MEMORANDUM OF LAW

DATE: March 30, 1989

TO: Dan Teague, Long Term Disability Administrator

FROM: City Attorney

SUBJECT: Long Term Disability

In a memorandum dated February 24, 1989, you asked this office for legal advice concerning two aspects of long term disability (LTD). First, can an application for sick or annual leave be construed as notice for purposes of LTD, and second, if it is so construed, when is an employee entitled to have 70% of the hours used for his/her illness reinstated to his/her leave balance? You have indicated that employees are using accumulated sick leave for long term illnesses thereby receiving 100% of their wages during the term of their unemployment. Upon returning to work, these employees apply for LTD and request that 70% of their leave time be reinstated. Had the employees opted to use LTD initially, their leave time would have remained intact but they would have been compensated during their illness at only 70% of their full salary.

The City of San Diego's Employees' Long Term Disability Plan contains in Article VII, Section 7.4, a requirement that claims for benefits be made in writing on forms provided by the Plan Administrator and be filed with the Administrator within sixty (60) days of the disability date or within sixty (60) days of the date the claimant first becomes aware of the disabling condition. This provision is similar to clauses found in most insurance policies requiring the insured to give timely notice to the insurer of a loss or occurrence under the policy. The purpose of such a provision is to allow the insurer to form an intelligent estimate of its rights and liabilities, to afford an opportunity for investigation, to prepare for a defense if necessary, or to be advised that it is prudent to settle any claims. 39 Cal.Jur.3d Insurance Section 397. However, failure to comply with notice provisions will not bar recovery to the insured unless prejudice to the insurer is shown. Prejudice is not presumed and the burden of showing prejudice is on the insurer. Billington v. Interinsurance Exchange, 71 Cal.2d 728, 737 (1969). Campbell v. Allstate Ins. Co., 60 Cal.2d 303 (1963).

In the case of the City's LTD program the purpose of the notice is to give the administrator an opportunity to investigate the claim and determine whether the claim should be approved or

denied.

At first glance it appears that the failure of an employee to promptly file a claim for LTD creates no prejudice to the City, and the application for sick leave may be construed as constructive notice for purposes of LTD. This is true because an employee is entitled to LTD for extended illnesses and as long as the illness and the date it began are confirmed, date of notice causes no problems for the City. However, detriment to the City can be shown because the employee receives 100% of his/her wage while not working and then has 70% of his/her full salary leave time reinstated. This in effect creates a windfall benefit for the employee and prejudice to the City. This type of option shopping need not be tolerated. As the court stated in Schulze v. Schulze, 121 Cal.App.2d 75, 83 (1953), "One to whom two inconsistent courses of action are open and who elects to pursue one of them is afterward precluded from pursuing the other."

It is best to treat an employee's decision to use his/her sick leave or annual leave as an election. Employees are, or should be, aware of the option to use LTD in lieu of sick leave. The decision to use sick leave must be construed as a conscious decision by the employee to obtain the benefit of 100% of his/her wages during the period of the employee's illness. The employee cannot then return to the City and expect to have the benefit of those hours returned. The theory of election is based upon the principle of estoppel. This has been interpreted by the courts to mean:

> Whenever a party entitled to enforce two remedies either institutes an action upon one of such remedies or performs any act in pursuit of such remedy, whereby he has gained any advantage over the other party, . . . he will be held to have made an election of such remedy, and will not be entitled to pursue any other remedy for the enforcement of his right.

Steiner v. Rowley, 35 Cal.2d 713, 720 (1950).

Exceptions to this policy could be made in those instances when an employee is simply incapable of making a knowing and intelligent election. For example, if an employee were comatose, or mentally incapacitated for an extended period of time, the election could be waived until the employee was physically or mentally capable of making a decision.

However, except in the case of this type of extenuating circumstance, it is the opinion of this office that election would normally apply to the scenario you present and preclude an employee from requesting LTD after having received the benefits

of using sick leave. If the employee's initial decision is an election, the question of whether an application for sick leave can be construed as notice for purposes of LTD becomes moot.

JOHN W. WITT, City Attorney
By
Sharon A. Marshall
Deputy City Attorney

SAM:mrh:341.1(x043.2)
ML-89-35