



michigan municipal league

# Law Enforcement Action Forum Newsletter



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## Requiring Return-to-Work Doctor Slips for Sick Time & U.S. Supreme Court to Rule on Body Cavity Search



By Gene King, LEAF Coordinator

These days, top-management often asks, “Can I require an employee to provide a doctor’s slip so they can return to work or does this violate some law or regulation on privacy”? As we will discuss in this newsletter, it depends on the situation, on any policies or agreements in force, and on whether the organization applies the requirement uniformly and within statutory guidelines.

In dealing with employees’ medical information, it can be challenging for employers to determine just what they must do to avoid the pitfalls associated with the many laws and regulations governing employee health information. The acts that most commonly arise in discussing whether requiring employees to provide a doctor’s slip violates privacy rights are the Health Insurance Portability and Accountability Act (HIPAA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), and the Genetic Information Nondiscrimination Act (GINA). In addition, if someone is really reaching they may point to the Michigan Public Health Code, MCL 333.513. This rule imposes a criminal penalty for revealing information from all reports, records, and data concerning serious communicable diseases or

infections of HIV and acquired immunodeficiency syndrome for the information is confidential. It is no wonder that the mention of the acts, especially when coupled with Title VII Civil Rights violations or Michigan’s Elliott-Larsen Civil Rights Act (MCL 37.2101), sends chills through all but those managers who are well-versed in employee law.

Examining the acts, however, makes it clear that making decisions about requiring employees to submit a doctor’s slip after using sick time is far simpler than many managers imagine.

### Can’t Use HIPAA

The LEAF committee turned to its Legal Advisor, Audrey Forbush, and asked her, “Can an employer require a doctor’s slip for return to work if an employee uses sick leave?” Her response was “Yes!” She went on to say that the first thing that employers have to recognize is that asking for information does not violate any privacy rights as long as the request is in the context of information that the laws allow employers to obtain.

Many people erroneously believe that a request for a doctor's slip violates the HIPAA law. Forbush points out those HIPAA privacy requirements apply to covered entities. These generally include hospitals, medical offices, health insurance or medical billing offices, which could include Fire/EMS operations billing for patient treatment and transport. Unless the municipal entity has a health insurance plan that is entirely self-insured, the privacy section of HIPAA is not likely to apply.

Since requesting information is permissible, the holder of the information is responsible for meeting HIPAA's privacy requirements. For the holder to provide specific medical information, the employee will need to sign a release. This does not apply if the employee is getting benefits under Workers' Compensation for it is exempted under HIPAA.

Forbush went on to say that employers might ask for medical information to complete FMLA documentation or to clarify a request for an ADA or Persons with Disabilities Civil Rights Act (PWDCRA - MCL 37.1101) accommodation and to substantiate an employee's use of sick time. Once employers obtain the medical information, they must keep it apart from personnel records and share it only on a need to know basis.

### **Before Requesting a Doctor's Slip**

Although there is nothing in the law to prevent employers from requesting medical information for a variety of situations, Forbush said that before requiring a doctor's slip, employers need a policy that outlines the rules and practices for using sick time. The policy should outline what the organization considers acceptable use and under what circumstances, including the logistics of reporting the use. The employer should reserve, at their expense, the ability to verify fitness for duty prior to the employee returning to work. If a labor contract is in place the practice could be subject to negotiations.

In addition, employers should require employees who are returning to work to produce an employer

designated form on which their treating medical professional has certified that they are fit to return to work. A defined length of absence or a pattern or reasonable suspicion that abuse exists may trigger the use of the form. The policy should prescribe what type of medical professional is acceptable and outline the information that is required on the form. The employer must apply the policy equally to all employees no matter their status.

Forbush recommends that the employer-provided form require the nature of the employee illness, fitness for return to work and any restrictions that may be appropriate. The form should require the doctor's signature and printed name including credentials, location of treatment and telephone and electronic contact information.

### **The ADA Is Not An Excuse**

Forbush points to the 2011 case of *Lee v. City of Columbus, Ohio*, No. 09-3899 (6th Cir. Feb. 23, 2011) in which the U.S. Sixth Circuit Court of Appeals ruled that they did not find the requirement that an employee provide a general diagnosis – or in this case, an even less specific statement regarding the “nature” of an employee's illness – to be tantamount to an inquiry “as to whether such employee is an individual with a disability or as to the nature or severity of the disability” under the ADA (42 USC§12112(d)(4)(A)).

In addition, she cites [EEOC Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the Americans with Disabilities Act \(ADA\)](http://www.eeoc.gov/policy/docs/qanda-inquiries.html) (found at <http://www.eeoc.gov/policy/docs/qanda-inquiries.html>):

***DISABILITY-RELATED INQUIRIES  
AND MEDICAL EXAMINATIONS  
RELATED TO LEAVE***

***May an employer request that an employee provide a doctor's note or other explanation when the employee has used sick leave? (Question 15)***

Yes. An employer is entitled to know why an employee is requesting sick leave. An employer, therefore, may ask an employee to provide a doctor's note or other explanation, as long as it has a policy or practice of requiring all employees to do so.

***May an employer ask disability-related questions or require a medical examination when an employee who has been on leave for a medical condition wants to return to work? (Question 17)***

Yes, if an employer has a reasonable belief that an employee's **present** ability to perform essential functions will be impaired by a medical condition or that he or she will pose a direct threat because of a medical condition. Any inquiries or examination, however, must be limited in scope to what is needed to determine whether the employee is able to work.

Forbush said that other courts and the EEOC have relied upon the enforcement guidance as a resource for ruling that an employer's request for employees to supply information justifying the use of sick leave is not an improper medical inquiry under the Rehabilitation Act or the ADA.

In *Lee*, the court cited *Lambert v. Hartman*, 517 F.3d 433, 442 (6th Cir. 2008) in which the court reaffirmed their position on privacy in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998) and *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998). The court said that by applying these

standards, this court has recognized an informational privacy interest of constitutional dimension in only two instances: (1) where the release of personal information could lead to bodily harm (*Kallstrom*), and (2) where the information released was of a sexual, personal, and humiliating nature (*Bloch*).

Furthermore, Forbush added that there are certain job classifications in a municipal entity that are important to providing critical service to the public. Examples are public safety, corrections and water and wastewater operators. Employers may want to add a line to the Doctor's Slip that asks if the employee's injury or illness presents a direct threat to the health or safety of other individuals at work.

If the answer is yes, the employer may wish to request a note from the employee's doctor stating that the employee is not contagious or to identify any workplace modifications that may be necessary to protect the health and safety of others. To make this request, the employer must be able to demonstrate that the request for information is job-related and that the practice of asking for the information is consistent with a legitimate business purpose.

It is important for employers to work with a trained human resources specialist or legal counsel when formulating a policy and developing the forms they will require employees to use. The labor contracts often speak to the issue of regulating sick time use. Employers should also ensure compliance with the management rights language in the labor contract as it pertains to establishing a new policy or rule.







**Medical Information Regulated By The Rest**

Forbush cautions employers to understand that requests for medical information for the ADA, FMLA, GINA, or for the many other acts concerning employee health issues, must be specific and targeted to the issue the employer is addressing. Examples are FMLA medical certification or ADA accommodation requests. Medical information that

employers obtain must, under the various laws, be kept as private as is reasonable. Storing records separately from personnel files and having a policy of only providing information on a need to know basis is best practice. In addition, supervisors and managers should receive training in their responsibility to secure information that their employers hold private. Charges of civil rights violation generally are the outcome of another using information held by the employer to discriminate against or do harm to the subject as a result of obtaining the information.

If employees discuss or disclose their medical information to others, it is not an issue for employers unless a safety or discrimination issue exists. Any information employers obtain through public domain is not protected. Inadvertent discovery of information through social media or other means prior to employment decisions can be problematic and have been mentioned in the LEAF Newsletter on Social Media (October 2009).

#### Things To Do:

-  Implement a policy that you apply equally to all employees and meets labor contract obligations.
-  Require employees to submit the employer-provided Doctor's Slip if and when they meet criteria in the policy.
-  Keep medical information in separate files and provide it on a need to know basis.
-  Train supervisors and managers to their responsibilities and hold them accountable.
-  Train all employees to the policy and the use of the form.
-  Consult a human resources professional or legal counsel on issues of medical information, compliance with regulations and fitness for duty evaluations.

### U.S. Supreme Court to Hear Visual Body Cavity Search Legality Case

The U.S. Supreme Court has agreed to hear the appeal of *Florence v Board of Freeholders of*

*Burlington County et. al.*, 621 F. 3d 296 (3<sup>rd</sup> Cir., 2010); cert. granted 131 S. Ct. 1816 (2011) which involves a claim that having a blanket policy to strip search every new detainee, regardless of the charge, violates the Fourth Amendment. The Third Circuit Court of Appeals held that it is reasonable to search everyone being jailed, even without suspicion that a person may be concealing a weapon or drugs. The Court of Appeals reversed a Federal District Court ruling that such a blanket policy was unconstitutional.

The facts in the case are that Albert Florence was strip searched twice, in two different jails, in the seven days after his arrest on a warrant for a traffic violation he had already paid. Florence filed a lawsuit against officials of the two counties and at the two jails, contending the jailhouse searches were unreasonable because he was being held for failure to pay a fine, which is not a criminal offense in New Jersey. Upon appearing in court, all charges were dismissed.

He brought suit for civil rights violations citing, among other cases, *Bell v. Wolfish*, 441 U.S. 520 (1979), in which the Supreme Court rejected a Fourth Amendment challenge to a policy of visual body cavity searches for all detainees—regardless of the reason for their incarceration—**after contact visits with outsiders** (Emphasis Added). The Court applied a balancing test and concluded that the visual body cavity searches were reasonable because of the prison's security interest

Since *Bell* was decided, ten circuit courts of appeals applied its balancing test and uniformly concluded that an arrestee charged with minor offenses may not be strip searched consistent with the Fourth Amendment unless the prison has reasonable suspicion that the arrestee is concealing a weapon or other contraband.

In this case the Third Circuit joined the Eleventh Circuit in *Powell v. Barrett*, 541 F.3d 1298, 1300 (11th Cir. 2008) (en banc) and the Ninth Circuit in *Bull v. City and County of San Francisco*, 595 F.3d 964 (9th Cir. 2010) in determining that a blanket

policy of strip searching all arrestees admitted to a general jail population is reasonable under *Bell*.

Because of this significant split in the various circuits, it is apparent that the U.S. Supreme Court thinks it needs to review the issues some 32 years after the original decision and decide if the Bell analysis by the Circuits is in line with their opinion. The U.S. Supreme Court's decision in this case could significantly change the practices of jails and lock-up facilities in how they handle non-criminal offenders that are taken into custody. It will also standardize practices around the country.

This issue before the Court involves a policy of visual inspection of a person and is defined as a strip search. In Michigan the law is very specific on performing strip searches as outlined in part: (Added Emphasis)

#### **MCL 764.25a Strip search.**

Sec. 25a.

(1) As used in this section, "strip search" means a search which requires a person to remove his or her clothing to expose underclothing, breasts, buttocks, or genitalia.

(2) A person arrested or detained for a misdemeanor offense, or an offense which is punishable only by a civil fine shall not be strip searched unless both of the following occur:

(a) The person arrested is being lodged into a detention facility **by order of a court** or there is reasonable cause to believe that the person is concealing a weapon, a controlled substance, or evidence of a crime.

(b) The strip search is conducted by a person who has **obtained prior written authorization from the chief law enforcement officer of the law enforcement agency conducting the strip search, or from that officer's designee**; or if the strip search is

conducted upon a minor in a juvenile detention facility which is not operated by a law enforcement agency, the strip search is conducted by a person who has obtained prior written authorization from the chief administrative officer of that facility, or from that officer's designee...

In addition:

6) A law enforcement officer, any employee of the law enforcement agency, or a chief administrative officer or employee of a juvenile detention facility who conducts or authorizes a strip search in **violation of this section is guilty of a misdemeanor.**

(7) This section shall not apply to the strip search of a person lodged in a detention facility **by an order of a court** or in a state correctional facility housing prisoners under the jurisdiction of the department of corrections, including a youth correctional facility operated by the department of corrections or a private vendor under section 20g of 1953 PA 232, MCL 791.220g.

The anticipated ruling before the Supreme Court will give guidance on issues of federal civil rights protections in federal court but in Michigan Court the law of the state will be the focus.

If a department has a jail or lock-up facility that meets the definition of a detention facility, they should watch this case closely and seek guidance from their legal counsel on any practice that falls within this discussion.

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LEAF continues to develop policies and resource documents designed to help Law Enforcement Executives manage their risk exposure. Do not hesitate to contact the Michigan Municipal League's, Loss Control Services at 800-482-2726, for your risk reduction needs and suggestions.

*While compliance to the loss prevention techniques suggested herein may reduce the likelihood of a claim, it will not eliminate all exposure to such claims. Further, as always, our reader's are encouraged to consult with their attorneys for specific legal advice.*

LAW ENFORCEMENT ACTION FORUM (LEAF) is a group of Michigan law enforcement executives convened for the purpose of assisting loss control with the development of law enforcement model policy and procedure language for the Manual of Law Enforcement Risk Reduction. Members of the LEAF Committee include chiefs, sheriffs, and public safety directors from agencies of all sizes from around the State.

The LEAF Committee meets several times yearly to exchange information and ideas relating to law enforcement issues and, specifically, to address risk reduction efforts that affect losses from employee accidents and incidents resulting from officers' participation in high-risk police activities.

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