

MEDICAL CERTIFICATES FOR SICK LEAVE AND/OR REASONABLE ACCOMMODATION: EXPOSITON OF THE LAW AND RECOMMENDATIONS

1. INTRODUCTION

SAMA's primary duty is towards its members, and in dealing with issues relating to certification by medical practitioners, it will aim to protect the interests and integrity of the profession.

The Association is receiving more and more calls from medical practitioners about employers requesting detailed information on patients. In this medical practitioners are often threatened with legal action, etc. In short, medical practitioners have found themselves right in the middle of many a battle between employer and employee.

From the analysis of the relevant legislative frameworks below, it should be clear that no absolute and unconditional disclosures are permitted, and that there is no general rule that any employer is entitled to know the health status of his/her employees. Disclosures have to take place with the specific objectives in mind, and within the limited circumstances of the provision. It should be noted that there may be differences in what (and to what extent) is disclosed when certification, reporting, investigations and examinations are referred to.

Recommendations are found on the last page of this paper.

2. THE ETHICAL FRAMEWORK

Health care practitioners are bound to maintain confidentiality, and may only divulge information to third parties if the patient consents, if the law so requires or if ordered to do so by a court of law. One instance where the law requires of a medical practitioner to disclose, would, for example, be where the doctor knows that a person is employed as a driver and is medically unfit to do so.

The Health Professions Council of South Africa's (HPCSA) ruled in May 2001 that no diagnosis may be stated on a medical certificate without the patient-employee's informed consent. The Ethical rules state that a certificate should include:

“(a) the name, address and qualifications of the practitioner; (b) the name of the patient; (c) the employment number of the patient (if applicable); (d) the date and time of the examination; (e)

whether the certificate is being issued as a result of personal observations by the practitioner during an examination, or as the result of information received from the patient and which is based on acceptable medical grounds; (f) a description of the illness, disorder or malady in layman's language **ONLY WHEN THE PATIENT PROVIDE INFORMED CONSENT**; (g) whether the patient is totally indisposed for duty or whether the patient will be able to perform less strenuous duties in the work situation; (h) the exact period of recommended sick leave; (i) the date of issue of the certificate of illness; and (j) a clear indication of the identity of the practitioner who issued the certificate."

If pre-printed stationery is used, words that should be deleted should in fact be deleted. To refuse to issue a brief, factual report to a patient where such patient on reasonable grounds requires information concerning him, is also prohibited.

South Africa adopted a Bill of Human Rights that protects the right to privacy and confidentiality, and a number of laws were enacted, dealing with issues of information, privacy and discrimination. Health issues have also received more prominence, due to HIV/AIDS. As more employers become involved with the medical welfare of their employees, via medical schemes, occupational health practitioners or merely in coping with the impact of HIV/AIDS, the matter becomes more pressing.

3. THE LEGAL FRAMEWORK

3.1 The Promotion of Access to Information Act (PAIA)

The **Promotion of Access to Information Act** of 2000 states that personal information may be withheld from a third party (section 63). "Personal information" is defined as:

"information about an identifiable individual, including, but not limited to—

...

- (b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved..."

3.2 Basic Conditions of Employment Act (BCEA)

The **Basic Conditions of Employment Act** of 1997 provides as follows:

"23. **Proof of incapacity.**—

- (1) An employer is not required to pay an employee in terms of section 22 if the employee has been absent from work for more than two consecutive days or on more than two occasions during an eight-week period and, on request by the employer, does not produce a medical certificate stating that the employee was **unable to work for the duration** of the employee's absence on account of sickness or injury.
- (2) The medical certificate must be issued and signed by a medical practitioner or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament.
- (3) If it is not reasonably practicable for an employee who lives on the employer's premises to obtain a medical certificate, the employer may not withhold payment in terms of subsection (1) unless the employer provides reasonable assistance to the employee to obtain the certificate."

This means that in order for an employee to get paid sick leave, s/he has to produce a medical certificate of a person registered by a professional council. **The Act does not require any diagnosis, only that the employee was unable to work for the duration of the employee's absence.** Occupational injuries and diseases are not included and are to be handled separately i.t.o. section 24 BCEA.

Any disclosure of an illness therefore rests with the employee, and employers can use various mechanisms, such as informed consent, the principle of reasonable accommodation, (contractual) provisions in its policies, etc. to obtain information they may need to plan in relation to human resources.

It has also been suggested that workplaces should have an occupational health practitioner who could enquire from the patient-employee's medical practitioner the nature and extent of the illness, for purposes of verification, and that both will be bound by the duty to confidentiality.

3.3. Labour Relations Act (LRA)

According to section 188 of the **Labour Relations Act** of 1995, a dismissal will be justified if it was fair and related to the employee's capacity. The Code of Good Practice: Dismissal (schedule 8, LRA) determines as follows:

" 10 Incapacity: Ill health and injury. —

- (1) Incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability.
- (2) In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.
- (3) The degree of incapacity is relevant to the fairness of any dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism or drug abuse, counselling and rehabilitation may be appropriate steps for an employer to consider.
- (4) Particular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness. The courts have indicated that the duty on the employer to accommodate the incapacity of the employee is more onerous in these circumstances."

This process once again illustrates the fact that the primary relationship is between employer and employee. It also affirms that the relevant information relates to the extent and duration of incapacity, not the exact nature or description of the illness. It states that any employer must embark on a process of investigation. Where such investigation entails contacting the employee's medical practitioner, the practitioner may, in the absence of a legislative provision to that effect, only disclose what the patient has consented to. In terms of item 10(2), the employee must state his/her side of the case and it is likely that in this process, the employee may consent to more medical information been made available or make the information available him/herself. This is affirmed by item 11 in the Code:

"11. Guidelines in cases of dismissal arising from ill health or injury.—

Any person determining whether a dismissal arising from ill health or injury is unfair should consider—

- (a) whether or not the employee is capable of performing the work; and
- (b) if the employee is not capable—
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or, where this is not possible, the extent to which the employee's duties might be adapted; and
 - (iii) the availability of any suitable alternative work.

Where an employee faces dismissal due to prolonged absences based on incapacity, the medical practitioner may be approached to state whether the employee is/was capable to work, and if not, the extent thereof, the possibility for reasonable accommodation and suitable alternative work. However, there is nothing indicating in section 11 that a medical practitioner has to co-operate with an employer in this regard. It is advised that such co-operation only take place with the employee-patient's informed consent.

It will also be reasonable for an employer to require that the employee provide proof regarding the need for reasonable accommodation. Part of this process may entail an agreement to consult an independent / third party practitioner, so as to assess the situation and report to both parties (after informed consent has been provided) in this regard. This will be the case where an employee alleges that accommodation or alternative work is viable, or any allegation in relation to the extent of the incapacity.

3.4. Employment Equity Act (EEA)

The **Employment Equity Act** of 1998 prohibits discrimination on disability and HIV status. **It also prohibits medical testing on employees, except where legislation permits or where the Labour Court approves such testing.** The Labour Court has already ruled that employees may only be submitted to HIV tests where they provide their informed consent.

3.5 Health Professions Act 56 of 1974

Section 16 – Certificates and reports

- (1) A practitioner shall grant a certificate of illness only if such certificate contains the following information –
 - (a) The name, address and qualification of such practitioner;

- (b) The name of the patient;
 - (c) The employment number of the patient (if applicable);
 - (d) The date and time of the examination;
 - (e) Whether the certificate is being issued as a result of personal observations by such practitioner during an examination, or as a result of information which has been received from the patient and which is based on acceptable medical grounds;
 - (f) A description of the illness, disorder or malady in layman's terminology with the informed consent of the patient: Provided that if such patient is not prepared to give such consent, the practitioner shall merely specify that, in his or her opinion based on an examination of such patient, such patient is unfit to work;
 - (g) Whether the patient is totally indisposed for duty or whether such patient is able to perform less strenuous duties in the work situation;
 - (h) The exact period of recommended sick leave;
 - (i) The date of issue of the certificate of illness; and
 - (j) The initial and surname in block letters and the registration number of the practitioner who issued the certificate
- (2) A Certificate of illness referred to in sub rule (1) shall be signed by a practitioner next to his or her initials and surname printed in block letters
 - (3) If pre-printed stationary is used, a practitioner shall delete words which are not applicable
 - (4) A practitioner shall issue a brief factual report to a patient where such patient requires information concerning him or herself.

4. REASONABLE ACCOMMODATION

It is clear that the above-mentioned Code of Good Practice refers to investigations into the possibility of reasonable accommodation of employees who are incapacitated. This concept is also found in the Employment Equity Act, and is widely seen as a manifestation of the principle of substantive equality. Reasonable accommodation means that the employer must do everything short from that causing undue hardship, to accommodate the employee's illness/incapacity. This may include changing the job description, -workplaces or work-stations, -shifts/hours of work, etc.

5. ABSENCES RELATING TO FAMILY RESPONSIBILITY

The BCEA allows for three days off to employees in connection with family responsibility, e.g. illness, death, etc. of immediate family members. This is a statutory right accruing unto any employee. Section 27 BCEA reads as follows:

“27. Family responsibility leave.—(1) This section applies to an employee—

- (a) who has been in employment with an employer for longer than four months; and
- (b) who works for at least four days a week for that employer.

(2) An employer must grant an employee, during each annual leave cycle, **at the request of the employee, three days’ paid leave, which the employee is entitled to take—**

- (a) when the employee’s child is born;
- (b) when the **employee’s child is sick**; or
- (c) in the event of the death of—
 - (i) the employee’s spouse or life partner; or
 - (ii) the employee’s parent, adoptive parent, grandparent, child, adopted child, grandchild or sibling.

(3) Subject to subsection (5), an employer must pay an employee for a day’s family responsibility leave—

- (a) the wage the employee would ordinarily have received for work on that day; and
- (b) on the employee’s usual pay day.

(4) An employee may take family responsibility leave in respect of the whole or a part of a day.

(5) Before paying an employee for leave in terms of this section, an employer may require reasonable proof of an event contemplated in subsection (1) for which the leave was required.

(6) An employee’s unused entitlement to leave in terms of this section lapses at the end of the annual leave cycle in which it accrues.

(7) A collective agreement may vary the number of days and the circumstances under which leave is to be granted in terms of this section.”

Where the person who is ill is not the patient of the practitioner, s/he cannot certify that such patient’s family member is sick. However note that an employee may attach a medical certificate from the practitioner treating such child or family members regarding his/her child in support of their application for family responsibility leave, provided that the medical practitioner who saw that child actually give such a certificate.

6. OCCUPATIONAL SAFETY, -INJURIES & DISEASES

6.1 Occupational Health and Safety Act (OHSA)

This Act provides as follows:

“23 Report to chief inspector regarding occupational disease.—Any medical practitioner who examines or treats a person for a disease described in the Second Schedule to the Workmen’s Compensation Act, 1941 (Act No. 30 of 1941), or any other disease which he believes arose out of that person’s employment, shall within the prescribed period and in the prescribed manner report the case to the person’s employer and to the chief inspector, and inform that person accordingly.”

In relation to disclosures, it states

“36. No person shall disclose any information concerning the affairs of any other person obtained by him in carrying out his functions in terms of this Act, except—

- (a) to the extent to which it may be necessary for the proper administration of a provision of this Act;
- (b) for the purposes of the administration of justice; or
- (c) at the request of a health and safety representative or a health and safety committee entitled thereto.”

6.2 Mine Health and Safety Act (MHSA)

This Act contains the following provisions:

“13. Employer to establish system of medical surveillance.—(1) The employer must establish and maintain a system of medical surveillance of employees exposed to health hazards—

- (a) if required to do so by regulation or a notice in the Gazette; or
- (b) if, after assessing risks in terms of section 11 (1), it is necessary to do so.

(2) Every system of medical surveillance must—

- (a) be appropriate, considering the health hazards to which the employees are or may be exposed;
- (b) be designed so that it provides information that the employer can use in determining measures to—
 - (i) eliminate, control and minimise the health risk and hazards to which employees are or may be exposed; or

- (ii) prevent, detect and treat occupational diseases; and
- (c) consist of an initial medical examination and other medical examinations at appropriate intervals.

...

(6) If any employee is declared unfit to perform work as a result of an occupational disease, the employer must conduct an investigation in terms of section 11 (5).

(7) If an employee is **temporarily unfit** to perform work as a result of any occupational disease, but there is a reasonable expectation that the employee's health will improve so that the employee can return to work, the occupational medical practitioner must **record that fact and notify both the employer and employee of it.**"

It should be noted that only medical practitioners working on this Act may in terms of section 13(7) notify the employer of the employee being temporarily unfit and the reasonable expectation of improvement. **It does not specify diagnoses, neither does the investigation in terms of section 11 state that the specific employee or the exact nature of the illness or disease must be disclosed.** Section 15 protects the **employee's confidentiality** and the principle of **informed consent** in relation to disclosures:

"15. Record of medical surveillance.—(1) An employee's record of medical surveillance kept in terms of section 13 (3) (c) must be kept confidential and may be made available only—

- (a) in accordance with the ethics of medical practice;
- (b) if required by law or court order; or
- (c) if the employee has consented, in writing, to the release of that information.

(2) Any person required to maintain an employee's record of medical surveillance must—

- (a) store it safely; and
- (b) not destroy it or dispose of it, or allow it to be destroyed or disposed of, for 40 years from the last date of the medical surveillance of that employee."

"Medical surveillance" means a planned programme of periodic examination, which may include clinical examinations, biological monitoring or medical tests, of employees by an occupational health practitioner or by an occupational medical practitioner.

Three other sections are also relevant in this regard:

“16. Annual medical reports.—(1) Every occupational medical practitioner at a mine must compile an annual report covering employees at that mine, giving an analysis of the employees’ health based on the employees’ records of medical surveillance, without disclosing the names of the employees.

(2) The annual report compiled in terms of subsection (1) must be given to the employer, who must deliver one copy of the report to each of—

- (b) the health and safety committees, or if there is no health and safety committee, the health and safety representatives; and
- (c) the Medical Inspector.

17. Exit certificates.—(1) If an employee was subject to, or was required to be subject to, medical surveillance in terms of this Act and such employee’s employment at a mine is terminated for any reason, the employer must arrange an exit medical examination of the employee.

(2) The examination referred to in subsection (1) must be held before, or as soon as possible after, termination of employment.

(3) The employee must attend the examination.

(4) The occupational medical practitioner conducting the examination must—

- (a) produce an exit certificate with respect to that employee indicating the results of all medical surveillance and the presence or absence of any occupational disease; and
- (b) enter a copy of the exit certificate into the employee’s record of medical surveillance.

18. Costs of examination.—The employer must pay the costs of all clinical examinations and medical tests performed in terms of this Act unless this Act expressly provides otherwise.”

As with the Promotion of Access to Information Act, an employee has the right to obtain information held on him/her:

“19. Employees’ right to information.—(1) An employee may request, and the employer must then provide, a copy of the record or of any part of it that—

- (a) is being kept in terms of sections 12 (3) and 13 (3) (c); and
- (b) relates to that employee.

(2) The occupational medical practitioner conducting an examination in terms of section 17 must provide the employee with a copy of the exit certificate prepared as a result of that examination.”

Section 20 provides for an employee to dispute a finding of unfitness to perform work.

Other legislation that regulate specific aspects of occupational health and safety include **Occupational Diseases in Mines and Works Act, 1973**.

6.3 Compensation for Occupational Injuries and Diseases Act (COIDA)

COIDA, 1993 contains the following provision:

“42. Employee to submit to medical examination.—

- (1) An employee who claims compensation or to whom compensation has been paid or is payable shall when so required by the Director-General or the employer or mutual association concerned, as the case may be, after reasonable notice, submit himself at the time and place mentioned in the notice to an examination by the medical practitioner designated by the Director-General or the employer or mutual association concerned.
- (2) Such expenses incurred by the employee to comply with the provisions of this section as the Director-General may deem necessary and reasonable, and the prescribed remuneration for a medical examination in terms of this section, shall be paid by the party requiring the examination.
- (3) If, in the opinion of any medical practitioner, the employee is not capable of calling upon the designated medical practitioner, the employee shall inform the party requiring the examination thereof or cause him to be so informed, and the designated medical practitioner shall then examine the employee at a time and place as agreed upon.
- (4) An employee shall be entitled at his own expense to have a medical practitioner or chiropractor of his choice present at an examination by a designated medical practitioner.”

7. CONCLUSION

It is possible to harmonise the ethical and legal duty to confidentiality with the interests of the employer within the framework of current legislation.

In order to achieve this, the following guidelines should be set:

Clear Policy

1. Employers should have a clear policy in relation to sick leave.
 - 1.1 When entering into the employment relationship, the employee signs an employment contract that refers to all the conditions of service that includes all policies.

- 1.2 In any policy, reference has to be made to the relevant legislative provisions.
- 1.3 In such a policy it may be stipulated that the employer may investigate the matter.
- 1.3.1 In such investigation the employee may be requested to provide written and informed consent so that the employee's medical practitioner may be contacted for purposes of explaining the impact of the employee's illness/incapacity on the employee's work to the employer. This may not necessarily entail disclosing the exact illness/incapacity.
- 1.3.2 The investigation may entail recommendations from the practitioner in relation to reasonable accommodation. It may also state that reasonable accommodation require proof and a willingness from the side of the employee to disclose material facts relevant to such accommodation.
- 1.3.3 The policy may also stipulate that employees may be required to undergo a second medical examination by either the company's medical practitioner or a practitioner of their own choice, at the employer's expense so as to confirm the duration and extent of the incapacity.
- 1.3.4 Employees should be made aware that prolonged absences or repeated absences from work may result in dismissal.

Informed consent

2. In the absence of-
- informed consent,
 - specific legislative provisions (such as OHSA, etc.) or
 - specific legal duties such as where the lives of other employees may be at stake,
- the medical practitioner may not disclose any patient information to any third party.

Confidentiality

3. Where a medical practitioner in the employ of the employer contacts the medical practitioner of an employee, such medical practitioner is also bound by the duty to confidentiality, and may not disclose any information to the employer unless the employee consents. Such a medical practitioner may however confirm the duration- and extent of the illness/incapacity with the employee's medical practitioner and relay that confirmation to the employer.

Fraud

4. Employers who suspect fraud from the side of the medical practitioner has to take the matter up with the medical practitioner and may report the matter to the relevant SAMA branch's

ethics committee. Employers who suspect fraud from the side of the employee have to take that up in terms of their specific disciplinary policies and procedures. Suspected fraud may also be reported to the relevant authorities.

Students and learners

5. The above could be applicable to learners/students and their places of learning.

HPCSA Ethical Rules

We also recommend that the HPCSA ethical rules in relation to what should be written on a medical certificate be changed. It should rather include the duration of- and extent to which the illness/incapacity will affect the employee's work, and not specify the diagnosis/illness, as consent may actually be obtained under the (impression of the) threat of leave not being granted, etc. It should also specify requirements of reasonable accommodation, if applicable.