Helpful Legal Information for MAHCP Members

Attendance Management Programs

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There is a movement afoot in today's medical workplace to optimize every aspect of the employer's most valuable resource, its employees. Greater education is demanded, more experience with ever increasingly sophisticated machinery, understanding of more and more complex medical procedures are a required to effectively work in the modern health services workplace. Most of the changes are beneficial to the employees because more education and experience usually leads to greater self worth and job satisfaction. One aspect of this drive to squeeze the most out of the employee as a resource is something that employees are NOT fond of, Attendance Management Programs (AMP). This article will look at some common provisions of AMP and discuss the possible limitations of such policies when they are carried out by overzealous managers.

The basic intent of the AMP is to ensure employee timeliness and absentee avoidance. This is a perfectly acceptable goal in the workplace. The more an employee is at work, the more that employee can accomplish.

In order to enter the AMP a triggering incident occurs. This triggering event is usually the use of a threshold amount of sick time over a certain period of time, like 20 or more hours of sick leave credits within a 3 month period for non-culpable or innocent absenteeism. For culpable or blameworthy absenteeism, the triggering event could be much less time missed such as tardiness, leaving early, or an unauthorized absence.

Once on AMP the employee is usually subjected to more scrutiny for absences than others not on the program. Employers want more medical information when an absence occurs. They may ask the employee to

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provide a certificate from a doctor that answers some fairly invasive questions like:

1. What was the first date the patient was seen by or spoke to the physician?
2. Was the employee's absence from work commensurate with this illness?
3. If patient is our employee, is the employee able to return to his/her full duties?

And if the patient is someone other than the employee, then there is a fourth question,

4. If patient is our employee's family member, did the patient require a caregiver?

Failure to comply with AMP requirements may result in disciplinary action on a graduated scale, from verbal warning to suspension, all the way to termination. Meetings are scheduled by managers with the employees in AMP without the benefit of representation from the union until the employee reaches the suspension or termination stage, if it goes that far. Once the AMP program is successfully completed some employer's take the position that the documents related to the employee's involvement in the program are part of the employee's permanent file.

Under the terms of MAHCP central table collective agreement the employer reserves the right to require medical evidence, "without cause", of the employee's fitness for work after three consecutive days of absence. This implies that it can require medical evidence where "cause" exists. **The collective agreement does not require production of medical evidence from family members in its sick leave provisions.**

There are many cases on this issue in the Canadian arbitration jurisprudence. One recent case provided this basic arbitral rule on AMP:

> *"The general principles relating to discipline or discharge for innocent absenteeism are clear. The employer must first establish that the employee's attendance record shows excessive absenteeism. Absenteeism is excessive when it is above the work place average and is excessive when viewed without comparison to others' absenteeism. The employer must also establish that the employee is not capable of regular attendance into the future. The past record of excessive absenteeism and other factors may be relied upon to draw the inference that future attendance will not improve. Any such inference may be rebutted by the Union and the grievor with objective evidence. An over-arching consideration is the balancing of the legitimate interests of the parties. The grievor must have been warned that her or his employment is in jeopardy if there is no improvement and thus be given an opportunity to improve their attendance. Having warned the employee of the problem, the employer may justifiably terminate the employment relationship when it is undermined by the employee's mental or physical condition." (Sault Area Hospital v. CAW-Canada, Local 1120 Sault Area Hospital v. CAW-Canada, Local 1120 (2010))*

In the case of I*nternational Union of Operating Engineers Local 987 v. Health Sciences Centre (2003)* a grievance arbitrator in Manitoba was asked to determine a policy grievance on the issue of providing medical evidence when on the AMP. The grievance asked the arbitrator to determine that an AMP provision requiring an employee to provide a medical certificate for each instance of absenteeism was unreasonable and inconsistent with the collective agreement.

The union provided evidence that there was a long history regarding the benefit of not having to provide medical certificates. The employer had repeatedly tried to negotiate a requirement for a certificate. Through their AMP the employer had tried to achieve that requirement without the need for negotiation. The union referred to *Re Lumber and Sawmill*

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Workers Union Local 2537 and KVP Co. Ltd. (1965) 16 L.A.C. (3rd) 73. In that case the principle was laid down that if an employer introduces a new rule into the workplace, it must, among other things, be reasonable and must not be inconsistent with the collective agreement.

The arbitrator in deciding the issue stated, "the broad ambit of general management rights is subject to the more particular rights as defined by the parties in the Collective Agreement… Particular to this case is the requirement that the Policy be consistent with the Agreement and be reasonable." (para 47) She goes on to say that:

> *Here the parties have addressed their minds as to when a medical certificate will be automatically required. That is … when an employee is absent due to illness for a period exceeding his income protection credits. … The hospital has discretion where reasonable to require a medical certificate or to obtain further medical information … if the circumstances warrant.*

She found that the provision in the AMP that required a medical certificate for each absence due to illness after the "triggering" event contravened the collective agreement and was inoperative.

The case Re Natrel (Ontario) Inc. and Retail Wholesale Canada, Local 440 (2001) concerned a policy grievance of the administration of an attendance improvement program. One of the issues to be determined was whether employees in the program should be required to present a medical certificate every time they were absent after progressing to stage 2 of the program. The collective agreement required a certificate only when the employee was absent and had no income security credits. The arbitrator found this was a conflict between the program and the agreement and struck the provision out of the program. He stated:

> *The inconsistency that I have identified, between the stage two requirement concerning a doctor's note and article 11.05(5), violates the employer's obligation under article 4.02 'to exercise its rights… in a manner which is not inconsistent with the collective agreement.' The employer is directed to amend the attendance management program to eliminate this inconsistency. Employees who have credits in their sick bank should not be required to produce a doctor's note unless there are reasonable grounds to suspect an absence was not caused by illness. (page 6)*

In *Re Toronto Electric Commissioners and CUPE, Local 1* (1986) 25 L.A.C. (Ontario) the arbitrator was asked to decide whether an AMP was in conflict with the collective agreement. In the case, the employer had made a number of attempts during collective bargaining to introduce the program but the union resisted and the AMP was not included under the collective agreement. Eventually, the employer unilaterally introduced the AMP. The arbitrator struck down various aspects of the AMP. He stated:

> *… I find that "positive discipline" is a form of discipline and is, therefore, inappropriate in cases involving innocent absenteeism… I find that the only portion of the AMP consistent with the collective agreement is the part that provides for interviews and non-disciplinary letters to employees deemed to have high levels of absenteeism.*

The case law is clear that implementing this type of program (attendance improvement/management) is a valid exercise of management rights. The case law is also clear that an AMP must not violate the provisions of the collective agreement and that its terms must be reasonable. The reasonableness test outlined in the case law should be applied to the implementation of the AMPs of employers on a case by case basis.

Documenting that an employee arrived 1 minute late at a workplace without a time clock may not be a reasonable "triggering" event in the circumstances. It is also not reasonable to ask employees to reveal the medical condition, illness or injury that led to the absence to aid an evaluation of whether there is questionable use of leave time. That is a violation of the employee's right to privacy. There is also the implication that some medical conditions are more "questionable" than others.

The *Human Rights Code* prohibits intentional or non-intentional "systemic discrimination". There may be a violation of this prohibition in the case of someone who is pregnant or disabled and that condition requires more than average frequency of absenteeism due to medical attention. The violation would occur if it is established that the AMP is a disciplinary measure and that these employees are being disciplined because of the characteristic that is protected under the Code. It may also trigger the accommodation provisions of the collective agreement where there is a legitimate disability that needs to be addressed.

The *Personal Health Information Act* (PHIA) protects health information of patients and employees who work in healthcare settings. PHIA allows individuals to share their personal health information and therefore avoid the proscription under the Act. If the way in which the AMP is being applied can be proven to be coercive, i.e. if the supervisors are telling employees that "you tell me why you went to the doctor or you will be disciplined" that could be in conflict with the Act.

Employers are entitled to get the most of their most valuable resource, their employees. They must however be careful not to run roughshod over an employee's statutory rights and the rights the union has negotiated for them under the collective agreement. Employees should make themselves aware of those rights so they can properly protect themselves if they happen to come within the terms of the Attendance Management Program.

Please refer to the MAHCP website under "Member Services" then "Forms" for illness certificates.

This paper is intended as an introduction to the topic and not as legal advice. If you require specific advice with respect to your situation, you should contact a lawyer.

This series of articles will continue in future editions of the MAHCP News. If there is a topic that you would be interested in, please contact Wendy at 772-0425.