



2012 Essential Guide Article



Absenteeism and Disability Management in the Workplace

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One of the most common issues facing employers is employee absenteeism. Workplace absenteeism rates are on the rise and absence costs are escalating. Absenteeism can lead to high financial costs including overtime or agency costs for replacing workers, cost of self-insured income protection plans, secure replacement employees and costs to re-assign remaining employees. The indirect costs associated with absenteeism often surpass direct costs of managing an effective workforce, including the payment of wages and the provision of benefits. Employers must proactively manage workplace absenteeism in order to minimize the negative impact on business.

Unfortunately, the law relating to sick and disabled employees is complex and presents numerous challenges to employers. In order to adequately manage absenteeism, employers must be familiar with all legal obligations including the common law, human rights law, privacy law and other applicable legislation that governs the employment relationship. Overlooking or ignoring obligations could have serious negative legal and business consequences for an employer.

Absenteeism

Innocent absenteeism occurs where an employee is away from work frequently and yet has genuine reasons. Examples of innocent absences may include: sick leave, with or without pay (even though there is medical certification); outside appointments during working hours; and absences from work to deal with ongoing family problems

Although the employee may be capable of doing the job when at work, the excessive absences create problems for the employer, and as a result, the employee is not fulfilling the requirements of the employment contract. Innocent absenteeism should not be corrected in a disciplinary fashion but rather through education and assistance to the employee.

On the other hand, unauthorized absences, which are within the employee's control, may warrant a disciplinary response. Examples of a culpable absence include: excessive lateness; false explanation for an absence; no reason provided for absences; unsubstantiated absence, where evidence of the reason is required; or where the reason for the absence is not legitimate.

Discipline imposed for a culpable absence should reflect two considerations:

- the gravity of the immediate offence, and
- any prior disciplinary record.

In order to terminate employment for excessive innocent absenteeism, the employer must be able to demonstrate that the employee's past record of absenteeism was undue or excessive and there is no reasonable prospect for improved attendance in the foreseeable future. Furthermore, if the employee has unreasonably refused to cooperate in the accommodation process, the employer may be able to terminate the employment relationship.

Where the innocent absenteeism is a result of disability or illness, employers are required to accommodate employees with a disability to the point of "undue hardship". Under human rights legislation, the termination of a disabled

employee on the grounds of mental or physical disability is prima facie discriminatory. Therefore, the employer will have a duty to accommodate the return to work of a disabled employee. In these cases, the employer has a duty to accommodate the employee to the point of undue hardship. Unfortunately, there is no formula and no precise judicial definition of undue hardship. Employers will be required to assess each case according to the specific circumstances. For example, an employer may be required to provide special, personalized attendance goals which may fall below the norm as part of the employment accommodation.

Obligations during the accommodation process

The process of determining reasonable and appropriate accommodation short of undue hardship is a shared responsibility between the employee and employer. While the employer's duty to accommodate is significantly more onerous, the employer is entitled to rely on the assistance and cooperation of the employee seeking accommodation

Employers have the following obligations during the accommodation process:

- Determine if employee is disabled
- Obtain relevant medical information including prognosis for recovery and capabilities for alternative work
- Request expert medical opinion if necessary
- Assess employee's limitations
- Consider all possible accommodations
- Discuss accommodation options with employee
- Respond to a request for accommodation within reasonable time
- Keep a written record of the accommodation request and steps taken to respond to request
- Maintain confidentiality and ensure protection of privacy
- Limit requests for information to that necessary to determine employees limitations, restrictions, and prospects for future improvement only
- Consider employee's accommodation suggestions

- Assume all costs for the medical information or documentation requested and produced in support of the request
- Where accommodation causes undue hardship, explain to the employee why accommodation is impossible
- Follow-up with employee to ensure that accommodation needs are being met
- Review and modify the accommodation if required

Employees have the following obligations during the accommodation process:

- Advise employer about the need for accommodation (exceptions may be made where the employee suffers from a mental disability and is too embarrassed to disclose the nature of the disability because of the nature and stigma attached to the illness)
- Provide employer with information sufficient to respond to the request for accommodation. i.e. information that will assist the employer in establishing the need for accommodation and the possible forms of accommodation
- Provide suggestions for appropriate accommodation
- Allow employer reasonable time to respond to the request
- Co-operate with employer. For example, the employee must answer questions or provide information requested regarding relevant restrictions and limitations and participate in discussions with the employer regarding possible accommodation
- Facilitate the implementation of the accommodation
- Advise employer if the need for accommodation has changed or has come to an end
- Accept reasonable accommodation

Employers should also acknowledge and accept that they have a positive duty to accommodate an employee to the point of undue hardship. They be proactive with general

planning and preparation and be sensitive when dealing with specific problems in the workplace.

Accommodation is a process, not an event. The duty to accommodate is an ongoing and fluid process, not a sequence of events. As the employee's condition changes (for better or for worse) and as the workplace circumstances evolve, the employer needs to re-investigate and re-assess options. Accommodation measures will need to evolve over time, becoming more or less restrictive depending on the changing circumstances. Employers and employees will have to exchange updates and adjust any accommodation accordingly. As long as the accommodation measures adopted remain reasonable, the employer is properly discharging the duty to accommodate. If all of the parties understand their legal obligations and work together in good faith, workable solutions can and usually do result.

Creation and implementation of policies and programs

In order to assist managers and employees with absenteeism and disability management, employers should consider developing and implementing a policy dealing with disability and accommodation as well as an attendance management policy and program.

An successful attendance management program should promote optimal and consistent attendance at work, raise awareness of the importance of good attendance and promote an atmosphere of mutual respect, fairness and

concern. The program should set out a system of structured counselling sessions and progress assessments, as the most effective way to address chronic, innocent absenteeism is through frequent and structured dialogue with the employee.

A successful disability and accommodation policy should include a general statement with respect to the employer's commitment to accommodation employees' needs in the case of disability, outline both the employees' and employers' duties and responsibilities in the accommodation process, include examples of the types of accommodation that might be made available to the employee depending on the circumstances of the case, and outline steps that the employee should follow when making a request for accommodation as well as the steps that an employer will take when responding to an accommodation request.

Given the difficulty that an employer may face when tasked with assessing whether an employee that is sick or has a disability should be terminated, employers are advised to proceed with great caution and to seek both human resources and legal advice prior to making any decisions. Making the wrong decision will expose the employer to liability and cause unnecessary stress to both parties.

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