How Long Is Too Long to Wait for Employees to Return from an Extended Absence?

When an employee misses extended work time with a disabling injury or illness, it puts your company in a tough position, especially if the employee holds a key job. You're legally required to hold the position open long enough to give the employee the chance to return. But just how long is long enough?

Bottom Line on Top

The answer isn't X weeks, X months or even X years. The general rule is that an extended absence becomes too long to tolerate not after any fixed time period but when there are no reasonable expectations of the employee's returning to work any time soon. But there are limited exceptions in which employers may establish fixed time limits on how long absences can last before employees forfeit their job.

What the Law Requires

As far as discipline is concerned, all absences are not created equal:

- **"Culpable,"** or blameworthy absenteeism, i.e., when an employee misses work without a reasonable excuse or explanation such as calling in sick when they're not really ill, is subject to discipline;
- **"Nonculpable"** absenteeism caused by illness, injury or other circumstances for which the employee can't be blamed, isn't cause for discipline and demands some degree of toleration.

This rule comes principally from human rights law which requires employers to accommodate employees' disabilities to the point of undue hardship. The need for accommodation applies when, as is almost always the case, the long-term absence is the result of an injury, illness or other condition the law deems a disability. Accommodation typically involves letting employees return to work in the same or similar position even if their absence drags on for an extended period. But holding the job open becomes undue hardship when there are no reasonable prospects of a return to work.

The other legal basis of termination for long-term, non-culpable absence is the so called frustration of contract rule which allows either party to terminate a contract when, through no fault of either side, an event or change occurs that defeats the purpose of the contract and makes it impossible to fulfill. In the employment

context, frustration includes a disabling illness, injury or condition that renders employees incapable of doing the job they were hired for.

Applying the Law

Understanding the law is one thing. The real challenge for HR directors is knowing how to apply it to real-life situations. Specifically, how can you tell when a long-term absence has reached the point of undue hardship or frustration of contract? It's a case by case determination that must be made based on the following factors:

- How long the absence has already lasted: While there are no hard-and-fast rules, some courts have set the point of frustration at a rough range of 18 to 24 months [*Demuynck v. Agentis Information Services Inc.,* 2003 BCSC 96 (CanLII)];
- The medical prognosis: Termination is easier to justify when a medical assessment determines that there's no reasonable prospect of a return in the near future; and
- The importance of the position: In general, the more significant the position, the shorter the absence you're expected to tolerate. Thus, for example, the point of frustration may be 6 months for an organization's CFO and 24 months for a receptionist.

Pre-Determined Time Limits

One way to avoid guessing is to establish set time limits on how long employees can be absent before forfeiting their job. But while it may seem fair, this approach violates the employer's duty to accommodate—even when the time limits are not only reasonable but generous.

Explanation: The accommodation process must consider the needs, characteristics and circumstances of the particular employee. Blanket policies treating all employees the same violates that principle. According to the leading Supreme Court case, each person must be "assessed according to his or her own personal abilities, instead of being judged on presumed group characteristics." A workplace rule that "unnecessarily fails to reflect the differences among individuals runs afoul of the [duty to accommodate] and must be replaced" [*British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights),* (called the *Grismer* case)].

Despite *Grismer*, you have room to maneuver especially if your workplace is unionized. Courts have ruled that unions can negotiate automatic termination clauses stating how long absences can last before employees lose their jobs (and/or their seniority) as long as the employer:

- Can show that the maximum is the point at which undue hardship would be reached; and
- Applies the maximum on a case-by-case basis after assessing each employee's actual circumstances.

[*McGill University Health Centre v. Syndicat des employés de l'Hôpital general de Montréal,* [2007] 1 S.C.R. 161].