

Managing innocent absenteeism in the unionized workplace

Readers of *FOCUS* know from our recent three-part series on accommodating disability that employers have significant new legal obligations towards disabled employees (see "[The accommodation of disabled employees - a guide to the legal landscape](#)", "[The duty to accommodate in action](#)", and "[Accommodating disability short of undue hardship](#)"). Another aspect of this issue, however, is the problem for employers presented by employee absenteeism and the importance of the employee's obligation to attend work. As one commentator has put it:

"One of the most functional needs of an employer is to maintain its operations and services without interruption; to this end it is necessary to have its workforce in regular attendance. Correspondingly, the most fundamental obligation of an employee is the requirement to attend at work. Absentee employees can have a profound effect on the ability of an organization to operate efficiently. [T]hus the desire to minimize employee absence is significant."

Given the importance of employee attendance at work, arbitrators have recognized the legitimate interest of employers in fostering good attendance. However, in acting to advance this interest, employers face numerous legal pitfalls, particularly in the case of innocent absenteeism. In this article, we will discuss the problem of innocent absenteeism and the tool of choice for controlling it: the attendance management program.

WHAT KIND OF ABSENTEEISM?

It is important to keep in mind that absence may be either culpable or innocent; otherwise one risks having an attendance management program invalidated at arbitration. Culpable absence takes several forms, extending from fraudulently applying for sick leave at one end of the scale to lateness and failure to notify management of absence at the other. These may be dealt with through an appropriate disciplinary response.

On the other hand, absence due to illness or injury is referred to as innocent absenteeism. While this may become so frequent or excessive as to undermine the employment relationship itself, and may ultimately justify termination, an employer is not permitted to respond with disciplinary sanctions. The reason for this is that a sick employee is genuinely incapable of performing his or her duties.

In order to support its decision to terminate an innocent absentee employee, the employer must be able to demonstrate that the employee's past record of absenteeism is excessive, that the prognosis for improved attendance is poor, and that the employee was given fair warning that his or her job was in jeopardy. Readers of *FOCUS* will also be aware of the impact of human rights law on the decision to terminate: where the absenteeism is the result of a disability as defined in human rights legislation, the employer must also show that it either incurred or would have incurred undue hardship in accommodating the employee's disability.

THE ATTENDANCE MANAGEMENT PROGRAM

Implementation of a well-thought out attendance management program will help in dealing with the problem of innocent absenteeism. Such programs typically aim to improve the attendance of employees with above-average absentee records by monitoring their absences and counselling them about the reasons for the absence and the importance of maintaining staffing levels. A reading of the case law in this area shows that systems set up to monitor employee attendance with a view to controlling excessive absenteeism are permissible. However, the cases also show that many arbitrators are uneasy with certain aspects of these systems, and it is useful to be aware of those features that increase the chances of a program's success.

1) No conflict with collective agreement

At the outset, obviously, an attendance program must not conflict with any provisions of the collective agreement. Where, for example, sick pay provisions stipulate that benefits will be paid upon proof of illness, the program may not impose additional requirements, such as advance notice of absence, in order to qualify for the benefit. However, it is also clear that the mere existence of sick pay provisions does not preclude management from setting up a parallel system of attendance monitoring that operates on its own track. To the extent the collective agreement is silent, the program may be applied.

2) Administrative, not disciplinary in nature

Those features that lend the program the appearance of being disciplinary are best avoided. For example, lumping together the treatment of culpable and innocent absences would arouse the suspicions of an arbitrator. So too would the existence of various "automatic" responses that ignore individual circumstances. An example of the type of automatic provision that weakens such programs in the eyes of arbitrators is a mandatory statement to an employee that she significantly improve her attendance at work, even if she has provided a clear explanation for a finite period of absence. By contrast, a program that leaves room for exemptions, accommodation, or discretion based on individual circumstances at each stage of the process will be less open to challenge.

An attendance management program cannot be used to substitute for "just cause" at the point of termination. As one arbitrator has remarked, when terminating an employee for innocent absenteeism, the employer must establish that past absenteeism was excessive; future attendance shows no promise of improvement; and the employee had been put on notice. In this regard, the value of the attendance management program is in tracking the level of absences and fulfilling the requirement of notifying the employee of his situation. Therefore, warning letters issued under such programs, even though they may be perceived as coercive by employees, are not only permissible but required if the termination is to be upheld.

3) A reasonable program, reasonably administered

An attendance management program must also be reasonable. Arbitrators have commonly held programs to be unreasonable where they are overly mechanical in their functioning and lack flexibility. This is the case where, for example, the program ignores the nature of the claimed illness or where it is stricter towards employees who fall ill twice, while showing leniency to employees who are ill only once but for a longer period of time. The number of absences serving as the threshold at which application of the program to an employee is triggered may be subject to scrutiny for reasonableness, but arbitrators tend to look at the operation of the program as a whole rather than emphasizing this particular factor.

Programs that are too invasive of an employee's medical privacy or that require the employee to report to the employer's chosen physician have been held unreasonable. However, one arbitrator has noted that, while employees have the legal right to refuse disclosure of confidential medical

information, by exercising this right, they risk being placed in a more precarious position if their attendance record does not improve. Moreover, an employee faced with termination for excessive innocent absenteeism will not be able to establish the prognosis for recovery without disclosing this information, and may not discharge her obligation under human rights law to assist the employer in developing measures to accommodate her disability.

A consistent theme in the case law is that, however reasonable a program is in its design and various aspects, it must also be reasonably applied. Employers must therefore make sure that staff entrusted with administering the program are adequately trained and understand its true, non-disciplinary purpose.

Employers must be prepared for the fact that, however reasonable such a program is applied, and however remedial the emphasis, many employees will resist its implementation. As one arbitrator has said, "[i]t is clear to me that most employees will never accept the concept of innocent absenteeism and will always see it as disciplinary."

Be that as it may, arbitrators recognize the right of employers to establish programs to promote good attendance, even on the part of employees who are absent for good faith reasons. If employers avoid the pitfalls described here, attendance management programs will likely have a favourable impact on absenteeism while sustaining any challenges at arbitration. (See also ["Emerging issues in attendance management"](#) and ["Attendance management program found wanting by arbitrator"](#).)

In Our View

As noted, employees are likely to be suspicious of programs under which management seeks to counsel them about their absenteeism. For this reason, arbitrators have recommended that efforts be made to develop these programs in a spirit of openness and cooperation. Where possible, the union should be advised ahead of time of the implementation of the program. Support for the program will also be strengthened if the employer identifies the main workplace causes of innocent absenteeism.

For more information on this subject, please contact [Lynn Harnden](#) at (613) 563-7660, Extension 226.

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