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For Business Owners



Dealing With Suspect ill Health Absenteeism & Fraudulent Medical Certificates

Introduction

Labour legislation may come and go, but the problems of phoney or fraudulent medical certificates and suspect ill health absenteeism seem to stay with us forever. In this article we focus on the circumstances under which you may fairly refuse to pay for sick leave, when you may take action against employees for fraud, and what you can do about unacceptable ill health absenteeism.

A “valid” medical certificate

There is no statutory definition of a valid medical certificate, i.e. one on which you must pay the employee for ill health absence. As a point of departure, the Basic Conditions of Employment Act (BCEA), does state that a medical certificate must be: issued and signed by a medical practitioner, or any other person who is certified to diagnose and treat patients and who is registered with a professional council established by an Act of Parliament. A medical practitioner is defined in the BCEA as “a person entitled to practice as a medical practitioner in terms of Section 17 of the Medical, Dental and Supplementary Health Service Professions Act”. Furthermore, section 56(1) of the Nursing Act 33 of 2005 states that nurses can be registered with the South African Nursing Council (a Council established in terms of an Act of Parliament) to assess, diagnose, prescribe treatment, keep and supply medication for prescribed illnesses and health related conditions (herein after “a registered nurse”).

At this time there are no “professional councils established by an Act of Parliament”, other than the Medical and Dental Council and the South African Nursing Council, and it is thus safe to assume that the only persons authorised to issue valid medical certificates are medical practitioners and registered nurses as defined above. If you have agreed to accept medical certificates which are issued and signed by persons who are not medical practitioners, (for example from traditional healers), then these certificates are of course valid.

In addition to being issued and signed by a medical practitioner, the BCEA importantly requires that the certificate should specify that the employee was too ill, or injured, to work for the entire period of his or her absence. Rule 15(1) of the Medical and Dental Professions Board Rules: Medical Certificates, provides medical practitioners and registered nurses with certain guidelines pertaining to medical certificates. In terms of the abovementioned rule, a valid medical certificate should also: (1) show the date on which it was issued, (2) show the date on which the employee was examined, (3) stipulate whether the medical practitioner or registered nurse performed a medical examination on the employee or whether the employee communicated his symptoms to the medical practitioner or registered nurse, (4) describe in general terms only the broad nature of the illness or affliction, and, (5) contain the issuer’s name, qualifications, address and a ‘contactable’ telephone number.

If a certificate does not meet the above criteria then you would, in our opinion, be entitled to refuse to pay the employee for any ill health absenteeism until such time as he or she presented you with a ‘proper’ medical certificate.

If an employee is absent for health reasons *for not more than two consecutive days in an eight week period, or on not more than two occasions during an eight week period*, then he or she is **not** required to produce a medical certificate in order to be paid for such absences. (The ‘eight week rule.’) The employee must of course still be too ill, or injured, to work and if

you can prove that this was not the case, you could refuse payment and discipline the employee for abuse of sick leave.

“Valid but suspect” certificates

It is an unfortunate fact that medical certificates may be purchased in many places, as it is easy for the sellers to steal or print them.

If you are suspicious of a certificate, the first step is to contact the issuing medical practitioner, and confirm that he or she actually did examine the employee and issue the certificate. If you are unable to contact the practitioner, because the address or phone number on the certificate don't exist, then you may be able to charge the employee with fraud, if the certificate is related to paid sick leave. (If the certificate does not relate to paid sick leave, but to general absenteeism, then you may discipline the employee on a charge of dishonesty in presenting a counterfeit medical certificate in order to justify his or her absence.)

If the medical practitioner can be contacted, but states that he or she did not examine the employee and based the diagnosis on what the employee said, then you may request that a new certificate be issued based on a proper medical examination. If the medical practitioner denies all knowledge of the certificate, or states that it has been altered, then you may discipline the employee for fraud.

Suspect medical practitioners

There are medical practitioners who are willing to issue medical certificates when the alleged illness or malady is highly suspect. There are also practitioners who are prepared to issue medical certificates when there is absolutely no reason whatsoever to do so. The question which arises, is what can be done when you suspect this type of behaviour? The answer is: very little.

A medical practitioner is under no obligation at all to provide you with any information as to the exact, or even general, nature of the employee's illness.

In fact, it could be a serious ethical breach of patient - doctor confidentiality to tell you anything without the employee's express permission. In reply to any query you may have as to whether or not the employee is or was actually ill, or whether the medical practitioner actually examined him or her, the doctor is quite entitled to tell you to mind your own business, and that the medical certificate stands as written.

If you are dissatisfied with the response you get, you may refer the matter to the Medical & Dental Council, or its equivalent, and lay a complaint that the doctor is issuing medical certificates without proper medical grounds on which to do so. However, unless you can show a pattern of 'strange' certificates, or an example of a medical certificate which is clearly contrary to the known facts of the matter, you are unlikely to get much satisfaction from this route. The medical profession is highly organised and is generally disinclined to take action against its members, unless the reason for such action is overwhelming. (This is not to suggest that you should never consider approaching the Council, only that you will need to have considerable patience, determination and concrete evidence.)

Dealing with suspect ill health absenteeism

Absenteeism due to ill health is merely one form of absenteeism, and should be treated as such. Management should be more concerned with the fact that the employee is absent, than with the fact that the reasons for the absence may be suspicious. In other words, as there is little point in attempting to deal with the problem of dubious medical certificates via the medical profession, it is usually more constructive to handle the matter as absenteeism which can be dealt with through your internal procedures. This approach is particularly useful in those situations where the employee keeps making use of the 'eight week rule' to avoid having to present a medical certificate at all.

For example, the employee has a record of absenteeism due to ill health, each incident of which is supported by valid medical certificates. You sense that he or she is taking advantage of the sick leave provisions, but cannot prove it. Alternatively, the employee takes exactly two days off every eight weeks and thus doesn't have to present a certificate to be paid for this sick leave. In each case the approach is the same - to treat the problem for what it is, i.e. absenteeism due to ill health.

The employee who is regularly off sick and presents medical certificates each time should thus be counselled about the problems which his or her absenteeism are causing you. If the level or pattern of absenteeism continues, the employee should be counselled again, and informed that unless there is improvement, he or she may become unsuitable for continued employment. If there is no improvement, you may eventually dismiss the employee on the grounds of incapacity, i.e. *unsuitability for continued employment due to absenteeism resulting from ill health*.

Exactly the same approach may be used for those employees who take off a few 'sickies' in every eight week period. The problem should be discussed with them in relation to the difficulties the absenteeism is causing you, and, if there is no improvement, they may eventually be dismissed for incapacity.

The problem of the sick leave cycle

Some employers believe that they may not dismiss employees for ill health absenteeism until all of their statutory sick leave has been used. This is incorrect. Absenteeism of any kind, and the handling thereof, is based on the operational difficulties it causes and the ability of the organisation to cope with them. If the employee's absenteeism is causing real operating problems, then the employee could be dismissed *even though he or she still has sick leave available in his or her cycle*. The sick leave cycle reflects the amount of days which the employee is entitled to be paid for when absent because of ill health - it is **not** a measure of how many days sick leave the employee is 'entitled' to.

Concluding comment

Abuse of sick leave is a costly and ongoing predicament. The statutory requirements regarding medical certificates, the eight week rule, and the reluctance of the medical profession to assist, will usually make it more appropriate for employers to deal with such abuse via the counselling / incapacity route, rather than as a form of misconduct. This may take time and patience, but it does eventually secure the desired result.

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