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CONTENT

NOTIFYING YOUR INSURER OF POTENTIAL LEGAL PROCEEDINGS: A SENSIBLE MEASURE WHICH MAY HELP YOU AVOID SIGNIFICANT COSTS!

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Company directors sometimes have the reflex of minimizing the importance of a letter of demand or of the threat of a legal action. Fearing, for example, to see their insurance premiums increase, they sometimes decide not to notify their insurer of potential legal proceedings. This can have significant consequences and cause problems that a simple notice could have avoided.

OBLIGATION TO NOTIFY THE INSURER

Particularly in liability insurance matters, the insured has the obligation to notify his insurer as soon as he becomes aware of any loss, as provided under article 2470 of the *Civil Code of Québec*. Such is the case, for example, upon receipt of a letter of demand. If the insured neglects to notify his insurer, the insurer may, in certain circumstances, refuse to respect its own obligations.

This article also provides that the insured must declare any loss “which may give rise to an indemnity”, that is, which would be covered under the insurance policy. Once again, it is best to play it safe. In fact, it is not for the insured to determine whether a loss is covered or not[1]. When in doubt, it is therefore prudent to notify the insurer as soon as possible upon a loss occurring, the receipt of a formal notice or a legal action.

A timely notice will allow the insurer to investigate, meet with the appropriate witnesses, visit the site, hire the necessary experts, etc. It will also allow the insured to more quickly be informed of the position of the insurer as to insurance coverage.

Failing to receive such a notice, an insurer sustaining injury therefrom may set up against the insured any clause of the policy providing for forfeiture of the right to indemnity. A liability insurer could thus refuse to cover the loss and refuse to defend its insured against legal proceedings.

COSTS OF DEFENCE

One of the main obligations of the insurer in liability insurance matters is that of defending its insured against any proceedings covered by the insurance policy. Article 2503 of the *Civil Code of Québec* provides that the costs and expenses resulting from actions against the insured, including those of the defence, judicial costs, lawyers' and expert fees, are borne by the insurer, over and above the proceeds of the insurance. This obligation is all the more important since the costs of defending a legal action may escalate rapidly even if the amount claimed is not very high.

With this in mind, it is therefore prudent and advisable to notify the insurer as soon as possible in order to have him assume these costs, irrespective of the amount claimed and the chances of the proceedings being successful.

DEMONSTRATION OF INJURY SUSTAINED BY THE INSURER

To invoke a late notice, the insurer must however demonstrate that it suffered an injury therefrom. It may assert, for instance, that it was prevented from investigating and that the site of the loss has been disturbed between the event and the time it received the notice[2]. The disappearance of exhibits or evidence which would have allowed to establish the loss, exonerate the insured or involve a third party, the death of some witnesses, etc. may also constitute an injury to the insurer[3].

Although the courts require from insurers convincing demonstration of the injury sustained, failure to notify the insurer may be fatal to the claim of an insured, even if he successfully defends the liability proceedings instituted against him.[4]

CONCLUSION

An insured has the obligation to notify his insurer of a loss as soon as he becomes aware of it. Upon receipt of a letter of demand or a notice whereby he may incur liability, the insured should notify his insurer accordingly. Failure to do so may result in the insurer refusing to take up the defence of the insured and thus put him in a position where he has to incur significant costs which he may have avoided. It is always better to be safe than sorry.

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[1] *Marcoux* v. *Halifax Fire Insurance*, [1948] S.C.R. 278; *Androutsos* v. *Manolakos*, J.E. 2000-2046 (C.S.).

[2] *Union canadienne Compagnie d'assurance* v. *Bélanger* [1998] R.R.A. 685 (C.A.).

[3] LEMAIRE, M., *Du délai d'avis et de la prescription en assurance : quelques problèmes*, Développements récents en droit des assurances (2001), Service de la formation permanente du Barreau du Québec, Yvon Blais, 2001, online: EYB2001DEV220.

[4] *Axa Boréal Assurances inc*. c. *Université Laval* J.E. 2003-540 (C.A.); See also *Gagnon* v. *Ratté* [1996] R.R.A. 766 (C.S.).

THE ABCs OF MANAGING ABSENTEEISM AT WORK

Marie-Hélène Jolicoeur

INTRODUCTION

Absenteeism brings with it high costs for employers, leading to losses in efficiency, productivity and even the demoralization of staff. In such a context, the employer must act quickly. This text provides an overview of the basic principles applicable to absenteeism.[1]

The obligation to perform work is the foundation of the employment contract.[2] The employer can expect work to be performed in a consistent manner and for such work to be of sufficient quality.

However, a wide range of laws apply to the issue of absenteeism, sometimes making it difficult for employers to make sense of them all and to fully understand the scope of their managerial rights. In a unionized environment, such managerial rights are of course limited by the terms of the collective agreement.

Generally speaking, an employer is entitled to be informed of the health of its employees , meaning that he or she may be provided with access to certain medical information. In addition, the employer has not only the right, but also the duty, under various occupational health and safety laws, to ensure that such an employee is capable of performing his or her work. The employer is also entitled to be informed of the reasons for the employee's absence, to assess whether such justifications are reasonable, and, if necessary, to take disciplinary action.

There are two forms of absenteeism, and each must be managed in a different way.

UNJUSTIFIED ABSENTEEISM

Unjustified absenteeism can leave the employee open to sanctions in accordance with the principle of escalating sanctions (verbal notice, written notice, short suspensions, lengthy suspensions, and dismissal).

Unjustified absences are absences which are neither authorized nor justified, and include absences taken under false pretences. There are also other violations which are related to absenteeism, such as the failure to provide notice of an absence or of the fact that one will arrive late to work (even where such absence/ tardiness is justified), the unjustified and unauthorized abandonment of one's position, the refusal to provide a valid medical certificate upon request, or the falsification or fabrication of a medical certificate.

Where absences are repeated or combined with other violations, the sanction will be more severe.

Note that, in the absence of specific clauses in the collective agreement on this subject, an absence for "personal reasons" is not justified.

JUSTIFIED ABSENTEEISM

Justified absenteeism is involuntary. In such a case, the employer's management of the employee will be administrative rather than disciplinary in nature.

For example, an employee may be absent on numerous occasions, all of which may be justified, particularly if the absences have been authorized by the employer for a valid reason (e.g., health problems), or were permitted by statute (Act Respecting Industrial Accidents and Occupational Diseases,[3] Act Respecting Labour Standards[4]) or the collective agreement.

This type of absenteeism can sometimes justify dismissal. For this to be the case, the following five (5) elements must generally be demonstrated:

1) The absenteeism is excessive and lasts for a significant amount of time.

In this respect, it is useful to compare the employee's rate of absenteeism with the average rate of absenteeism within the company. While there is no magic number, an absenteeism rate fluctuating at a minimum of about 20% over a period of three (3) or four (4) years can be considered excessive.[5]

2) Little likelihood of improvement in the foreseeable future.

If the employee's absenteeism is primarily or entirely due to a single cause (e.g., chronic illness), medical evidence will be necessary and must address the prognosis, among other things. The instructions to the medical expert must be well-written so that he or she can provide a complete and substantiated opinion. Where the absence is due to multiple causes, such evidence is not required.

3) The absenteeism has consequences for the business.

It is advisable to document the effects of the absenteeism both on the workplace (e.g., work overload) and on the costs that it entails (e.g., overtime, new hires).

4) The employee is informed of the problem and of the risk of losing his or her job.

It is appropriate to meet with the employee to ensure that he or she is aware of, and to require him or her to resolve, the absenteeism problem. The employee should be informed that his or her employment may be terminated if his or her attendance does not improve.

5) The employee has a disability or "handicap"[6] and the employer is not able to accommodate him without undue hardship.

If the employee has a "handicap" within the meaning of the Charter of *Human Rights and Freedoms*,[7] the duty to accommodate will be triggered. For example, physical musculoskeletal limitations, alcoholism, drug addiction, bipolar illness, depression, and anxiety may all constitute "handicaps". The employer will therefore have a duty to attempt to find a reasonable accommodation. The employee, his union, where applicable, and his colleagues must also be involved in this process. However, the employer will be relieved of its obligation if it can demonstrate that it is not possible to accommodate the employee without experiencing undue hardship. Undue hardship may result from the impact of the accommodation on other workers or from the significant costs the business may incur given its size and financial resources.

MEDICAL CERTIFICATE

The employer is not entitled to require medical certificates on a systematic basis, but rather must have a legitimate interest and valid reasons for doing so. Such reasons may include:

- repeated or chronic absenteeism;
- where questionable reasons are given for the absence;
- to evaluate an employee's ability to return to work following a prolonged absence;
- to evaluate the employee's ability to perform the work where there are valid reasons for doubting his or her ability (e.g. repeated falls, disorientation, blackouts).

To be valid, the medical certificate must be signed by a physician and must refer to the specific dates of the absences. A mere statement that the employee was seen by a physician is insufficient.[8] The employer may require a detailed medical certificate indicating a diagnosis.[9]

CONCLUSION

We invite you to clearly inform your employees of the company's expectations as they relate to attendance (punctuality, notice of absences or tardiness prior to the beginning of one's shift,

compliance with the work schedule, and the obligation to remain at one's station for the entire shift, etc.). Employees should also be informed that they may be required not only to justify their absences, but also to provide a valid medical certificate if they cite their health as the reason for their absence.

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[1] This text was taken from a presentation on the management of absenteeism given by Carl Lessard and Marie-Hélène Jolicoeur on November 13, 2013 at the offices of Lavery de Billy. It is not a legal opinion, nor is it comprehensive in its coverage of this issue, providing only an overview of the basic principles that apply.

[2] Article 2085 of the *Civil Code of Québec*, SQ, 1991, c. 64.

[3] CQLR, chapter A-3.001.

[4] CQLR, chapter N-1.1.

[5] For example: *Syndicat des métallos, section locale 7625 et Dyne-A-Pak inc.*, D.T.E. 2012T-212.

[6] Section 10 of the *Charter of human rights and freedoms*, CQLR, chapter C-12.

[7] CQLR, chapter C.-12.

[8] *Aliments Cargill et Travailleuses et travailleurs unis de l'alimentation et du commerce, section locale 500* (TUAC), D.T.E. 2010T-817 (T.A.).

[9] *Syndicat des travailleuses et travailleurs du Pavillon St-Joseph (CSN) et Pavillon St-Joseph*, D.T.E. 2010T 754 (T.A.), upheld by the Superior Court (2011 QCCS 3426).