Managing Absenteeism: 8 Things to Include in Your Attendance Management Program



What's At Stake

$16.6 billion

That's how much employee absenteeism costs Canadian businesses per year, according to Conference Board of Canada estimates. Add in productivity losses, replacement worker costs and other indirect costs and those losses balloon to over $37 billion. With so much on the line, it's hardly surprising that many employers have made it a priority to get absenteeism under control.

The Attendance Management Program

One common approach is implementing an attendance management program (AMP). The AMP establishes a process for dealing with employees who fail to meet specific attendance standards. The goal of the AMP process is to correct, not punish. At each stage of the process, employees are notified of their failings and what they must do to correct them. The reward for improvement is removal from the AMP. But employees who fail to improve face the risk of discipline up to and including termination.

The Legal Challenge

Although they've proven effective in controlling chronic absenteeism, AMPs also generate more than their share of grievances and litigation. Employees and labour unions tend to regard the AMP not as a constructive process for correcting attendance problems but an instrument of coercion and discipline. There've been more than 2 dozen reported cases challenging the legality of an AMP across Canada since the 1980s, with employees winning at an approximate rate of 3 to 2.

The Importance of the AMP Policy

One way to manage the legal risks is to negotiate and secure the union's agreement to the AMP. But if you adopt the AMP unilaterally, you need to anticipate legal challenges. Whether those challenges succeed will depend in large part on what your AMP policy does and doesn't say. While you probably won't have to do the actual drafting, as HR manager, you should have a general understanding of whether it's valid and likely to withstand legal scrutiny.

8 Key AMP Provisions

The starting point is making sure your policy includes the necessary provisions. Although there's no scientific formula, based on cases and best practices, there are at least 8 things you should include in your AMP.

1. Definitions of Culpable and Nonculpable Absence

When courts and arbitrators strike down an AMP, it's often the result of treating all absences the same. Starting with a 1972 case called *UAW Local 458 v. Massey-Ferguson Ltd.*, courts and arbitrators require employers to distinguish between two types of absence: culpable and nonculpable.

Example: AMP policy is unreasonable because it defines absenteeism as including both abuse of sick leave (culpable) and absenteeism due to illness (nonculpable) [*Royal Alexandra Hospital and U.N.A. Local 33 (Re)*].

So make sure your policy includes clear definitions of both culpable and nonculpable absences:

Culpable Absences
Not being at work due to factors within employee's power to control, including but not li • Absence without leave • Abuse of leave • Failure to notify • Lateness or leaving work early without notification, justification or excuse

2. Attendance Standards for Each Type of Absence

The AMP policy should establish clear attendance standards or a process for determining them. And those standards must recognize and account for the differences between culpable and nonculpable absences.

Example: Arbitrator finds AMP policy reasonable because, among other things, it distinguishes between and provides for separate treatment of culpable and nonculpable absences [*Dominion Controls Ltd. and I.A.M. Lodge 1927 (Re)*].

3. AMP Triggering Event

State or establish a process for determining a triggering event that causes an employee to be placed in the AMP, typically either:

- A specific number of absences over a defined period of time; or
- An absenteeism rate above a benchmark or departmental rate over a period of time.

The triggering event calculation should differentiate between culpable and nonculpable absences and make allowance for the latter. Another approach is to establish a separate, less strict triggering event for nonculpable absences.

4. Stated Commitment to Non-Disciplinary Resolution

AMPs should be non-disciplinary. Discipline is a last resort used only when non-disciplinary measures fail. It's important to expressly state this in your policy. Explanation: An AMP that's too disciplinary is apt to be challenged and struck down, especially if it's imposed unilaterally in a union workplace. "The risk is that a court will regard the policy as an end-run around the disciplinary provisions of the

collective agreement," explains an Ontario lawyer.

Example: Arbitrator strikes down AMP because the penalties for sick leave abuse are harsher than the collective agreement's penalty schedule [*Champion Road Machinery Ltd. and Gearco Ltd. and I.A.M. Lodge 1863 (Re*)].

Example: Arbitrator upholds AMP because it doesn't circumvent the disciplinary process for sick leave violations set out in collective agreement [*Perley Hospital and C.U.P.E. Local 870 (Re*)].

5. Defining Disabilities as Nonculpable Absences

Keep in mind that absenteeism may be caused by physical and mental illnesses and conditions that constitute disabilities under human rights laws (or family obligations protected by family status discrimination laws). The first way to insulate your AMP from disability liability risk to include absences due to disabilities and family obligations in your definition of nonculpable absenteeism.

6. Recognition of Employee Accommodation Rights

Although it was touch and go for a while, courts now recognize that using an AMP to control disability-related absenteeism isn't *automatically* discrimination. But it can *become* discriminatory if employers don't respect the employees' right to accommodation. So make sure your policy includes a clear statement recognizing those rights and promising to take them into account in administering the AMP process.

And make sure you keep your word. The cardinal rule of accommodation is that it must assess and account for the individual circumstances, capabilities and needs of each employee. Blanket and *per se* rules generally won't pass muster.

7. Non-disciplinary Process for Responding to Attendance Violations

The AMP process typically unfolds in stages. The initial response should be constructive and non-disciplinary, especially if absences are nonculpable. Although there are umpteen possible variations, the standard formula includes:

- Notifying employees who don't meet attendance standards (or who are approaching the triggering event);
- Getting their explanation;
- Establishing specific improvement goals and timelines, based on the particular circumstances involved.

Rather than threats, try to offer employees counselling, medical referral, placement in the employee assistance program and other resources necessary to achieve their AMP goals.

8. Process for Imposing Discipline

Although you want to avoid it, you need to have a process in place in case discipline becomes necessary. Discipline may be appropriate when:

- Absenteeism is culpable;
- Absenteeism in nonculpable but: (i) it frustrates the employee's contract, and (ii) where the absence is disability- or family status-related, discipline can be meted out in a way that doesn't violate the employee's right to accommodations.

And while the cases aren't totally clear, a strong argument can be made that

tolerating an employee’s unreasonable failure to meet AMP improvement goals after giving her a fair chance to improve isn’t a reasonable accommodation but undue hardship.

Last but not least, make sure the disciplinary procedures and penalties are consistent with the progressive discipline provisions of your collective agreements.