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CASE CONFIRMS THAT ATTENDANCE MANAGEMENT PROGRAMS ARE NOT DISCRIMINATORY

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Attendance management programs are a common vehicle used by employers to deal with employees with chronic absenteeism problems.

As a general rule, these programs operate on the basis of tracking the non-culpable absences (as opposed to culpable absences) of all employees and then managing the attendance of those employees whose absenteeism is either above the average rate or above a particular threshold. An employee with a high absenteeism rate will have their attendance actively managed and monitored. If the absenteeism rate remains high, the employee continues to move through the stages of the program, which usually has escalating intervention strategies. Although these programs are non-disciplinary, the ultimate result for employees who continue to have poor attendance and move through the program is usually termination of employment on the basis of 'innocent absenteeism' or 'frustration'.

Attendance management programs are often criticized by unions as being unfair or discriminatory. It is common where a unionized employee ends up losing their job through the operation of an attendance management program that there will be a grievance and that part of the grievance will involve an attack on the actual program that the employee had gone through.

One of the claims sometimes made to challenge an attendance management program is that chronic absences that are related to a disability (diabetes, for example) should not count as part of an attendance management program because to do so would be discrimination on the grounds of disability. The argument is made that the employer has a duty to accommodate the employee and thus, disability related absences should not be included in determining absenteeism rates. This challenge to an attendance management program creates a significant problem because it is often the case that an employee with a high absenteeism does have a disability which is the cause, at least in part, of many of the days of work that are missed.

The validity of this type of claim was recently addressed in a court decision in British Columbia (*Coast Mountain Bus v. CAW-Canada*). While this case deals primarily with the specific application of the attendance management program to persons with chronic or recurring disabilities, the court did comment on the general issue of whether attendance management programs are discriminatory.

CONTENT:

Tribunal Decision

The original decision in this matter came from the B.C. Human Rights Tribunal. The basic facts were that the Employer introduced an attendance management program to deal with high absenteeism

rates. The Union asserted that the program discriminated against employees with disabilities. The Tribunal ruled that the program resulted in systemic discrimination against employees with one or more chronic or recurring disability. The Tribunal ordered that the Employer cease applying its program to employees with chronic or recurring disabilities where those disabilities were the cause of some or all of the absences considered in the program. The Employer sought judicial review of this decision.

Court Decision

On judicial review, the court overturned the finding of the Tribunal that the program itself was discriminatory. In doing so, the court reached the following conclusions:

(a) the inclusion of persons with chronic or recurring disabilities in the program was not due to stereotypical or arbitrary assumptions about their disability, but because they reached the threshold number of days absent;

(b) without some monitoring of employee absences and a program for assessing and dealing with the causes, an employer would be left with arbitrary approaches (which would not be appropriate); and

(c) there was nothing systemically discriminatory about monitoring attendance and providing letters to those whose rate of absenteeism was considered to be excessive – in fact it is the employer's obligation to warn its employees of this fact and the potential consequences.

Summary

Based on the court's decision, employees with absenteeism related to chronic or recurring disabilities are not exempt from attendance management programs. However, employers must keep in mind that the duty to accommodate remains in place and that careful thought should be given to what measures can be taken to accommodate these individuals. Miller Thomson LLP would be pleased to assist with the design or review of your absenteeism and accommodation policies.

A CAUTIONARY TALE: TERMINATION PACKAGES

A recent court case in Ontario provides a good example of the care that should be taken when making termination package offers to employees.

In *Stowar v. Telehop Communications Inc.* the Employer provided a dismissed employee (who had three years of service) with a termination letter that stated the employee would receive five (5) months pay in lieu of notice of termination. There was a space provided at the end of the letter for the dismissed employee to sign if she was satisfied with the contents of the letter. The dismissed employee signed the letter.

A few days later the dismissed employee was advised that there had been a mistake and that the letter was supposed to have said three (3) weeks and not five (5) months pay. The Employer only paid the three weeks and the dismissed employee commenced legal action for the remaining money which she claimed she was owed.

The court ruled that the Employer was bound by the terms that if offered in the letter and that the dismissed employee had accepted.

This case provides a helpful reminder to be careful about what is included in a termination letter. The same care should be taken in respect of what goes into an offer letter. In both cases, what is being created is a contract. An offer letter establishes the basis of the employment contract, and a termination letter (to the extent it includes a severance package) sets out the terms for ending the employment relationship. Once the terms set out in either an offer letter or termination letter are accepted by the employee, a contract is formed and it becomes very difficult to argue that there was a mistake and that the contract should not be enforced as written.

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