**MEDICAL ABSENCE WARNINGS**

Many employers contact the employer commissioner's office with questions regarding progressive disciplinary procedures for an employee who is missing excessive amounts of work due to medical problems of herself and her minor child/children. Usually, the problem is not lack of notice of absence, lack of medical documentation, or failure to comply with instructions. Rather, the employee's medical absences are so frequent that the employee is basically medically unavailable for work. In cases where a work separation results from such absences, an employer's best bet, or safest route, would be to argue that its tax account should be protected from chargeback under the medical work separation provision in the unemployment insurance law. A verbal warning might be phrased something like this (*do not treat this like a script - such a warning is effective only if it sounds natural and unrehearsed*):

\_\_\_\_\_\_\_\_\_ , we need to talk about the number of absences you have had during the past \_\_\_\_\_ months. It's just too much. We're a small company - you're one of \_\_\_\_ employees, and the [only one / one of only two] in your work area, and [the work has been falling behind / your coworker has been hard put to cover for you]. Isn't there some way that someone else could look after your sick child and allow you to come to work - a relative of some kind? Normally, I wouldn't be concerned about an absence here and an absence there, but it's gotten to the point where something needs to change. We can't keep going on with the status quo. I'm interested in trying to work with you on this - what can you offer me here? [Turn the conversation over to the employee - see what, if anything, she is willing to offer in the way of a commitment to try to change things around.]

After the verbal warning, make a memo of the conversation, including the date and time, for the employee's personnel file. In the event of continued problems, a written warning might look something like this (*do not simply copy and paste this into a document - the employer should use its own words - a warning that sounds like standard boilerplate terminology will generally not be as effective as one that appears to have been written with a specific situation or problem in mind*):

FINAL WARNING

On \_\_\_\_\_\_\_\_ \_\_, 200\_, you and I talked about your absenteeism and how it was causing serious problems for the practice in general and your coworkers in particular. I warned you verbally that you needed to do something to reduce the number of absences from work. At that time, I thought I had your commitment to try as hard as you could to minimize your absences due to medical reasons, but the problem has continued. You are not trying as hard as you could to find other sources of care for your [child/children] when [he/she/they] [is/are] sick. As much as I understand that you and your [child/children] have medical problems, we cannot handle so many absences on the part of one employee. Your position is very important to the company, and the other employees cannot continue to cover your absences to such an extent. The problem has reached the point where I have to place you on final notice that your position within the company is on the line because of your excessive absenteeism. Unless you are able to show me immediate and sustained improvement in your attendance, I will have no choice but to replace you in your position. I value you as an employee and sincerely hope that it will not come to that.

\_\_\_\_\_\_\_\_\_\_\_\_\_    \_\_\_\_\_\_\_\_\_\_\_\_\_  
/s/ (Employer)         Date

I understand that by signing this warning, I am not necessarily agreeing with its contents, but am merely indicating that I have seen it and have received a copy for my own records. I understand that I may write my own comments on the warning [in the space below / on the reverse side of this page], and that any comments I may write will become a part of my personnel file.

\_\_\_\_\_\_\_\_\_\_\_\_\_    \_\_\_\_\_\_\_\_\_\_\_\_\_  
/s/ (Employee)        Date

If the employee refuses to sign the warning, the employer or a witness should indicate that on the form. Give the employee a copy of the signed warning, and keep the original copy in the employee's personnel file.

In general, it is permissible to require an employee who is more frequently absent for allegedly medical reasons to submit medical documentation more frequently than other employees, but such an enhanced requirement should not be imposed until the employee has been warned, preferably in writing, that more frequent medical documentation will become a requirement if the employee fails to correct his or her attendance issues. The employee's work ethic and general motivation may be in a downward spiral, so an enhanced documentation requirement may actually help the employee focus on the needs of the job and on whether so much absenteeism is really necessary. Basically, the employee needs to know that the poor attendance is putting his or her job on the line, and before calling in sick again, he or she needs to think very hard about whether the condition is truly so bad that the employee cannot work. Conclude by emphasizing the bottom line: if the employee is not excited about working for the company, the company will not be excited about having him or her work there, and that kind of attitude will not work in any office the employee is likely to encounter in the future.

In the event of a UI claim under circumstances like this, an employer's best strategy is to argue for chargeback protection under the medical work separation provision of the UI law. A disqualification is basically impossible to achieve in a case involving mere medical absenteeism, due to the wording of the unemployment statutes, so the only other way to get chargeback protection is to have TWC decide that the medical chargeback protection provision applies. The way to do that is to point the TWC decisionmakers in that direction from the outset, without any distracting language about how the medical absences were "misconduct" - all that does in most cases is make a claim examiner or hearing officer think along the lines of "hmmm, no misconduct shown, so charge the employer's account." Thus, start off with a direct statement about how the case is not about misconduct, and continue with a direct appeal for chargeback protection. Here is an example of how such a claim response might be worded (*again, do not copy and paste this into a claim response - the employer should use its own words to avoid claim responses that sound like standard boilerplate terminology*):

We have no issue with Ms. \_\_\_\_\_\_ being entitled to unemployment benefits, since we understand that her medical absences were out of her control. However, in view of the small size of our company, and the number of times she was not at work due to medical problems, we feel that our tax account should not be charged. Her absenteeism rate was \_\_\_\_%, which unfortunately placed a huge burden on the other employees in our small office. We tried as long as we could to accommodate her problems, but it reached the point where the other employees had too much stress to continue like that, and we reluctantly had to replace Ms. \_\_\_\_\_ due to her medical unavailability for work. Since the work separation was the result of her medical problems, please protect our account from chargeback.

If the employer loses on the chargeback issue, it should appeal all the way up to the Commission, if necessary, and continue to make the same points about the medical nature of the work separation.