While the leave policies are found in the agency’s personnel manual, a person should always be familiar with the parties’ collective bargaining agreement. While unions have a duty of fair representation when a person may be subject to discipline, they also represent the rest of the workers who too often have to pick up someone else’s work when absenteeism becomes chronic. Yes, it is management’s responsibility, but the union can be equally effective in corralling misconduct.

There are six things that you can do to improve attendance in the workplace:

1. Make sure employees are aware of attendance expectations and the effects of excessive absenteeism on the operations including:
   * remaining team members,
   * productivity, and
   * customer service.
2. Analyze attendance records to carefully identify the extent of employee absence and any particular trends/patterns emerging.  Employees who seem to always be off on a Monday or a Friday or before or after a public holiday, for instance.  There is no law against confronting an employee and asking for an explanation as to why their absences mostly seem to occur on particular days.
3. Have a clear policy and procedure that employees must follow if they are going to be absent.  Provide that employees must:

* make direct contact with a manager or someone in authority to advise of their absence, the nature of their illness and when they expect to return.  Do not allow employees to just speak with the receptionist or send email or text messages to a work colleague.  If an employee is not genuine about being sick, they may think twice if they are required to speak directly with the boss.
* be expected to make contact by a certain time or within a specified time period.
* be required to provide evidence of their illness which may be a medical certificate. It may not be considered reasonable to expect employees to produce a medical certificate for every single day absent unless the sick leave is excessive or there is a clear pattern of single day absences leave.

1. Make employees aware of the consequences of not adhering to the leave policy, may include disciplinary action. Remember to focus on whether the employee has followed the correct notice and evidence procedures rather than try & establish whether the person was genuinely sick or not.
2. Follow up with employees face to face when they return to work and inquire about their wellness and whether they are fit to resume normal duties. This lets employees know that you are concerned about their well-being and that you have “noticed” their absence.
3. Identify any hidden causes.  Often poor attendance is just a symptom of a greater problem and not the real cause.  Aside from common illness, there can be many reasons why an employee is taking excessive sick leave:

* drug and alcohol problems;
* issues with a work colleague or supervisor;
* not coping with workload or some other aspect of their work;
* family/marital issues; or
* work/life Balance.

Asking these questions frequently takes a person out of their comfort zone, but as a supervisor you have a right to know these answers. Before launching into disciplinary action, speak with the employee concerned, and try to uncover the root cause of the problem.  You may then be able to determine some strategies to address the situation.

Caselaw

In ***Brenda Combs vs. Social Security Administration, 91 MSPR 148, February 26, 2002****,*the Board held that an agency cannot take adverse action when it has not warned the employee in advance that such action may be taken if she did not work on a regular full-time basis. Moreover, an agency cannot take disciplinary action when the leave was approved. The Board articulated an exception in ***Cook vs. Department of the Army, 18 MSPR, 610, 611-12, 1984****.*In this case, to take such an action, the agency must prove that:

1. The employee was absent for compelling reasons beyond their control so that management’s approval or disapproval of such leave was immaterial;
2. the absences continued beyond a reasonable time, and the agency warned the employee that unless they became available for duty on a regular full-time or part-time basis; and
3. the position needed to be filled by an employee available for duty on a regular full-time or part-time basis.

Although an agency may take disciplinary or adverse action up to and including removal for excessive use of approved leave as long as the agency properly follows the Cook criteria, an agency cannot include time treated as AWOL as part of the excessive leave charge. Any hours of AWOL must be presented as a separate charge – ***Savage vs. Army, 2015 , September 3, 2015****.*

In***Eloria Howell vs. Department of Labor, PH-0752-06-0030-I-2, August 31, 2007****,*the employee was removed for medical inability to perform her duties. The employee had been absent for an extended period of time for medical reasons, and failed to submit any medical documentation showing she could be expected to return to work immediately or in the foreseeable future.

In ***Yeager vs. Transportation Safety Agency, 35 NDLR 32, C06-0740 RSM, June 21, 2007****,*a screener, who was absent for an extended period because of a injury, was requested by the agency to provide medical evidence to support his extended absence, and to provide an indication when he could be expected to return to duty. He refused to comply believing that such a request by TSA was an unwarranted invasion of his medical privacy. The court found that his refusal was not protected because the agency had a right to make a determination with respect to his injury, and his ability to fulfill his duties.

***Jackson vs. Department of Homeland Security, 109 LRP 6609, EEOC No.***[***0120064483***](tel:0120064483)***, December 17. 2008,***involved a case of a former TSA screener who alleged he was subjected to disability discrimination when he was removed because he was medically unfit to perform because of his paranoid schizophrenia. The EEOC found that the complainant’s inability to speak in front of large crowd amplified that he may pose a harm to himself or others. The EEOC concluded that the complainant’s termination was not the result of disability discrimination.

***Ray vs. Department of Defense, 108 LRP 50993, EEOC No.***[***0320080090***](tel:0320080090)***, August 26, 2008,***concerned the removal of an individual who was continuously absent from work because of his psychological impairments. These excessive absences lasted from September 12, 2001 to November 4, 2006. Both the MSPB and the EEOC upheld the removal. What is particularly instructive about this case is the agency was fortunate that the total length of time did not adversely affect the removal. They could have removed the individual far sooner, and the delay could have easily worked to their disadvantage in proving that they needed to fill the position with someone far more reliable. While there is no specific yardstick in case law, a prolonged absence over 25 percent of the available duty time, or six months may be used as a guide.

The employee in ***Kohler vs. Department of the Navy, 108 LRP 20892, April 9, 2008,***was removed for excessive approved absence and the Board affirmed the removal on appeal. This is a case for which approved leave is immaterial inasmuch as there was “no foreseeable end.” In February 2005, the employee was granted LWOP for medical reasons. She did not return to duty and her physician indicated it was not possible to predict if and when she could return to work. She eventually was granted a disability retirement.

Each of these above cases, and more, can be easily found on Cyberfeds, Lexis/Nexis or other.

As an inside consultant to senior management, research and reading case law is crucial in providing advice and counsel to management as to what action may be necessary and appropriate. These situations are not easy, and all of the fact patterns require very careful analysis to determine which direction may be the best approach. This can only come about with training, years of experience, and an insatiable thirst to read and research cases.

- See more at: <http://www.fedsmith.com/2016/09/02/some-case-law-surrounding-excessive-leave/#sthash.CRJXYQIJ.dpuf>