented as follows at para 150: "I conclude as a matter of law that there is a doctrine of mutuality that imposes a duty on an insurer and an insured party to act in good faith when dealing with each other in the making or processing of a claim under a policy of insurance. This mutuality arises from the reciprocal duty of an insured to act fairly, honestly and in good faith when making a claim, and of an insurer to act fairly, honestly and in good faith when adjusting that claim." This is also in line with the Supreme Court of Canada's decision in *Bhasin v. Hrynew*, 2014 CarswellAlta 2046, 2014 SCC 71, where the Court introduced a general duty of good faith in the performance of contracts.
- **Short- and Long-Term Disability Insurance—Employers' Obligations—Termination of Employment—**The test for frustration of the employment contract due to disability is whether the employee is no longer able to perform the basic obligations of the position for the foreseeable future. There are no hard and fast rules in terms of a specific timeframe for this to apply. However, many insurers cut off an employee's benefits after two years when the test shifts from a disabled employee being able to perform their "own occupation" to being able to perform "any occupation" that is suited to them. Employees are eligible for long-term disability benefits only when they are "totally disabled." However, the exact meaning of this phrase may differ before and after the two-year threshold (for example, see *Roskaft v. RONA Inc.*, 2018 CarswellOnt

10638, 2018 ONSC 2934 (Ont. S.C.J.)). Note that in Ontario, under ss. 2(3) and 9(2)(b) of O. Reg. 288/01 (Termination and Severance of Employment), if an employee is terminated due to frustration of the employment contract because of illness or injury, they are still entitled to termination pay and statutory severance pay under the *Employment Standards Act, 2000*. However, they would not be entitled to reasonable notice or pay in lieu of notice under the common law. Nevertheless, human rights considerations may still apply with respect to accommodation up to the point of undue hardship.

- **Short- and Long-Term Disability Insurance—Employers' Obligations—Termination of Employment—**Employers may wish to continue certain benefits during a period of a reasonable notice where employees are terminated without cause. In a number of cases, employers have been held liable for long-term disability benefits and life insurance benefits where an employee has become disabled or has died during the period of reasonable notice. For that reason, it may be prudent to extend the benefits during the period of reasonable notice or, alternatively, provide the employee with sufficient compensation to enable them to replace those benefits that they wish to maintain. Note that in Ontario there are also statutory provisions covering this. Section 60(1) of the *Employment Standards Act, 2000* provides that an employer "shall continue to make whatever benefit plan contributions would be required to be made in order to maintain the employee's benefits under the plan until the end of the notice period." This refers to the statutory notice period, with the result that employers in Ontario are required, at a bare minimum, to maintain benefits coverage (including long-term disability where applicable) during the statutory notice period.
- **Short- and Long-Term Disability Insurance—Remedies—Proper Forum—**There have been cases where an employee alleged that a union breached its duty of fair representation under the governing labour relations legislation with respect to a long-term disability claim. An example of this is found in *Saltat v. SEIU, Local 1*, 2025 CarswellOnt 3083, 2025 CanLII 19769 (Ont. L.R.B.), where an employee brought an application alleging the union breached its duty of fair representation under s. 74 of the Ontario Labour Relations Act, 1995 in refusing to file a grievance for denial of long-term disability benefits. This case dealt with an employee who was denied long-term disability benefits twice. A union representative had informed the employee that her claim had no prospect of success, and the union would not be pursuing her claim. The employee had exhausted all appeals with the insurer, and she had been told several times that the union could not raise issues relating to the first denial of benefits. The Ontario Labour Relations Board does not generally

entertain allegations regarding a violation of section 74 of the Act that are made more than one year after the alleged incident(s). There was a lengthy and inexplicable delay on the part of the employee. The Board found that additional submissions filed by the employee should be limited to the Board's directions, and the employee did not need to repeat any of the pleadings that were already before the Board. Any new factual allegations would not be considered unless the employee was granted leave of the Board to amend her pleadings. The Board remained seized of the proceeding for the purpose of determining preliminary motions raised by union. Nevertheless, pursing a claim for an alleged breach of the duty of fair representation against a union may be open to a unionized employee where the union refuses to grieve the denial of long-term disability benefits. Such a claim is unlikely to be successful in relation to workers' compensation claims or a third-party insurer beyond the control of the employer (see for example *Qteifan v. ATU, Local 1587*, 2024 CarswellOnt 17513, 2024 CanLII 112286 (Ont. L.R.B.)).

- **Short- and Long-Term Disability Insurance—Remedies—Relief from Forfeiture—Subrogation—**An interesting case dealing with subrogation with respect to long-term disability benefits is the Nova Scotia Court of Appeal decision in *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Feener*, 2025 CarswellNS 492, 2025 NSCA 49 (N.S. C.A.), where the Court ruled against the insurer in its appeal of a decision relating to the application for determination of appropriate distribution of settlement for subrogation purposes. The individual in this case was an employee of the Nova Scotia Community College and was covered by the Nova Scotia Public Service Long Term Disability Plan. While working for another employer as a consultant, he suffered a slip-and-fall accident at the second workplace and suffered a second slip-and-fall incident in his driveway about a week later. He received disability benefits as a result. The employee settled a negligence action against the employer and received $365,000. The insurer (the Fund) consented to the amount from the settlement but disputed the allocation of the different heads of damages. The Fund then brought an application for determination of the appropriate distribution of the settlement for subrogation purposes. The application judge allocated the funds, reducing income loss claims for risk and "puffery". The Fund appealed to the Court of Appeal, but the appeal was dismissed. On appeal, it was held that the application judge's assessment of damages was found to be supported by evidence of causation and liability issues. The judge was left to make an assessment based on limited information. He was open to basing his percentages on the amount claimed in the mediation brief and not what should have been claimed

based on estimates provided by the Fund on appeal. The application judge's discretion over the risk assessment did not amount to a misapprehension of the evidence. The Court of Appeal also found that the application judge's decision that the Fund's failure to attend a mediation between the employee and his employer resulted in it waiving its right to be informed and was not an error in law.

- **Sample Documents—Sample Letters from Employers to Employees—**A new sample letter was added to Appendix A1 as follows:
- Response to Request for Reasonable Accommodation
- **Sample Documents— Checklists and Other Forms for Employers—**A new Appendix A7 was added, with the following checklists and other forms included:
- Reasonable Accommodation for People with Disabilities
- Evacuating Employees with Disabilities—An Emergency Preparedness Plan
- Reasonable Accommodation Assessment
- Voluntary Disclosure Form for Employees with Disabilities
- Selecting a Reasonable Accommodation
- Accommodating Disabilities—Policy Checklist
- Training for Managers of Employees with Episodic Disabilities
- Substance Use Policy— Checklist
- Bona Fide Occupational Requirements—Questions
- Termination of Employee with Physical Disability

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