



Managing Absenteeism in the Workplace

Robert M. Bell
rbell@millerthomson.com
416.595.8675

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Agenda

1. Defining Absenteeism; Culpable versus Non-Culpable
2. Employer and Employee Duties
3. Duty to Accommodate
4. Requesting Employee Medical Information
5. Termination
6. Liability
7. Managing Absenteeism

DEFINING ABSENTEEISM

Culpable Absenteeism

- Within employee's control
- Pattern absenteeism
- Failure to communicate/provide information in a timely fashion

Innocent Absenteeism (Non-Culpable)

- Beyond employee's control
- Illness, injury, accident, & statutory leave issues
- Compliance with call in/communication policy
- Medical evidence

EMPLOYER AND EMPLOYEE DUTIES

Duty of Employer

- Assess if absence is “culpable” (discipline) or “non-culpable” (take steps to encourage better attendance)
- If non-culpable, may need medical information to assess:
 - Prognosis for recovery (not diagnosis) – when can employee be expected to return to regular or modified duties

- Are absences related to a disability (if so, triggers duty to accommodate)
- Are there any permanent or temporary medical restrictions on a full return to work and if so what are those restrictions
- What accommodations, if any, are appropriate and available to meet such restrictions and facilitate timely return to work

Duty of Employee

- Provide enough medical information to
 - Justify absence from work as medically legitimate and
 - Assist in determining how long the absence will be, and what, if any, medical accommodation is required
- Accept reasonable offer of modified work that meets any accommodation requirements based on medical information provided

DUTY TO ACCOMMODATE

Reasonable Inquiries

- Reasonable inquiries to ascertain employee's medical state and prognosis, specifically:
 - Duration of absence – *“Not too distant future”*
 - When employee is being re-evaluated – *“Is being reassessed in 3 weeks”*
 - Whether and when recovery is expected – *“Unknown”*

Failure to Make Reasonable Inquiries

- Undermine a frustration defence (discussed later)
- Breach of procedural component of the duty to accommodate – *McKee v. Imperial Irrigation Co.* (2010 HRTO)
- Cannot discharge the duty to accommodate without making reasonable inquiries

Forms of Accommodation

- Access to EAP or other forms of medical support
- Change in
 - Physical demands
 - Work site
 - Teams
 - Hours
 - Attendance management requirements

Requesting Employee Medical Information

Purpose of Medical Information

- Inherent term of employment: the employee will attend and do a specific job to the satisfaction of the employer
- A failure to attend work without reasonable excuse = being AWOL – can address through discipline

Medical Disclosure When Requesting Accommodation

- Type and extent of information Employer entitled to receive is more extensive
- Requests for permanent accommodations places onus on employee to provide medical documentation that is sufficient, and in greater detail

As a general rule, employers have the right to access the following information to fulfill their duty to accommodate medical restrictions to the point of undue hardship:

- a) Details of any functional limitation(s) experienced by the employee that pose conflict with workplace requirements
- b) Information regarding the nature and degree of any physical restrictions and the duration of any restrictions (i.e. permanent or temporary);

- c) Details of how many treatment needs, medication or medical interventions affect participation in the workplace, such as scheduling medical appointments during working hours; and
- d) In cases of total disability, details of the prognosis in terms of timing for return to work or at least some indication of when further information in that respect may be available

- e) Employer is not entitled to ask for the employee's specific diagnosis in the absence of specific statutory language or special circumstances

Failure to Cooperate

- If doctor or employee fails to cooperate, employer should write to the parties advising that the employee has an obligation to provide the requested information
- Advise that failure to comply may prevent accommodation, and persistent refusal may result in discipline of the employee
- All communications should be respectful in tone and handled with tact
- Enlist assistance of union, meet with employee

Balancing Privacy Concerns

- Information sought must be reasonably necessary
- In some circumstances, employee's interest to privacy must yield to the employer's need for information to fulfill duty to accommodate
- Employers cannot ignore circumstances which should lead it to investigate i.e. bizarre behaviour
- However, employers can refuse to accept accommodation requests at face value without supporting documentation

Independent Medical Examinations

- Employer can request
- Cannot compel, absent any statutory authority
- No discipline for refusal to attend an employer – directed IME
- Failing to provide adequate medical information and refusing an IME may lead to situation where employee is absent without justification, which may lead to dismissal
- Requests for IMEs may also be made under the WSIA or by third party insurers

Practical Tips for Verifying Employee Medical Information

- When reviewing medical documentation, consider the following:
 - any medical opinion should confirm that the physician has seen the patient at the relevant time
 - physician had or has the right information to form the opinion, and the information provided is accurate and complete (i.e. job descriptions)

- is the doctor qualified in an area of medicine requiring special knowledge? If not, consider whether the employer could assist in making a referral to a specialist
- if challenging medical opinions, it is far more productive to adopt a cooperative rather than an adversarial approach
- if the employer is writing to the physician for additional medical information, ask specific questions as well as general, open-ended questions

TERMINATION

Obligations on Dismissal

- *Employment Standards Act, 2000:*
 - Termination pay
 - Severance pay
 - Continuation of benefits
- No common law notice required where frustration can be established

When Can You Terminate Employment for Frequent or Lengthy Absence

- If the absence or absences are excessive in the circumstances, at some point it can reasonably be argued that the employee is not fulfilling his/her part of the employment agreement by reporting to work to do the job
- Issue is: when is that point reached?
- Have to assess:
 - Probability of return to work in foreseeable future
 - Extent of any duty to accommodate

Burden of Proof is High

- Need to show employee not likely to meet reasonable attendance standards in foreseeable future and that duty to accommodate has been addressed:
 - Long standing and documented history of attendance issues
 - Expected attendance standards are reasonable, not arbitrary
 - Helpful to show impact on employer (replacement cost, scheduling issues)

- Absences have been consistently addressed and not condoned
- Accommodation of absences not medically required (not based on physical or mental disability) or accommodation is not possible (duty to accommodate met)
- Progressive coaching provided with warnings of consequences of failure to bring attendance up to reasonable norms

Frustration

- Can an employee be terminated for “frustration” of an employment contract?
 - The concept of frustration refers to a principle in the law of contract
 - Frustration can occur as a result of a long absence due to illness
 - The frustrating event stems from the failure of the employee to provide the services on which the contract of employment is based

When “Disability” Brings Employment to an End

- No reasonable likelihood that the employee can return to work within a reasonable time due to a disability
- The employee may return but is only capable of returning to work that is radically different than the one originally agreed to (i.e., undue hardship met)
- No reasonable likelihood that the employee can maintain regular attendance in the foreseeable future even with accommodation

Overall Considerations: Frustration Due to Absence

1. Terms of employment contract
2. Provision of paid sick leave?
3. Nature of the employment (unique position?)
4. Expected length of employment (indefinite employment, fixed-term)
5. Period of past employment
6. Nature and duration of the illness or injury – **KEY**
7. Length of absence.

LIABILITY

Liability if Improperly Terminated

1. Damages for breach of procedural obligations attending the duty to accommodate
2. Damages for failing to accommodate
3. Wrongful dismissal damages* – increased notice periods as a result of limited prospect of finding new employment
4. Reinstatement with full reinstatement of benefits, etc.
5. Mental distress damages potentially

** [N.B. Disability benefits may or may not be deductible from a notice award]*

HOW TO AVOID LIABILITY; PROCEDURE FOR MANAGING ABSENTEEISM

Managing Absenteeism in General

- Culpable
- Innocent
- Must differentiate to determine a correct response

Short Term Leaves – General

- Employer entitled to have substantiation that an employee has a *bona fide* illness before access to sick leave is granted
- Basic information required is whether the employee has an illness that prevents her from doing her job
- Scope of information required must also consider privacy rights

- Level of enquiry must be specific to the situation and take into account the purpose of the information required
- Employer must obtain consent to obtain information directly from physician
- Consent should be clear and request only the information required to substantiate the illness, or manage a return to work
- Implied term of reasonableness

Longer Term, Single Absences

- Human rights legislation prohibits discrimination on the basis of physical and mental disability – cannot refuse to continue to employ a person because of a disability – must offer reasonable accommodation
- If STD or LTD insurer assesses employee as not meeting definition of disabled, may only mean employee not eligible for benefits under plan
- Does not necessarily mean that the person is not disabled or that employer has cause to terminate employment

Irregular, Short-term Absences

- If unrelated to disability, accommodation not required
- Still need to address through “coaching” although process similar to progressive discipline
- Standards are reasonable, clear, attainable, and consistent; assistance is provided (EAP, counseling, referral to medical expert); and failure to meet those standards will impact employment

- Track reasonable attendance standard within company
- Advise all employees of this standard by way of written policy
- Coach (warn) employee on need to attend at work
- Provide any necessary support to reach those standards
- Warn employee of failure to attain required attendance standard within reasonable time (termination)
- Document the coaching/warnings in writing

Excessive, Frequent and Intermittent Absences

- Can be cause for dismissal even in the absence of a permanent disability
- Evidence of past record is important
- Excessive if a) significantly above the work place average and b) on an “absolute basis”
- What’s the likelihood of improvement?
- As the employee been warned that employment is in jeopardy?
- Subject to duty to accommodate

Attendance Management Program

- Written and posted (employee/union consultation?)
- Consistent with human rights legislation
- Sets attendance expectations/thresholds
- Defines process for follow-up
- Applied consistently, fairly but not mechanically
- Gives appropriate warning/establishes foundation for termination
- Distinction between culpable/non-culpable absenteeism?

Managing Culpable Absenteeism

- Disciplinary Response
- Appropriate discipline depends on the “offence” and the “offender”
- Progressive discipline in most cases
- Keep in mind potential human rights issues

Managing Innocent Absenteeism

- Cannot discipline
- Focus on worst cases
- Counsel, assist and advise
- Confirm with letters
- Human rights issues

Questions?

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Thank you!