

## Member's Quarterly

Spring 2016 Edition

### Feature

# Rethinking Attendance Management: Doctor's Notes & Sick Pay

*Develop a fair policy*



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**I**n the last issue of this newsletter, we looked at the four questions we should ask about an absence: Did the employees notify us properly? By what right are they not at work? Should I believe what they tell me? Do I have to pay them? In this article, we'll look at the last two questions.

## Should I believe what they tell me?

Employers often react to medical certificate policies by saying "The notes don't say anything", "My employees tell me their doctor doesn't give notes" or "My employees say they can't get in to see their doctors".

First, the standard of certificate required should be linked to the rules of evidence. In other words, the note should say something that, if said in court or at arbitration, would constitute evidence that there was a medical need for the employee to be absent from the available work.

Doctors are expert witnesses in the field of medical science. As such, they are entitled to have their opinions on the employee's ability to do their jobs taken as evidence, provided their opinions are based on their specialized knowledge of medical science. For most conditions, valid medical opinion must be based on observing symptoms, conducting examinations, and/or studying test results.

Doctors' opinions about their patients' credibility are not evidence, because doctors are not recognized as expert witnesses in the field of assessing the truth of things said to them. Labour arbitrator Rolf Hattenhauer famously said, in *Fisheries Products (Marystown) Ltd. (1979) 22 L.A.C. (2d) 439*: "To put it bluntly, medical certificates of illness are not Holy Writ, and that simply because of the fact that their authors are fallible and can be misled. Surely, to argue otherwise is tantamount to suggesting that professional competence in the health sciences field — or in any other field for that matter — *ipso facto* vests the individual with such divine qualities as omniscience or infallibility."

Doctors who provide a note based on only subjective complaints and the request for a certificate are not giving a medical opinion. If you have properly set up your policy or rule, the note will not meet the needed standard.

Asking employees to get notes that meet such a high evidentiary standard for all illness or injury related absences would be grossly unfair, unreasonable and abusive. However, limiting the requirement to the tiny minority who cause us to question reasonably our "benefit of doubt" policy is reasonable. So this brings us to the question of when to require a medical certificate.

Employers have created some very nasty and intrusive attendance policies. Unions have responded by placing mechanistic restrictions on the employer's right to use common sense in determining if absences are okay or not. Such restrictions are so commonplace today that even non-unionized employers often act as if they were unionized. For example, they prohibit requests for doctors' notes for absences of fewer than three days, but require them from everyone absent for three days or more. This allows a few abusers to play games with many short absences, but forces many good employees to get notes when their trust is not in question.

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We advise our clients against imposing such mechanistic medical certificate policies. You should treat your people like you want to be treated. When you're sick with the stomach flu, you typically need time and rest to get well. You don't want to have to drag yourself down to the clinic or doctor's office to get a note. So why treat your employees that way?

You need a program that creates no hassle for 95–98% of your workforce, but makes the few "games-players" provide real proof of a medical need to be off work. The principle we use is benefit of doubt. Every employee gets the benefit of doubt when they say they are too sick to work — right up to the point that common sense says that continuing to trust them without proof would be dumb!

Here's what an employee would have to do to tell you to stop giving them the "benefit of doubt" and to start producing medical certificates for all medical absences: get caught lying about a supposedly medical absence, threaten to "call in sick" when it is clear that they are not sick, or demonstrate a highly unusual pattern or frequency of absences where illness is claimed when the employer has no other evidence suggesting illness.

Your principle for doctor's notes is: Trust people until they lose your trust. Then require REAL proof.

### Do I have to pay them?

If an employee has given proper notice and has a compelling need to be off, then they should be given permission to be off. Having a good reason to be off doesn't necessarily mean the employee gets paid. This is where you have to turn to your paid leaves and benefit policies.

Just because a person has used all their "sick days" or "sick leave" doesn't mean their absence merits discipline. A good reason remains a good reason. It just means that you have exhausted your obligation to pay for the absence under that policy.

Don't forget that extreme absenteeism, even if for good reason, may give cause to end the employment relationship. This is the "frustration of contract" or "innocent absenteeism" case. But that's another story.

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