Glenn Commandments: Six Ways to Avoid Attendance Management Program Disability Discrimination Liability



Attendance management programs (AMPs) have proven effective in helping get absenteeism under control. An AMP is a policy arrangement authorizing employers to take measures to help employees improve poor attendance while also allowing for discipline if the problem continues. Although designed to be constructive and nondisciplinary, unions tend to see AMPs as coercive and discriminatory. So, when companies take action under an AMP, they often end up having to fend off grievances and legal challenges, including disability discrimination complaints. Here are six ways to prevent AMP legal challenges.

1. Don’t Treat All Absences the Same

Courts have historically distinguished between culpable absences that are subject to discipline and nonculpable absences that are not. So, your AMP should define both culpable and nonculpable absences and include absences related to disabilities in the latter. You might also want to consider making the trigger of participation in the AMP for nonculpable absences higher than for culpable absences.

Model AMP Language

Culpable Absenteeism: Failure to be present for work due to factors within the control of the Employee, including but not limited to: failure to notify, absence without leave, abuse of leave, and coming to work late or leaving work early without notification or excuse. Culpable absenteeism is grounds for discipline, up to and including termination.

Nonculpable or Innocent Absenteeism: Failure to be present for work due to illness or non-occupational injury, including absences resulting from a disability that is not a compensable illness or injury. Non-culpable absenteeism is subject to non-punitive corrective action in accordance with the terms of this Program.

2. Determine Absence Type before Taking Response Measures

Determine the cause of absence before putting employees into the AMP. Don't automatically initiate employees into the program if the absence is the result of a disability. Treat each case individually based on the medical situation and work circumstances.

3. Avoid Blanket Rules and Treatment

The question of when accommodation crosses the line from reasonable to undue hardship must be resolved case by case. But one thing is always true: Policies that purport to treat all employees the same are inconsistent with the duty to accommodate. Your AMP must consider the circumstances and condition of each employee whose absence is disability-related in determining what response measures to take.

4. Get Supervisors Involved

Give supervisors of absent employees a role in deciding what AMP response measures to take. In addition to helping satisfy your duty to accommodate, supervisor input and communication should result in better outcomes with all employees.

5. Consider Seeking Union Agreement to Time Limits

Establishing fixed limits after which employees can be terminated is the kind of blanket policy that would normally run afoul of the duty to accommodate. However, courts in some jurisdictions including Québec consider pre-defined time limits acceptable if they're generous, accepted by the union, and reflective of consensus on what's a reasonable limit for that particular workplace. But you still must apply time limits flexibly and on an individual basis.

6. Follow the AMP Procedures

Make sure you carry out the AMP policy consistently and in accordance with its terms and procedures. **Example:** The Canadian Human Rights Commission ruled that an employer failed to properly apply its own AMP procedures in terminating an employee for excessive absences due to migraines without first requesting a medical prognosis [*Desormeaux v. Ottawa-Carleton Regional Transit*, 2003 CHRT 2 (CanLII)].

Takeaway

AMPs aren't inherently discriminatory; but they're not inherently nondiscriminatory, either. The AMP crosses the line when it's overly broad and/or fails to adequately provide for individual accommodation of each affected employee.