

Table of Contents

Statement of Respect	p3
Course Objectives	p4
Course at a Glance	p5
Task Sheet 1 Words to Describe AMP's	p6
Generic Attendance Management Program	p7
Task Sheet 2 Case Law Comparison/Checklist	p8
Task Sheet 3 Contrast Your Workplace AMP	p9
AMP T/F Quiz	p10
Task Sheet 4 Critiquing Dr Notes	p11
Talking to Your Doctor	p12
Task Sheet 5 Common Employer Terms	p13
Documentation	p14
Task Sheet 6 Strategies for Member Cooperation	p15
Task Sheet 7 Taking it back to the Local	p16
Helpful Resources	p17
Intent vs. Reality	p18
Generic AMP	p19
Case Law Fact Sheet	p21
Case Law - Attendance Management Programs	p23
Medical Information Fact Sheet	p27
Sample Doctor Notes	p28
Independent Medical Examination Fact Sheet	p32
Last Chance Agreement Fact Sheet	p33
Non-disciplinary Dismissal Fact Sheet	p34
Stewards Checklist	p35

AMP Meeting Report Form	p36
Sample Medical Information request form	p38
Successes in OPSEU	p39
WSIB Policy Changes	p40
Tips for WSIB Re-integration Meetings	p41
OPSEU WSI Fact Sheet #4	p42
Glossary	p44

Statement of Respect

Harassment or discrimination of any kind will not be tolerated at OPSEU functions.

Whenever OPSEU members gather, we welcome all peoples of the world. We will not accept any unwelcoming words, actions or behaviours against our sisters and brothers.

We accord respect to **all** persons, regardless of political affiliation, including people of colour, women, men, First Nations men and women, Métis or other Aboriginal peoples, members of ethno-racial groups, people with disabilities, gays, lesbians, bisexual, trans-gendered/transsexual peoples, francophones and all persons whose first language is not English.

In our diversity we will build solidarity as union sisters and brothers. If you believe that you are being harassed or discriminated against, contact (specified names) * for immediate assistance.

* It is the event coordinator's responsibility to designate at least two qualified persons. The names and phones numbers of such persons must be listed. One of the designated members shall be female.

Revised September 2006.

Making Sense of Attendance Management Programs

Goal

- To provide participants with the knowledge and tools to help defend their members from unfair attendance management program practices

Objectives

Know

- What case law says Attendance Management Programs (AMP) are supposed to be
- What medical documentation the employer is entitled to
- When non-disciplinary dismissal and independent medical examinations are deemed appropriate by arbitrators
- What strategies have been used successfully in other workplaces

Feel

- More confidence to be able to defend members against unfair AMP practices

Do

- Recognize employer strategies and hidden agendas
- Contrast your employer's AMP with what arbitrators have said AMPs should be
- Explain to members the value of union representation for AMP programs

Course at a Glance

Session 1	Session 3
<p>60 minutes AMP's what they are/ what they are supposed to be Intros to participants, the issues, the course Identify common issues Contrast common issues with what AMP is supposed to be Review case law for attendance management programs</p>	<p>60 minutes Strategies to inform the membership and build the local Get the memberships cooperation/support Rate your locals readiness and next steps</p>
15 Minute Break	
<p>60 minutes What Employers Are Entitled To What do the members need to know Employer terms and strategies: independent medical exams, Non-disciplinary dismissal, and last chance agreements Documentation: what we need to document and why</p>	

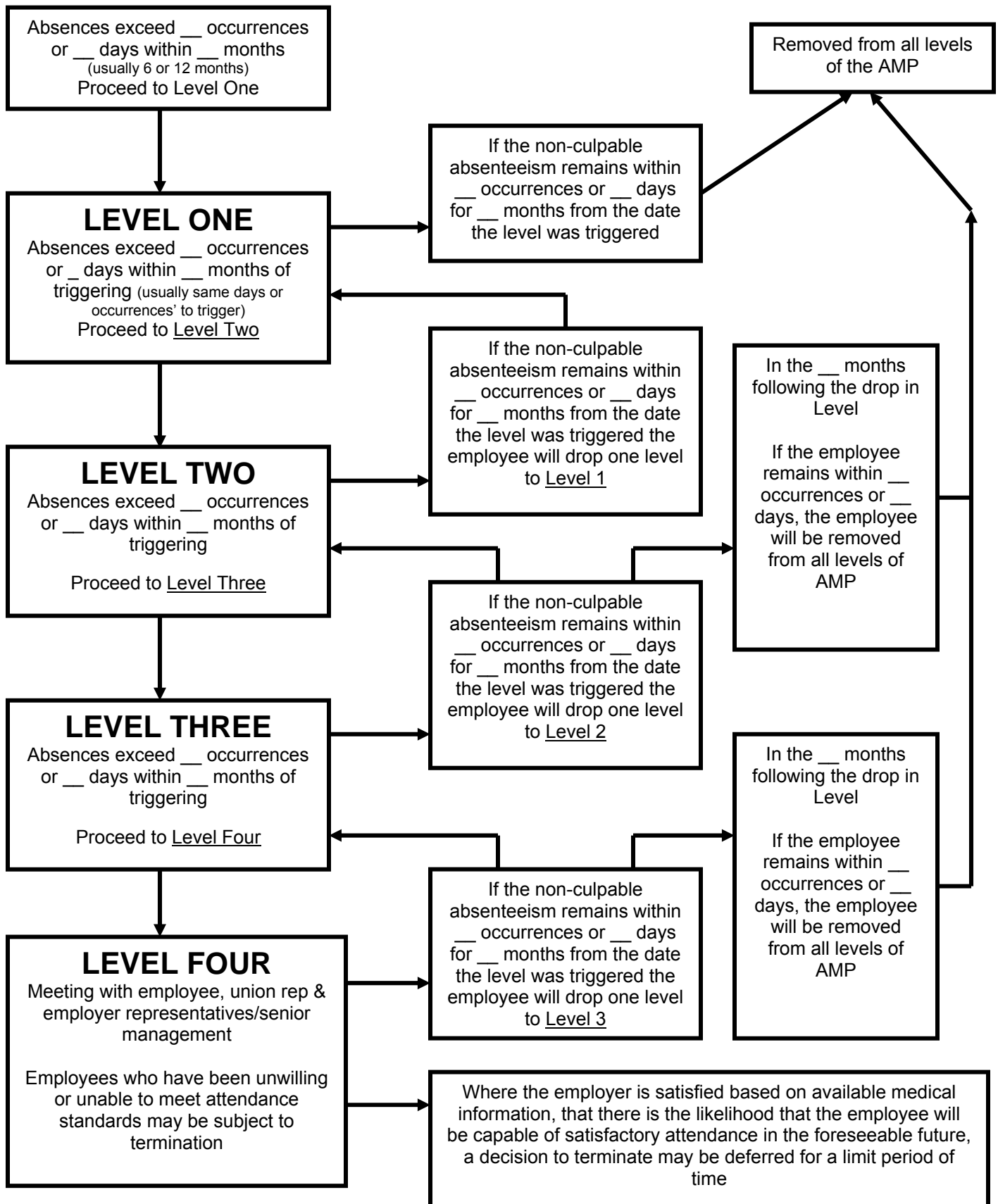
Task Sheet 1

Words to Describe AMP's

As a table group, in the spaces below please write a word or two, describing your workplace's attendance management program or your feelings towards the program, which starts with the corresponding letter next to it. (I.e. A = appropriate, D = disciplinary)

A		N	
B		O	
C		P	
D		Q	
E		R	
F		S	
G		T	
H		U	
I		V	
J		W	
K		X	
L		Y	
M		Z	

Typical AMP – FLOW CHART



Task Sheet 2

AMP Case Law comparison/checklist

Below is a list of AMP components of what an AMP program is supposed to be. Please check consistency with your own workplace's policy and how they implement the program. Place a checkmark in middle-column boxes if the AMP policy at your workplace follows the case law principles and in right-hand-column boxes if implementation is consistent with principles. Use the Case Law Fact Sheet (p 21-22) as a reference when completing this list.

What Case Law Says About Attendance Management Programs	Workplace Policy/Procedure	Implementation
Must provide a notice or warning that the present level of absenteeism is unacceptable		
Must provide an opportunity for the employee to effect improvement		
If using thresholds, WSIB and culpable absences cannot be factored into dismissal decisions		
Thresholds must be a reasonable indicator of a problem existing (i.e. workplace averages or sector norms)		
Must take into account the employer's duty to accommodate		
The program cannot be applied mechanically		
Counseling letters are allowable but the tone must not appear punitive or disciplinary		
AMP's cannot violate the collective agreement		
Program must be communicated to the employees.		

Task Sheet 3

Contrast Your Workplace AMP

Use your answers on Task Sheet 2 and the questions below to have a conversation with your partner. Be prepared to share the answers from your conversation with the larger group.

- Does the employer's AMP policy incorporate the case law principles outlined on Task Sheet 2?
- Is there a difference between your employer's AMP policy and its implementation? If so, what are they?
- Which of the case law principles does the employer do a poor job of adhering to?
- If the employer is not following the case law principles, why do you think that is?

AMP T/F Quiz

Identify the statements below as true or false

- Attendance management programs are just meant to harass me.
- My medical information is none of the employers business.
- The employer cannot fire me if I am legitimately sick.
- Last chance agreements are not worth the paper they are written on.
- The employer cannot tell me which doctor to see.
- My doctor's note cannot be challenged by the employer.
- A doctor's note needs only to say that I was sick and if I can come back to work.
- Attendance letters are meant to discipline me.
- If I sign a last chance agreement I forfeit my right to grieve dismissal.
- If I sign a "Waiver of Representation" I'm not entitled to union representation.
- If I am only off for a few days here and there I am safer than if I am off for long chunks of time
- The employer does not have to accommodate an employee if they do not know the employee has a disability



Task Sheet 4

Critiquing Doctors' Notes

Review together "Talking to Your Doctor," page 12 and the Medical Information Fact Sheet (p 27). Use it as a resource to assess your assigned doctor's note and scenario. As a group, answer the following questions:

- What you liked about the note
- What you would add (if anything)
- What you might remove (if anything)
- Your group's reasons for your decisions



Be prepared to share your answers with the larger group.

TALKING TO YOUR DOCTOR

You know more about your job, your work practices and your symptoms than anyone else. What should you tell your medical practitioner to help sort out the information that you need to provide to your employer

Talk about your symptoms

- How you feel
- When your problem started
- When you got your symptoms
- Do you have your symptoms only at work? After work?
- Are the symptoms worse at the beginning of the week or at the end of the work week?
- Does it make any difference what time of day it is? What day of the week it is?
- Does the problem go away when you are on holidays?
- Do you notice the symptoms only when doing certain tasks at work or home?
- Did your symptoms start after changing a work procedure or work area?
- After using different equipment
- Whether or not your health problem caused you to miss time from work?
- Do any co-workers have the same symptoms?

Give information about your job

- Where you work
- What your employer makes or does
- What your regular job duties are
- When you started your present job
- What hours you work
- What days you work
- Provide a job spec if you have one

What hazards you may be exposed to

- Anything in your work that could be harmful to your health (dust, heat, noise, stress, conflict etc...)
- What supplies and equipment you work with

- Are there any hazards that have been brought to the attention of the Joint Health & Safety Committee
- What protective equipment you use – do you wear a mask, gloves, lab coat, coveralls or other protection if necessary
- Do you eat in your work area?
- Exposures you might have outside work – your personal habits – Do you smoke, take drugs/medications or consume alcohol
- What are your eating habits?
- Do you exercise?
- Do you work a second job, volunteer?
- What are your hobbies?

Information you should have on your doctors note to the employer

- Your name – the patient
- The doctors name, address and phone number
- The date of the medical examination
- Whether you were examined in person by the health care professional
- The date when you can return to work
- Specific restrictions which indicate the doctors knowledge of your job requirements
- How long (as specifically as possible) the restrictions will apply. Are the restrictions permanent?
- Are you're absences likely to be sporadic. Will there be flare-ups due to your condition
- When, if at all, you will be able to return to regular duties

Remember – the employer is NOT entitled to a diagnosis. They are entitled to a prognosis along with duration and specifics about your medical restrictions as they relate to your job. The employer is also not entitled to know what medications you are on – they are only entitled to know if the medication causes a restriction, eg. Causes drowsiness.

Task Sheet 5

Defining IME, Non-Disciplinary Dismissal, Last Chance Agreements

Answer the following questions using your past experiences, knowledge of your collective agreement, or workplace policies. If you are unsure about the term assigned to your group, answer the questions from the perspective of what seems reasonable.

Insert the term you have been assigned into the blanks below and answer the questions.

What is _____?

When is _____ deemed appropriate?

What are the limitations on the employer when pursuing _____?

What are the employee's responsibilities when facing _____?

Task Sheet 6

Strategies for Member Cooperation

In your group create a strategy to build membership support and cooperation using the heading that your group has chosen. Your strategy could include:

- Who you are going to target your message to
- How you are going to achieve your goals
- What your message will be (Write out your message in detail in a way that will hook to the interests of your members)
- What you will need for success

Be prepared to share your strategy with the group

Task Sheet 7

Taking it back to the Local

When I first get back to the local I would like to _____

Within one month I would like to _____

In six months I would like to _____

Possible actions to take over these time frames include:

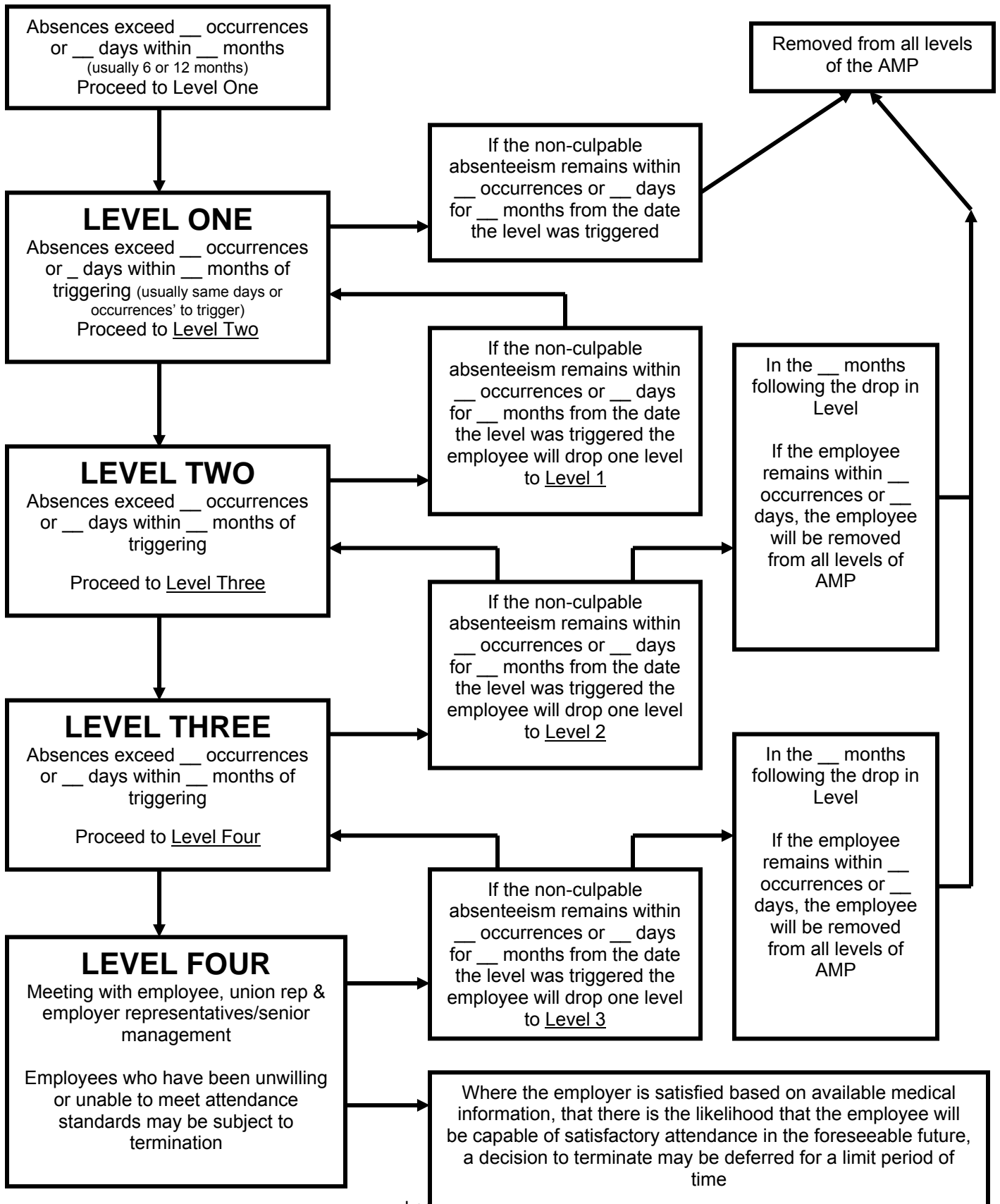
- Develop AMP specialists in the local
- Host lunch and learn
- GMM agenda item
- LMM/ERC agenda item
- Review workplace policy and procedure

Helpful Resources

Intent vs. Reality

	WHAT IT SHOULD BE	HOW IT IS IMPLEMENTED
A	<ul style="list-style-type: none"> • Awareness 	<ul style="list-style-type: none"> • Arbitrary
B	<ul style="list-style-type: none"> • Benefit (supports the worker) 	<ul style="list-style-type: none"> • Bad
C	<ul style="list-style-type: none"> • Cooperative • Consistent 	<ul style="list-style-type: none"> • Caustic
D	<ul style="list-style-type: none"> • Duty to Accommodate • Discretion 	<ul style="list-style-type: none"> • Disciplinary • Dismissal
E	<ul style="list-style-type: none"> • Evenhanded 	<ul style="list-style-type: none"> • Excessive
F	<ul style="list-style-type: none"> • Flexible • Fair 	<ul style="list-style-type: none"> • Fail (to account for disability)
G	<ul style="list-style-type: none"> • Guidelines 	<ul style="list-style-type: none"> • Galling
H	<ul style="list-style-type: none"> • Human Rights Code 	<ul style="list-style-type: none"> • Harassment
I	<ul style="list-style-type: none"> • Impartial 	<ul style="list-style-type: none"> • Intimidating
J	<ul style="list-style-type: none"> • Just 	<ul style="list-style-type: none"> • Jaw-dropping
K	<ul style="list-style-type: none"> • Knowledge (of principles) 	<ul style="list-style-type: none"> • Kick (employees that are down)
L	<ul style="list-style-type: none"> • Legitimate 	<ul style="list-style-type: none"> • Lip service (to policy)
M	<ul style="list-style-type: none"> • Morale 	<ul style="list-style-type: none"> • Mandatory
N	<ul style="list-style-type: none"> • Non-punitive 	<ul style="list-style-type: none"> • Nerve-wracking
O	<ul style="list-style-type: none"> • Occupational norms (to set thresholds) 	<ul style="list-style-type: none"> • Onerous
P	<ul style="list-style-type: none"> • Problem-solving 	<ul style="list-style-type: none"> • Penalizing
Q	<ul style="list-style-type: none"> • Questions (asks questions to assess DTA requirements) 	<ul style="list-style-type: none"> • Quit (makes employee want to)
R	<ul style="list-style-type: none"> • Reasonable 	<ul style="list-style-type: none"> • Rigid
S	<ul style="list-style-type: none"> • Supportive 	<ul style="list-style-type: none"> • Selectively applied
T	<ul style="list-style-type: none"> • Thresholds 	<ul style="list-style-type: none"> • Termination
U	<ul style="list-style-type: none"> • Undue hardship 	<ul style="list-style-type: none"> • Unreasonable
V	<ul style="list-style-type: none"> • Valid 	<ul style="list-style-type: none"> • Violate Collective Agreement
W	<ul style="list-style-type: none"> • WSIB • Warning 	<ul style="list-style-type: none"> • Wasteful
X	<ul style="list-style-type: none"> • Xerography (of medical information) 	<ul style="list-style-type: none"> • Xenomorphic (having a form not of its own)
Y	<ul style="list-style-type: none"> • Yard marker 	<ul style="list-style-type: none"> • Yakety-yak
Z	<ul style="list-style-type: none"> • Zero in on why attendance 	<ul style="list-style-type: none"> • Zero tolerance

Typical AMP – FLOW CHART





Generic Attendance Management Program

The above AMP is just an example. Steps, thresholds and time frames vary from workplace to workplace.

Top left box:

The employee exceeds an initial threshold that draws them into the program

Left Side:

The employee is subject to several levels of meetings of progressing seriousness. At each level meetings occur to discuss how to improve attendance, reasons for absenteeism, possible ramifications

Middle Boxes:

Decisions are made as to moving up or down in levels depending on number of absences over a predetermined period of time. Usually the same as the threshold and time period to enter the program

Right Side:

Decisions are made to further lower or return the employee to the previous level of the program

Case Law Fact Sheet

What Case Law Says About Privacy	Where to learn more
Must provide a notice or warning that the present level of absenteeism is unacceptable	Employer required to warn, and explore accommodation, before dismissing for innocent absenteeism, arbitrator rules <i>United Steelworkers of America, Local 1-423 v. Tolko Industries Ltd. (2005)</i>
Must provide an opportunity for the employee to effect improvement	Arbitrator reinstates employee with “appalling” attendance record, as absences were blameless and employee was worthy of one final chance <i>CAW-Canada, Local 414 v. Sysco Food Services (Central Ontario) 2009</i>
If using thresholds, WSIB and culpable absences cannot be factored into dismissal decisions	If the policy relies on objective numerical criteria, it must not mix culpable and non-culpable absences <i>Scarborough Fire Fighters Association, Local 626 v. City of Scarborough (1995)</i>
Thresholds must be a reasonable indicator of a problem existing (i.e. workplace averages or sector norms)	Arbitrary standard rendered attendance management program unenforceable: Discharge reversed <i>Ontario Nurses’ Association v. St Joseph’s General Hospital, Elliot Lake (2006)</i>
Must take into account the employers duty to accommodate	Bus company’s rigid adherence to its “employee availability” policy was a failure to accommodate. <i>B.T. v. AZ Bus Tours Inc. Federal Court (2009) F.C.J. No. 1412 (QL)</i>
The program cannot be applied mechanically	The sole use of a flow chart to administer a AMP was deemed “unreasonable” <i>United Nurses of Alberta, Local 2 v. David Thompson Health Region (2009)</i>
Counseling letters are allowable but the tone must not appear punitive or disciplinary	Attendance letters that stated they were not disciplinary and imposed no penalties were allowed by the arbitrator. The act of warning the employee that their absences are excessive, providing an opportunity for improvement, and notification of the consequences of

	<p>continued attendance problems was supported. <i>International Association of Machinists and Aerospace Workers, Local 103 v. Spartech Color (Stratford) (2008)</i></p>
<p>They cannot violate the collective agreement</p>	<p>Parts of employer’s absenteeism policy for nurses violated collective agreement, Arbitration Board Decides <i>United Nurses of Alberta, Local 2 v. David Thompson Health Region (2009)</i></p>
<p>Program must be communicated to the employees.</p>	<p>Employer required to warn and explore accommodation, before dismissing for innocent absenteeism, arbitrator rules. The arbitrator ruled that the “the employer was justified in its concerns about the grievor’s ability to be able to attend work in the future and live up to her side of the employment bargain” but had failed to warn the grievor, formally or informally, that her job was in jeopardy. The warning may have allowed the grievor to raise the need for accommodation. The grievor was reinstated. <i>United Steelworkers of America, Local 1-423 v. Tolko Industries LTD. (Armstrong Division) British Columbia (2005)</i></p>

Attendance Management Programs Case Law

Broad Parameters of Management Rights	Limits on Management Rights	Examples
<p>Generally, an employer has the right to implement AMPs.</p>	<p>Yet, the language and the implementation process cannot violate language in the collective agreement or the law (specifically human rights law).</p> <p>For instance, language around entitlement to sick days or requirement for medical certificates cannot be in conflict with the language in the collective agreement.</p>	<ul style="list-style-type: none"> • If the language of the C.A. stated that medical certificates were only required after a five-day absence, but the AMP stated that the certificate was required after a two-day absence, there is a violation of the C.A. • If the AMP does not distinguish between culpable and non-culpable absences, the AMP then violates the Ontario Human Rights code which is implied into every collective agreement and states that disabilities must be accommodated to the point of undue hardship. • In one case, an employer was ordered to refrain from encouraging employees to use vacation days instead of sick days to avoid entering the AMP. This was seen as a violation of the sick leave provisions in the C.A.¹

¹ *C.U.P.E., Local One v. Toronto Hydro*, (October 3, 2003), (Saltman)

Broad Parameters of Management Rights	Limits on Management Rights	Examples
	<p>AMPs must distinguish between culpable and non-culpable absences.²</p> <p>When dealing with non-culpable absences, AMPs cannot be disciplinary or punitive in nature³ (i.e. the overall tone of the policy and letters that are sent, and the language around consequences must not sound punitive).</p>	<ul style="list-style-type: none"> • Non-culpable absences include: WSIB absences, ESA emergency leaves and other statutory leaves, illnesses related to disability, etc. • The tone of any letter or communication around non-culpable absences must demonstrate employer “concern” and the desire to offer support/accommodation to employees. • In one case, where the interview and documentation emanating from the interview did not form part of the record for determining discipline, this was seen to meet the test of non-punitive.

² *Scarborough (City) and Scarborough Firefighters Ass’n, Local 626* (unreported), June 2, 1995 (Mitchnik); *C.U.P.E., Local 543 v. City of Windsor*, March 11, 2002, (Williamson, Morgan and Robitaille)

³ *Health Employers Ass’n of British Columbia and H.E.U.* (2002) , 2002 C.L.L.C, paragraph 220-021
Last Updated: 7/29/2011

Broad Parameters of Management Rights	Limits on Management Rights	Examples
Employers are usually required to show and take a “progressively escalating response.” ⁴	<p>AMPs must build in the following requirements:</p> <p>a) The employee must receive notice that his or her absenteeism is unacceptable and that their jobs are in jeopardy.⁵</p> <p>b) The employee must have a chance to effect an improvement.</p>	<ul style="list-style-type: none"> • In one case, an arbitrator allowed the union’s grievance on the grounds that the employee was never warned, either informally or formally, that her employment was in jeopardy. The arbitrator said that such a warning may have allowed the employee to go to her union and raise the need for accommodation, which may have improved her attendance record.⁶ • Employees have less protection from dismissal where their absenteeism is of the short-term, intermittent type, or where there is no single, accommodatable cause for the absenteeism.
Employers can terminate on the basis of non-culpable absenteeism in appropriate circumstances. ⁷	<p>However, employers must be able to show that:</p> <p>a) The employee’s past record of absenteeism is undie or excessive</p> <p>b) There is no reasonable prospect for improvement in the foreseeable future.⁸</p> <p>Still, the employer’s right to terminate is subject to the duty to accommodate to the point of undue hardship.⁹</p>	<ul style="list-style-type: none"> • In one case, an employee demonstrated that he took steps to rectify the major causes of his absenteeism. As a result, the arbitrator found the employer did not meet the onus of proof that the employee was then incapable of regular attendance in the future.¹⁰

⁴ *Miramachi Pulp & Paper and C.P.U., Local 689* (1986), 26 L.A.C.(3d) 222 (Stanley), at p. 225.

⁵ *Vancouver (City) and Vancouver Municipal & Regional Employees Union* (1983), 11 L.A.C.(3d) 121 (Hope); *General Tire Canada Ltd. and U.R.W., Local 536* (1982), 7 L.A.C. (3d) 238 (Kennedy); *Maritime Beverages Ltd. and Teamsters, Local 927* (1990), 12 L.A.C.(4th) 38 (Darby)

⁶ *United Steelworkers of America, Local 1-423 v. Tolko Industries Ltd.*, (2005) B.C.C.A.A.A. No. 176 (Kinzie)

⁷ *Air BC Ltd. and C.A.L.D.A.* (1995), 50 L.A.C.(4th) 93 McPhillips; affirmed more recently in *Desormeaux v. Ottawa Carleton Regional Transit Commission*, (2004) F.C.J. No. 2172 (QL) F.C.

⁸ See note ii *Scarborough*.

Broad Parameters of Management Rights	Limits on Management Rights	Examples
<p>Overall, where Management shows the use of discretion or individual application of the policy, their decision will receive more deference.</p>	<p>In making a decision to terminate, employers cannot apply the policy “mechanistically”.¹¹ That applies in two concrete ways:</p> <p>a) Decision to terminate – employers cannot make the decision to terminate based on numerical criteria alone. Rather, employers must be being able to show consideration of the personal circumstances of the employee and attempts to accommodate that individual’s specific needs.</p> <p>b) Individual approach to each absence – the employer must be able to show consideration of the nature, duration, and reason for each absence¹² (see the box below).</p>	<ul style="list-style-type: none"> In one case, the arbitrator found against the employer where employees were brought into the program simply by violating the numerical threshold without consideration of the reasons for the absence. The arbitrator ordered that discretion be exercised at each step of the program.¹³
<p>Employers can establish a numerical/objective threshold for attendance.</p> <p>Employers can also adopt a standard lower than the average absenteeism rate if they can demonstrate that there is a reasonable basis for it.¹⁴</p>	<p>This numerical/objective criteria</p> <p>a) Cannot mix non-culpable and culpable absences</p> <p>b) Cannot be arbitrary¹⁵</p> <p>c) Must be proven to be based on reasonable attendance criteria.¹⁶</p> <p>When using the numerical threshold, employers must still assess the nature, duration or reasons for each absence (i.e. cause is not met by meeting the numerical criteria alone).</p>	

⁹ See note ii *Scarborough; Alcan Smelters & Chemicals Ltd. and C.A.W., Local 2301* (1996), 55 L.A.C. (4th) 261 (Hope); *Amalgamated Transit Union, Local 113 v. T.T.C.*, (2003) O.L.A.A., No. 520 (Chapman).

¹⁰ *National Automobile, Aerospace, Transportation and General Workers of Canada (CAW-Canada) Local 111 v. Coast Mountain Bus Company*, October 24, 2003 (Dorsey)

¹¹ See note ii *Scarborough*.

¹² See note ii *City of Windsor*.

¹³ See note i.

¹⁴ *C.U.P.E., Local 136 v. Oakville (Town)*, (2005) O.L.A.A., No. 393 (Kaplan)

¹⁵ See note ii *Scarborough*.

Note: Even where these rules are followed in an AMP on paper, Unions can still argue the issue of how the programs are administered. Unions have been very successful in proving that AMPs were discriminatory or illegal where they have been able to demonstrate that, despite the technically correct language of an AMP, they were being administered illegally i.e. mechanistically, in a punitive fashion, without accommodation and support options, without allowing meaningful chances for employees to improve their attendance, etc.

Arbitrator Greyell in the **Purolator Courier Ltd. and Teamsters, Local 31 (2000), 89 L.A.C. (4th) 129, ordered the inclusion of an explicit statement that all its terms were subject to the applicable Human Rights Code*

Medical Information Fact Sheet

The general consensus among arbitrators is that when assessing a request for short-term disability or illness:

Employer is entitled to:

- General information as to the nature of the illness or disability
- General description of the work the employee can or cannot do
- The expected date of return of the employee.

In *Ontario Nurses Association v. Hamilton Health Sciences (2008)*, the arbitrator stated that the employer is entitled to the reason for the incapacity in the form of a “general statement” of the nature of the ... illness or injury, that the employee has and is following a treatment plan (but not the plan itself), the expected return to work date, and what work the employee can or cannot do.

Employer is NOT entitled to:

- Specific diagnosis
- Symptoms
- Treatment plan
- Medical history
- Prospective consent to contact the employee’s doctor

In one case an Arbitrator went as far as to rule that medical information request forms supplied by the employer must make clear that diagnosis and symptoms are not to be provided. *Ontario Nurses Association v. Brant Community Healthcare System (2008)*

For more lengthy or complicated medical leaves, some arbitrators have supported employers’ requests for additional medical information such as:

- Information about prognosis
- Functional limitations
- Medical follow-up
- Expected return-to-work date
- General course of treatment

CUPE, Local 728 v. Surrey School District No. 36 (2006)

Medical Note 1:

Scenario:

Joan has been off for four days. These are the only sick days she has been off for this year. Her collective agreement states that an employee off work for three consecutive days must provide her employer with a medical note.

Doctor's Note:

Dr. J Erving, MD.

June 7, 2011

To Whom it May Concern: Joan is a patient under my care. She was off work due to illness May 17-20. At present, Joan can return to full duties.

Dr. Erving

Medical Note 2:

Renaldo has been off work due to illness for the last three days bringing his total number of sick days for this year to 10. This sick incident has put Renaldo over the workplace Attendance Management Program threshold of nine days for this calendar year. His manager has asked that he bring in a medical note explaining his most recent illness.

Doctor's Note:

Dr. J Rochette, MD.

June 7, 2011

To Whom it May Concern: Renaldo is a patient under my care. He was off work due to illness May 17-20. At present, Renaldo can return to full duties.

Dr. Rochette

Medical Note 3:

Perdita has been off work for the last two weeks. It is known that she has been in poor health over the last several months. Perdita is at stage two of the workplace Attendance Management Program. Her supervisor has asked her to submit a medical note prior to returning to work.

Doctor's Note:

Dr. D. Igali, MD.

June 7, 2011

To Whom it May Concern: Perdita is a patient under my care. She was off work due to a cardio-respiratory illness since May 24th. At present, Perdita can return to full duties with the following restrictions:

- Frequent rest breaks (10 minutes every hour)
- No heavy lifting (weights over 10 kg)

I plan to assess Perdita in two weeks' time (June 21st) to determine any changes in restrictions.

Dr. D. Igali

Medical Note 4:

Daniel has been off work due to illness for the last three weeks, bringing his total number of sick days for this year to 35. This sick incident has put Daniel into level three of the workplace Attendance Management Program. His manager has asked that he bring in a medical note explaining his most recent illness, prognosis, functional limitations, and expected return to work date.

Doctor's Note:

Dr. C. Petitclerc, MD.

June 7, 2011

To Whom it May Concern: Daniel is a patient under my care. He has been off work due to complications from his diabetes. He is currently undergoing insulin treatments and should be able to gradually return to work June 13th. Currently he has limited mobility and cardiovascular reserve. I expect that this will improve as his condition improves. I have included a return-to-work plan below.

Return to work plan:

Week 1: 4 hour shifts

Week 2: 6 hour shifts

Week 3: Full days

General restrictions:

- Limited walking
- No heavy lifting
- Frequent breaks

Dr. Petitclerc

Independent Medical Examinations Fact Sheet

Independent medical examinations are consultations with a third party who is deemed to be “independent”. The purpose is to provide expertise that the employer feels is necessary to determine the employee’s health status.

Independent medical examinations are a controversial topic. Some unionists see them as a way to move the process forward, while others avoid them at all costs. What we all need to know is this:

- **They can be required** – an arbitrated decision (Telus vs. Telecommunications Workers Union 2006) upheld the employer’s right to discontinue a worker’s short-term benefits when the worker refused to attend an IME with a doctor of the employer’s choosing.
- **Watch Collective Agreement Language** – Some STD language includes terms like “consult with a third party physician”.
- **Employee’s physician** – If the employer does not agree with, or feels they do not have enough, medical information, ask that they go back to the employee’s family doctor for the information before IME.
- **Physician that is mutually agreeable** – Meet the employer halfway. The arbitrator said that the employer and employee should try to find an independent physician that is mutually agreed upon before picking a doctor of the employer’s choice.
- **Reasonable grounds** – The employer must have reasonable grounds to distrust or challenge the employee’s doctor.
- **Employee’s rights** – In the end, the employee will always have the right to what is disclosed or to decide whether they attend an IME. They may not be disciplined for any choice they make, but the employer will have the right to deny sick benefits.

The necessity for an IME is assessed by arbitrators on a case-by-case basis. It is typically not upheld for an “initial/first instance” absence. Where an IME is warranted, other less intrusive ways of providing the medical information or clarification of medical information should be explored.

Last Chance Agreement (LCA)

Fact Sheet

This is an agreement entered into by the employee and the employer (occasionally the union) that makes the employee's continued employment or reinstatement conditional on the employee meeting a number of conditions.

Common Conditions:

- Maintaining a specified level of attendance in the future.
- Addressing the behaviour which led to the discharge.

Failure to adhere to these conditions results in the employee's immediate discharge, without recourse to the grievance procedure.

Other Factors:

- **Notwithstanding any agreement, the employer must take into account its obligation to not discriminate and fulfill their duty to accommodate under the Human Rights Code.**
- Conditions must relate directly to the illness. i.e. If the disability is alcohol or drug dependency, random drug and alcohol testing has been deemed appropriate.
- Arbitrators are reluctant to interfere with LCA's, as they feel this would discourage employers from providing employees with a last chance.
- Last Chance Agreements are more likely to be upheld if they are a "tripartite agreement" (the union, employer, and grievor are involved in the process).

Non-Disciplinary Dismissal Fact Sheet

Arbitrators have upheld the employer's right to dismiss an employee for non-culpable absenteeism in appropriate circumstances. The rationale for this comes from the "employment relationship" where the employer has a right to expect reasonable attendance on the part of its employees in exchange for providing employment.

The appropriateness of the circumstances involves the employer's duty to accommodate and a two-part test.

Two-Part Test:

- The absenteeism is excessive
- The employee is unable to fulfill the basic obligations associated with the employment relationship for the foreseeable future

Deemed Terminated Clause:

Some collective agreements have clauses that set a period of time (usually 24-36 months) the employee may be off work after which, if exceeded, the employee is "deemed terminated". Arbitrators have ruled that "deemed terminated" clauses cannot be applied without an individualized assessment. They are "a factor to consider when assessing the duty of reasonable accommodation". *McGill University Health Centre (Montreal General Hospital) v. Syndicat des employés de l'Hôpital general de Montréal (2007)*

ATTENDANCE MANAGEMENT PROGRAM (Sample)

UNION STEWARD – AMP MEETING REPORT FORM

Members Name: _____ **Date:** _____

Meeting is being held at Level of the AMP: (circle one) 1 2 3 4

Who is at the meeting?

Name and Position

Name and Position

Name and Position

Name and Position

Did the member provide medical information to the employer? Yes ___ No ___

Who was the information given to? _____
Name and Position

Was the information provided a: (check one)

- Doctor's note
- Employer Medical Information Form
- WSIB
- Independent Medical Information
- Self-identified disability
- Other _____
Please Describe

Did the member ever sign a "Waiver of Representation" Yes ___ No ___

What is the employer saying about the member?

PLEASE SEE OVER...

What is the member's or union position on what the employer has said?

What was the outcome of the meeting? Was there any agreement?

Did the employer give any correspondence to the member? Yes ____ No ____

What was the correspondence? _____

Stewards Name _____

Please Print

Stewards contact information _____

Phone

e-mail

The member has received a copy of this report form. Yes ____ No ____

Members signature _____

***CONFIDENTIAL - Please keep this information secure and on file
DO NOT give a copy to the employer***

Providence
Care

FAF

Functional Abilities Form
for Planning Early
and Safe Return to Work

A. Section A to be completed by the employer and/or worker.			
Worker's Last Name	First Name	Telephone	
Address (no., street, apt.)	City/Town	Province	Postal Code
Employer's Name		Date of Birth (dd/mm/yyyy)	
Full Address (No., Street, Apt.)		Date of Accident/Awareness of Illness (dd/mm/yyyy)	
City/Town	Prov.	Postal Code	
		Employer Telephone	
		Employer Fax No.	
1. Type of job at time of accident (where available, please attach description of job activities)		Area(s) of injury(les)/illness(es)	
2. Have the worker and the employer discussed Return To Work <input type="checkbox"/> yes <input type="checkbox"/> no		If no, will be discussed on dd mm yyyy	
3. Employer contact name		Position	

B. Worker's Signature	
By signing below, I am authorizing any health professional who treats me to provide me, my employer with information about my functional abilities on the "Functional Abilities for Planning Early and Safe Return to Work" form.	
Signature	Date dd mm yyyy

C. Health Professional's Information			
Health Professional's Designation <input type="checkbox"/> Chiropractor <input type="checkbox"/> Physician <input type="checkbox"/> Physiotherapist <input type="checkbox"/> Registered Nurse (Extended Class) <input type="checkbox"/> Other			
Health Professional's Name (please print)			
Address (No. Street, Apt.)			
City/Town	Province	Postal Code	Fax
I hereby declare that the information being submitted in Sections C, D, E and F of this form is true and complete. It is an offense to knowingly make a false or misleading statement or representation.			
Health Professional's Signature		Telephone	Date dd mm yyyy

Successes in OPSEU

Context	Strategy Used	Results
Challenged an attendance management program	Policy grievance over Correction's ASMP Keller decision.	Employer must: <ul style="list-style-type: none"> • Treat members on a case by case basis • Remove absences that arise from disability • Preclude WSIB absences from Level 4 determinations
Successfully challenged a non-disciplinary dismissal termination	Filed an individual grievance that was "fast tracked" to arbitration.	Won the arbitration due to the employers refusal to consider supplemental medical information
Successfully challenged an arbitrary threshold	Policy grievance currently in the works against the Corrections ASMP	Awaiting decision
Got an accommodation through the AMP process	One OPSEU worksite had 22 members in the AMP. OPSEU used a training program to equip stewards to challenge the program	Fifty percent of the members in the program have been moved to a lower level of the program or removed entirely

WORKPLACE SAFETY & INSURANCE BOARD (WSIB) RETURN TO WORK POLICIES ARE CHANGING

The previous “Early and Safe Return to Work (ESRTW)” policies have now been replaced with the new “Work Re-integration (WR)” policies.

What does this mean?

- The purpose of the new WSIB Work Re-integration Policy is to get workers with active claims back to work as soon as possible after their accident
- The WSIB will be taking on a more pro-active role in the return to work process. Workers are now required to co-operate with the WSIB as well as their employer.
- To initiate early intervention the WSIB will arrange a return to work meeting (usually at the workplace) with the worker and the employer twelve (12) weeks into the claim regardless if you can attend or not
- The Board’s Return to Work Specialists will be actively involved in the planning and implementation of the return to work strategies at these RTW meetings
- The Work Re-integration process should ensure a healthy recovery for the injured worker, provide a safe return to work, identify any limitations or restrictions and restore pre-injury earnings where possible
- It will be the goal of the RTW Specialist to have a comprehensive return to work plan by the end of the meeting
- Both Employers and Workers will now face financial penalties for not co-operating in the work re-integration process

For complete information on these policy changes visit the WSIB website at www.wsib.on.ca; click on Workers → Resources → Operational Policy Manual (OPM)

Tips for the WSIB Work Re-integration Meeting:

- Be prepared!
- Involve your Union Representative in the process and have them attend the meeting with you
- Workers should co-operate in the process to avoid any possible loss of benefits
- Workers and their representatives should be aware of the worker's condition, limitations, restrictions and abilities and should also have the medical evidence / documentation to support it
- Provide updated functional abilities information from your treating physician that indicates your restrictions and limitations including your medical prognosis
- Help identify any suitable alternative work that may be available and within your capabilities
- Consider any modifications that could be done to your pre-injury position that would make it suitable for you to return to work
- Be willing to participate in the return to work plan; however should it appear unsuitable communicate at the meeting that you are not a Doctor and request that your doctor be given the opportunity to review the plan
- Keep in mind, it is the worker's medical professional (Doctor) who is qualified to determine what type of work is suitable or not according to the medical condition.

Should you require assistance with your return to work meeting contact your OPSEU Staff Representative.

WSI Fact Sheet #4

Returning to Work While on Workplace Safety and Insurance

Rehabilitation and Return to Work (RTW) planning begins the day of the worker's absence from work or requires accommodation as a result of a workplace injury or illness.

The return to work process should:

- ensure a healthy recovery process for the injured worker;
- provide a safe return to work as soon as is medically possible;
- identify any limitations that should be placed on the worker if the worker comes back to a pre-injury job on a modified or part-time schedule (until capable of returning to normal job functions) and,
- restore pre-injury earnings where possible or a job that is comparable to pre-injury job in nature and earnings.

The worker, the employer and the union should provide effective, ongoing communication and documentation where requested. Based on this information a return to work or a written accommodation plan should be developed and implemented between the workplace parties.

As an injured worker returning to work, you should:

- ✓ get proper medical attention immediately upon experiencing a work related injury;
- ✓ report injury to employer as soon as you are reasonably aware of the injury;
- ✓ maintain effective communication between you, employer, the union representative and WSIB during recovery and RTW process
- ✓ help to identify suitable work with respect to your functional abilities and contribute to the development of your RTW plan
- ✓ report any significant change in your circumstances. This includes returning to work, additional income, or any change in your medical condition. These changes must be reported within ten days of the change occurring and comply with recommendations for treatment
- ✓ provide functional abilities information regarding your restrictions and limitations including your medical prognosis

You can expect ongoing evaluations of your work progress in relation to your injury from both your employer and WSIB to ensure that you are able to perform your pre-injury job functions or whether there is a need to modify your RTW plan.

Since December 2010, the WSIB will monitor all claims for worker opportunities to return to the workplace including part-time, modified and full-time work whether it is your home position or alternative employment. As soon as there is an opportunity, the WSIB will be arranging for a meeting at the worksite to discuss return to work with the worker, the employer and the union. The WSIB will arrange for a meeting no later than 12 weeks after the claim and must conduct the meeting within 6 months. However a meeting can be arranged much sooner based on the worker's ability to return to work.

An offer of work should include:

- ✓ what work is being offered
- ✓ the nature of the work
- ✓ hours of work
- ✓ associated remuneration
- ✓ location of work site

If you are not able to return to perform your job duties included in your RTW plan, you must:

- ✓ notify your employer that the job is not suitable and provide reasons
- ✓ communicate with your employer as to any alternate accommodations available
- ✓ where no resolution can be met, inform WSIB and provide all relevant information to the dispute.

In turn, the WSIB will consider all relevant functional abilities/health care information; all information regarding the job description including information pertaining to the physical and cognitive demands associated with the job offered; and any other relevant considerations, such as whether changes in the location of work or the hours expected to work will negatively impact your recovery.

You should work with your union, employer and physician or specialist to return to work.

You should contact and arrange for a union representative to act on your behalf throughout the RTW process. If you are having return to work issues (such as accommodation issues), please contact your local's union representative or an OPSEU staff representative for assistance.

If you wish to appeal a denial of a benefit or return to work dispute, please refer to Fact Sheet #1- Appealing a Decision.

Glossary

Absenteeism: are absences that are avoidable, habitual, and unscheduled.

Culpable absences: When an employee is absent without a valid or substantiated reason or when giving a false reason for absence.

Non-culpable absences: refers to circumstance where the employee is absent from work through no fault of their own and the absence could not have been anticipated by the employee.

AMP's: Attendance Management Programs are programs that employers use to address, what they see as a problem, of excessive absenteeism. These programs usually involve a benchmark threshold that draws the employee into the program and a series of steps that may lead to non-disciplinary dismissal.

Deemed Terminated Some collective agreements have clauses that set a period of time (usually 24-36 months) the employee may be off work, which if exceeded allow the employee to be "deemed terminated".

Independent Medical Examinations (IME's) are consultations with a third party who is deemed to be "independent". The purpose is to provide expertise that the employer feels is necessary to determine the employee's health status.

Last Chance Agreement: An agreement entered into by the employee and the employer (occasionally the union) that makes the employee's continued employment or reinstatement conditional on the employee meeting a number of conditions.

Short term sick leave: A negotiated benefit in the collective agreement that provides for maintenance of an employee's income when he or she is absent from work due to illness or non-occupational injury.

Workplace medical form: A form used by the employer to obtain medical information for the purpose of assessing an employee's right to benefits.