

THE INVISIBLE EMPLOYEE

Managing Absenteeism in the Workplace

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INTRODUCING AN ATTENDANCE MANAGEMENT PROGRAM AND POLICY IN THE WORKPLACE

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WHY YOU NEED AN ATTENDANCE MANAGEMENT PROGRAM

- Financial costs
 - Overtime, income protection plans, replacement employees, training costs
- Productivity costs
 - Employees carrying extra work, supporting replacement employees, training new or replacement employees
 - Reduced productivity, loss of output
- Administrative costs
 - Time in securing replacements or re-assigning work
 - Time to control absenteeism

ABSENTEEISM AFFECTS THE WORKPLACE

- Affects employee morale – additional stress may be placed on employees who must act as replacements or assume additional tasks
- Causes disruption in the workplace
- May create a perception of unfairness
- Affects the “team”
- May be the expression of other problems

LEGITIMACY OF UNILATERAL WORKPLACE RULES - KVP

1. It must not be inconsistent with the collective agreement
2. It must not be unreasonable
3. It must be clear and unequivocal
4. It must be brought to the attention of the employee affected before the company can act on it
5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule was used as a foundation for discharge
6. The rule should have been consistently enforced by the company from the time it was introduced

“THREE ESSENTIALS OF ATTENDANCE MANAGEMENT”*

- Identification
- Correction
- Prevention

*The Canadian Attendance Management Guide (3rd ed.)

FEATURES OF A GOOD ATTENDANCE MANAGEMENT PROGRAM

- Distinguish between innocent and culpable absenteeism
 - Culpable absenteeism (blameworthy, pattern absenteeism)
 - Several forms, ie. fraudulently applying for sick leave, leaves work early without permission, lateness, etc.
 - Dealt with through an appropriate progressive discipline program
 - Innocent absenteeism (non-culpable)
 - Absences caused by illness or injury
 - Non-disciplinary, administrative
 - Disability-related absenteeism – human rights obligations
 - Indefinite absenteeism
 - Recurring absenteeism

FEATURES OF A GOOD ATTENDANCE MANAGEMENT PROGRAM

- No conflict with collective agreement
- Administrative, not disciplinary in nature
- Reasonable in its design, reasonably administered
 - Avoid programs which are overly mechanical in nature and lack flexibility
 - Avoid automatic responses that ignore individual circumstances
 - Ensure flexibility, leave room for exceptions, accommodation or discretion of individual circumstances at each stage of the process
- Consistent with human rights law
- Ongoing communication with absent employees

CONTENTS OF A PROGRAM

- Policy statement and goals of program (organization and individual), objectives, describe problems absenteeism creates (supportive approach)
- Absence reporting procedures
- Requirements for substantiating absences
- Identification of absenteeism problem
- Roles of individuals in the organization (employees, human resources, managers, occupational health and safety nurse)

CONTENTS OF A PROGRAM

- Identification of an attendance problem – notice to employee
- Continued monitoring
- Counselling guidelines
- Action plan
- Return to work protocol from an illness or injury

COMMUNICATING THE NEED FOR ATTENDANCE MANAGEMENT TO EMPLOYEES AND THEIR UNIONS

Absenteeism:

- Increases replacement and overtime costs
- Causes stress for employees who must replace absent co-workers
- Affects team morale
- Affects the company's bottom line

UNION AND EMPLOYEE CONCERNS

- Collective agreement has rules
- Fairness of the program
- Validation of information - company average
- Individuals with disabilities
- Confidentiality of health-related information
- Access to sick leave and long-term disability coverage
- Role of management in monitoring attendance

ATTENDANCE MANAGEMENT AND PRIVACY IMPLICATIONS

- Much of the information provided to the employer will be personal medical/health information
- Determine who will handle the confidential interactions with employees regarding the specifics of their health problem(s) and need for referral
- Confidentiality guidelines must be clearly spelled out in the policy
- PIPEDA – federally-regulated organizations
- Ontario's *Health Information Protection Act* (HIPA) – effective November 1, 2004

COMMUNICATION WITH EMPLOYEES

Project a positive message

- All employees will benefit from having an attendance management program
- We care about your health and we have the means to help you return to work quickly from an illness absence
- We will offer you modified duties and a return to work program

COMMUNICATION WITH EMPLOYEES

Project a positive message

- We will offer you a confidential Employee Assistance Program
- Absenteeism costs the company money and reduces our competitive edge. It is important to us that you be healthy and able to attend at work
- Early intervention, detection and treatment can reduce likelihood that the problems will become chronic
- Longer out, harder it is to return to work

ATTENDANCE MANAGEMENT AND MEDICAL INFORMATION

- Statement in policy that medical report/certificate must be acceptable to the employer
- Employee consent
- Collective agreement provisions
- Return to work post-illness – medical certificate fit to return

MEDICAL AND HEALTH INFORMATION

- No diagnosis
- Legitimate medical information:
 - Prognosis for full or partial recovery
 - Fitness to return to work
 - Fitness to perform pre-injury job
 - Duration of restrictions/limitations

MEDICAL AND HEALTH INFORMATION

- If reasonable grounds to question adequacy, employers can:
 - Send letter to employee – information required, attach medical questionnaire, time frame required to return information
 - Ask that physician clarify information
 - Provide specific questions
 - Request consent to contact physician
 - Request independent medical examination
 - Employee consent or statutory authority
 - Cannot impose discipline for a failure to submit to IME

MEDICAL AND HEALTH INFORMATION

- Occupational Health and Safety Nurse to act as liaison with HR and Insurance Company for early intervention strategy
- Provide physician with job description/job demands analysis
- Ask whether employee is capable of performing 100% of duties
- Ask for a list of duties that employee can and cannot perform from the position description or analysis
- Proposed duration for modified work

COMMON PROBLEMS WITH EMPLOYEE HEALTH INFORMATION

- Lack of useful information
- Employee or physician is unresponsive or responds with useless information (i.e. employee requires light duties for 4 weeks; employee will be off work for 2 months due to stress)
- Reiterate request for specific information
- State employer is entitled to this information and necessary to return employee to work or facilitate accommodation
- Accommodation obligation may be frustrated, duty to co-operate

ATTENDANCE MANAGEMENT PROGRAMS AND POLICIES

The Legal Considerations

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ATTENDANCE MANAGEMENT PROGRAMS AND POLICIES

Human Rights Considerations

- Effect of the Ontario *Human Rights Code* on the employer's decision to terminate for innocent absenteeism

ONTARIO *HUMAN RIGHTS CODE*

Effect on decision to terminate for innocent absenteeism

- 2 scenarios where decision to terminate will not offend human rights legislation:
 - No identifiable “disability” accounting for absences that are taken into account when deciding to dismiss
 - Identifiable “disability”, but employer found to have attempted to accommodate “disability” to point of “undue hardship”

ONTARIO *HUMAN RIGHTS CODE*

Options to ensure compliance with the *Code*

- Remove employees with “disability” from program
- Leave employees within program but exclude absences caused by “disability”

DUTY TO ACCOMMODATE

Employee responsibility

- Employee must contribute to the accommodation process
- Level of commitment of employee in making the employer's efforts at rehabilitation effective
- Refusal to provide requested medical information
- Refusal to accept work within limitations
 - May frustrate accommodation attempts

DECISION TO TERMINATE Employer Must Demonstrate

- Past absenteeism was excessive
- Future attendance shows no promise of improvement
- Employee was given fair warning that his or her job was in jeopardy
- Where employee suffers from a disability within meaning of human rights legislation, employer must demonstrate
 - Accommodation to the point of "undue hardship"
 - *Meiorin*

ALTERNATIVES TO TERMINATION

You are not without recourse

- Reduction to part-time status
- Modified work
- Suitable alternative work
- Last chance agreement

LAST CHANCE AGREEMENTS

Contents

- Agreement provides employee will be discharged if employee fails to comply with regular attendance conditions
- Ensure attendance requirements are not more onerous than standard in attendance management policy
- Outline steps employer has taken to help employee with absenteeism problem
- Include clause that union and employer agree to steps in order to fulfill their respective obligations of accommodation under human rights legislation
- Make allowances for disability-related absences

TERMINATION OF EMPLOYMENT

- Consider possible short-term or long-term disability entitlement issues
- Number of cases hold that an employer may not dismiss until employee has exhausted all leave benefits provided for under the collective agreement

FRUSTRATION OF CONTRACT

- Excessive, long-term (2+ years) absence
- Poor prognosis for return to work (future attendance shows no promise of improvement)
- Reasonable accommodation has been offered if disabled

TERMINATING FOR INNOCENT ABSENTEEISM

- In 2004 the test for dismissal for chronic innocent absenteeism is onerous
- Tolerance of excessive intermittent absenteeism as a form of accommodation, where employer's operation is large and skills of employees are not unique
 - Canadian Human Rights Tribunal in two *OC Transpo* decisions (Parisien) (Desormeaux)
 - Judicial review decision pending from Federal Court
- Tribunal did recognize that in some situations “intermittent” absenteeism could create undue hardship
 - Small workforce, unique services provided by individual

Natrel Inc. and Teamsters

(2004 – Swan)

- Use of emergency leave as the factor which pushes an employee over a threshold and into an attendance management program or maintains the employee in the program constitutes a reprisal under section 74 of the *Employment Standards Act, 2000*
- “An employee ought not to be dissuaded, even by non-disciplinary pressures, to forego a statutory right to emergency leave.”

Toronto Hydro and CUPE **(2003 – Saltman) The Program**

- Employer unilaterally implemented an attendance management program
- Employees targeted for program where they were absent for 9 days and had 5 occurrences of absence over a 12-month period
- Program included progressively structured interviews, referral to EAP, attendance monitoring, follow-up meetings, assessments to determine the prognosis of future regular attendance and availability of accommodated work
- Program provided for a reward system where employees with perfect attendance over a 12-month period received a restaurant reimbursement to the value of \$50.00
- CUPE filed a grievance challenging the program

Toronto Hydro and CUPE **(2003 – Saltman) Arbitrator's Findings**

- Program was upheld but its application needs to be modified
- Statements in policy which suggest that the program considered culpable absences were to be removed
- Warnings and escalating interviews did not render the program disciplinary

Toronto Hydro and CUPE **(2003 – Saltman) Arbitrator's Findings**

- Program did not violate the just cause provision of the collective agreement – program provided for the exercise of discretion at the final step to determine whether an employee should be terminated
- Corporate standard of 9 days and 5 occurrences was acceptable – a mechanistic application of the program based solely on contravention of the corporation standard was objectionable. Discretion must be exercised in dealing with individual circumstances. Discretion should be referred to at each of the Action Steps

Toronto Hydro and CUPE **(2003 – Saltman) Arbitrator's Findings**

- Statement that a “medical certificate can be requested at any step of the process” must be removed. This was a matter of discretion and could not be promulgated as a general rule
- Reward and recognition component of program must be discontinued. Offended uniform salary rates of the collective agreement and union's exclusive right to negotiate on behalf of employees
- In accordance with the collective agreement, warnings issued under the program must be destroyed when an employee attains a “good” or better performance appraisal
- Employer must refrain from encouraging employees to forego sick leave in favour of other entitlements (vacation, floating holidays, leaves of absence, etc.) in order to avoid the application of the program