Absenteism

Disciplining workers for absenteeism problems can lead to employee lawsuits if employers don't follow their own absenteeism policies consistently, fail to give employees sufficient warnings, or step on the toes of employment laws. Among the legal issues to beware of are no-fault absenteeism policies that thwart the Family and Medical Leave Act (FMLA), medical document demands that transgress Americans with Disabilities Act (ADA) proscriptions, and discipline procedures that punish employees covered under the Pregnancy Discrimination Act.

FAQs About Absenteeism

1. Are "no-fault" attendance policies legal under the Family and Medical Leave Act (FMLA)?  
No-fault attendance policies under which an employer tracks occurrences of employee absences can run afoul of the FMLA because they do not differentiate the cause of each absence. To make sure your no-fault policy is FMLA-compliant, you must exempt absences for hospitalization, severe illness, chronic conditions, and other FMLA-qualifying conditions.

2. Can a company's attendance policy legally require employees to submit a doctor's note, including a brief diagnosis of the condition, after each sick leave absence?  
You can request a doctor's note that justifies an employee's use of sick leave, but asking for a specific diagnosis could violate the Americans with Disabilities Act (ADA), which disallows inquiries that are likely to elicit information about a disability. At most, the doctor's note should indicate when the employee saw the doctor and when the employee was medically unable to work. 

The ADA “prohibits employers from inquiring into whether an employee has a disability and the nature or severity of such disability,” unless the inquiry is job-related and consistent with business necessity (e.g., employee is unable to perform essential job functions; employees poses a direct safety threat; employee has requested an accommodation and the disability or need for accommodation is not obvious). Such inquiries must also be applied consistently to all employees.

Note: The Family and Medical Leave Act (FMLA) provides employers with more flexibility in the scope of information they may request from a doctor in relation to an employee’s need for FMLA leave.

3. Is it a violation of the Pregnancy Discrimination Act (PDA) to fire a pregnant employee for excessive absenteeism and lateness?  
The PDA requires that pregnant employees be treated the same as all other employees. It does not require employers to treat pregnancy-related absences more leniently than other absences. To avoid liability for
pregnancy discrimination under the PDA, make sure you enforce your attendance policies in a fair and impartial manner without regard to an employee's pregnancy.

4. Is it legal to request an employee with a history of attendance problems to reschedule non-emergency surgery during the height of the busy season?

Employers have the right to maintain control over the use of sick leave as long as they don't act arbitrarily or discriminatorily. Keep the following tips in mind when handling sick leave requests.

- Proceed with caution. Even if the employee has a reputation for taking advantage of sick leave, give him/her the benefit of the doubt. Get as much information as possible before making any decisions.
- Keep the employee's health top priority. Make sure the employee understands that he/she would be allowed to take the time off if there was an emergency need.
- Act within your rights as a manager. You have every right to protect the company's interests, and you can do it without stepping on employees' rights.
- Base your decision on a reasonable, business-related reason. Reduce the perception of bias by showing how important it is to have a full staff during the busy period.
- Consider sick leave requests on a case-by-case basis. In order to be fair to both sides, you can't make decisions in a vacuum.

5. What is considered a "pattern of abuse"? Is there any policy language that can be used to tighten the reins on employees who abuse their employers' sick leave policies?

Each individual company may define a "pattern of abuse" in regard to sick leave. It typically refers to employees who, over a period of time, have violated the company's attendance policy on numerous occasions. So in order to confidently discipline employees with attendance problems, your best bet is to have a clearly written policy that specifies company standards and employee requirements. Be sure to specify that discipline, including termination, may result. Keep your policy flexible, since it is virtually impossible to list every single offense.

Examples of attendance policy violations include:

- a number of absences, latenesses, or early departures that exceed the attendance policy allotment;
- failing to get permission for leaving early or coming in late;
- failing to give advance notice of an absence when possible;
- failing to report an absence properly;
- failing to submit medical certification upon request.

Calling in sick on Fridays, Mondays, or before or after a holiday may also raise suspicions of abuse. Again, "abuse" is relative to what your attendance policy stipulates.