Employment law: A guidance note for general practitioners on providing patient information to employers

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Background

Medical practitioners are often caught between a patient who is reluctant to provide their employer with personal health information and an employer who is requesting more detailed health information.

Objectives

This article outlines the rights and responsibilities of employees and employers with regards to the provision of personal health information within employment, and how medical practitioners can assist in advocating for their patient. Topics covered include legal requirements for medical certificates; when certificates can be questioned by an employer; and whether employers can request additional health information from a general practitioner (GP) or independent specialist.

Discussion

In many cases, employers have the right to seek further health information from their employees (eg for health and safety obligations), and employees can face disciplinary action and even dismissal if they are uncooperative. As GPs are necessarily involved in the provision of this information, it is important that they have a general understanding of employment law as it relates to the provision of a patient's personal health information to employers.

When is a medical certificate required and what information should it contain?

Under the National Employment Standards (NES), personal or carer's leave[1] can be taken:[2]

- when an employee is unfit for work because of illness or injury
- to provide care or support to a member of the employee's immediate family or household because of illness or injury, or an unexpected emergency.

For each year of service, an employee is entitled to 10 days of paid personal or carer's leave under the NES, or pro-rata for part-time employees.[1] To access personal or carer's leave, an employer may require the employee to give evidence of the reason for the leave that would satisfy a reasonable person[3] – this is usually a medical certificate. There are no mandatory rules under the NES as to the circumstances in which a medical certificate must be provided. However, 'rules' can be outlined in applicable industrial instruments or employment policies, and can vary between employers and situations. For example, if an employee used an excessive amount of personal leave, an employer may reasonably require a certificate for subsequent periods of leave, whereas for other employees, a certificate may only be required after two or three days of continuous leave.

The purpose of a medical certificate is to detail how the patient's condition affects their work capacity. Therefore, in many situations, a certificate that simply states that the patient is suffering from a 'medical condition' and is 'unfit for work' will, as a minimum, be sufficient. When issuing a medical certificate, the Australian Medical Association's *Guidelines on Medical Certificates 2011* (revised 2016; AMA Guidelines) should generally be followed.[4] However, in other situations, an employer may reasonably and lawfully require – from their employee – more detailed medical information, particularly where:

- there has been or will be an extended period of time away from work, or leave is required on a regular or ongoing basis
- an employee is returning to work or claims to have recovered after an extended period of incapacity
- workplace adjustments are required to accommodate persistent incapacity
- the employment is in a safety critical position or has statutory safety compliance requirements.

In these situations, certificates need to be more detailed and clearly state any required adjustments in the context of the particular workplace and duties. It may be appropriate, with the patient's consent, for the treating practitioner to liaise directly with the employer to ensure there is a good understanding of the workplace and what can be accommodated; this

can often be beneficial in ensuring the patient is returned safely to work in a timely manner. If the employee has privacy concerns, the employer should be asked to confirm that the information will be shared only with those who are specifically managing the employee.

Do employers have the right to question the legitimacy of a medical certificate?

An employer can question a medical certificate if there are suspicious circumstances surrounding an employee's incapacity or the medical certificate itself (eg post-illness or backdated certificate – refer to the AMA Guidelines for further information). In these situations, the employer may do one or more of the following:

- Ask the employee questions relating to their condition.
- Seek to confirm the authenticity of a certificate with the treating practitioner.
- Ask further questions of the treating practitioner (with the employee's consent).

For example, in *Kubat v Northern Health*,[5] after having a request for leave without pay for family-related travel denied, Kubat provided a future-dated medical certificate for the period she had proposed to take leave. In the circumstances, it was found to be reasonable for the employer to question Kubat about her medical certificate.

Can employers require additional medical information from a treating practitioner?

In certain circumstances, employers can require additional medical information from an employee's treating practitioner. Employers have a non-delegable duty of care for the safety of anyone affected by their business operations. If the circumstances indicate that an employee's health may have an impact on their safety at work, or that of third parties (eg co-workers), the employer has the right to clarify whether the employee's circumstances can safely be accommodated.[6]

Additional information may also be required to ascertain whether adjustments to the workplace can be made without detrimentally affecting the business, or to ascertain whether the employee is able to fulfil the inherent requirements of their position over the long term. In these circumstances, even if an employee is reluctant to provide the information, the employee – under a lawful threat of dismissal – can be directed to consent to provision of the information by their treating practitioner.*

In *Columbine v The GEO Group Australia*,[7] Columbine had been on modified duties away from her substantive position (corrections officer in a prison) for more than two years because of a medical condition. When informed that those duties were no longer available, Columbine provided a medical certificate stating that she could return to her original position, but with extensive limitations that would be reviewed after a month.

The next day, GEO wrote to Columbine stating that it was considering terminating her employment as she was unable to fulfil the inherent requirements of her position and requesting any information that should be considered prior to making a decision. A week later, Columbine emailed GEO stating that she had 'been given the all clear'.

GEO wrote a further letter to Columbine requesting a report from her general practitioner (GP) as to why his opinion had changed so significantly, and an authority allowing GEO to correspond directly with the GP. The GP did provide a brief report stating Columbine was fit for full duties, but he did not satisfactorily explain the change, and Columbine refused to give GEO authority to correspond directly with the GP.

GEO subsequently dismissed Columbine for not engaging with GEO in ensuring her health and safety, and that of others at work, thus disobeying a reasonable and lawful direction. Columbine made an unfair dismissal claim. During the hearing, it came out that:

- the report produced by the GP was nearly identical to a draft Columbine had emailed to the GP
- Columbine had not provided the GP with details of GEO's requirements or with GEO's letter requesting further information.

For these reasons, the Fair Work Commission (FWC) was critical of the GP's report, stating it was not a 'considered report' of the practitioner and that it failed to address GEO's requirements. It also became apparent during the hearing that the GP was reluctant to engage with the employer. However, as the employer was unaware of this, the FWC did not consider it to be relevant in determining the matter.

The FWC upheld the dismissal, affirming GEO's responsibility for the health and safety of Columbine, her co-workers and prisoners. The FWC also stated that GEO was entitled to conclude that there were health and safety issues involved, considering Columbine's medical status had changed significantly and suddenly.

Can employees be required to attend a medical assessment with an independent specialist?

Courts and tribunals will generally read into employment contracts, on safety grounds, a right of employers to direct their employees to submit to an independent medical assessment.[8] In determining whether a direction is reasonable, the main consideration is whether there is sufficient information to indicate there may be medical issues with potential adverse implications for work performance or safety. In particular, the courts consider:[6]

- long absences
- evidence regarding the employee's (lack of) capacity to perform the inherent requirements of a job

**In some instances, for example, where legal professional privilege may apply or where the GP suspects that the patient's health may be affected by becoming aware of certain medical information, further advice about the specific situation should be sought prior to release of the information.*

- the adequacy of medical information provided to explain absences or to demonstrate fitness for work
- sudden reported changes in the employee's abilities (eg Columbine's case)
- whether the employment is in a safety critical position
- any suspicious circumstances surrounding absences or claimed illness
- whether the employee has been advised of any concerning conduct and, ideally, given an opportunity to respond.

If a direction to attend an independent medical assessment is reasonable, an employer may be able to legitimately dismiss an employee for failing to comply with that direction. Typically, such directions will involve examination by a specialist, appointed and paid by the employer. This allows the employer to choose a practitioner who is familiar with the workplace, or to ensure the assessment is conducted with full information in that regard and full access to the outcomes. To assist in the assessment, the employer may provide previous GP reports or medical certificates to the specialist, and the employee may also be required to provide previous investigation results. On occasion, a treating practitioner may be given a copy of the assessment for comment, either by the employee or employer.

Key points

- While it is often the case that medical certificates stating an employee is 'suffering from a medical condition' will be sufficient, in certain situations, more detailed information will be legitimately required by employers.
- Employers have the right to question the legitimacy of medical certificates in suspicious circumstances.
- Where employers have concerns regarding the impact of an employee's health on safety in the workplace, or there is uncertainty regarding adjustments required or the employee's capacity to fulfil the inherent requirements of the job, employers can request employees to consent to obtaining further information from a treating practitioner – under threat of dismissal if necessary.
- When employees do consent, treating practitioners responding to requests for information from employers should specifically consider the employer's concerns or requirements within any report and, in more complex situations, consider engaging directly with the employer.
- A treating practitioner who is reluctant to engage with an employer for whatever reason should ensure the employer is informed as such so that the employee is not prejudiced in any way.
- In these and other circumstances, an employer can direct employees to submit to an independent medical assessment by a specialist appointed by the employer.

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