# 'No-Fault' Absenteeism Policies: A Critical View

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Absenteeism is an area in which employer and union objectives frequently clash. Employers are interested in reducing absenteeism, while unions are equally interested in assuring employees an opportunity for paid leave when they are ill or otherwise require time off.

Some employers have attempted over the past decade to control absenteeism through so-called "no-fault" absenteeism policies. Recently such policies have become popular in the transit industry. Typically they require counseling and impose automatic discipline when an employee has a certain number of absences within a given period of time. They frequently require progressively severe disciplinary action as the number of absences increase, culminating in termination.

This article will focus on problems raised by no-fault absenteeism policies, including the basis for union resistance, the conflict with traditional principles of "just cause" for discipline, and the relationship of such policies to various laws. As will be shown, no-fault policies have a number of drawbacks, which employers may not have considered, which might subject them to legal problems and which may limit their effectiveness as a means of reducing absenteeism.

A typical no-fault policy is one adopted by the North San Diego County Transit District, which was the subject of an arbitration award issued in February 1986.[1] On January 4, 1985, the district issued a district-wide policy on excessive absenteeism. (The award indicates that in an earlier arbitration, the policy, which was apparently not negotiated with the union, was upheld as not violating the bus drivers' contract.)

The policy (as described in the decision) provides that employees who have "six or more occurrences of absenteeism during the preceding 12 months" will receive counseling by their immediate supervisor and be placed on an "excessive absenteeism monitoring program." On the eighth absence, the employee must submit a doctor's certificate at his or her own expense for any future sick leave taken. The requirement of a medical certificate remains in effect as long as the employee has eight or more occurrences of absenteeism during a 12-month period. Once an employee exceeds eight occurrences within 12 months, the employee is subject to disciplinary action according to the following schedule:

| Number of occurrences | Disciplinary action |
|---|---|
| 9th | Letter of warning |
| 10th | 1 day suspension |
| 11th | 3 day suspension |
| 12th | 5 day suspension |
| 13th | Termination |

Although management has discretion whether to impose the disciplinary action set forth in the schedule and may consider mitigating circumstances, including prior attendance records, length of service, nature of absences, or efforts to improve, no provision *requires* management to consider mitigating factors.

The bus drivers' union challenged the policy as "unreasonable" and attacked its implementation in a termination case. Upholding the termination, the arbitrator concluded that the

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policy was reasonable both in its adoption and application, noting that no-fault policies "are generally accepted as reasonable by most arbitrators." He did not cite any authority for this assertion, and arbitral authority is actually mixed, as discussed later. For a number of reasons not discussed in the decision, this article takes a different view of whether such no-fault policies are "reasonable."

### 'No Fault' Means 'Strict Liability'

The term "no fault" is something of a misnomer in the context of absenteeism policies. The term is more commonly attached to an insurance industry scheme which pays benefits regardless of who was "at fault." The purposes of such insurance policies include a prompt and efficient method for resolving damage claims so as to assure that anyone injured is compensated. The no-fault policy is designed to benefit everyone in a given group (i.e., automobile drivers and passengers), and the insurance is funded by premiums paid by all drivers, thus spreading the risk evenly.

In a no-fault absenteeism policy, however, the risk is *exclusively the employee's.* If the employee is absent a certain number of times, regardless of the reason, he or she is automatically disciplined. Whereas in a no-fault insurance system the procedures protect the beneficiaries, in a no-fault absenteeism system the procedures work as a sword against the employee, since the employee is often not permitted to offer an excuse for the absence. A better characterization is a "strict liability" policy, since the employee is "guilty" if he meets certain defined standards.

### Union Criticisms of No-Fault Policies

Unions have objected to no-fault absenteeism policies for a number of reasons, a major one being that such rules undercut the purpose of sick leave policies, which were created to protect workers from risking their jobs because of illness or injury. Therefore, unions often resist punitive administration of rules that were initially created to protect workers. For example, many no-fault policies do not adequately define "absenteeism," leaving open the possibility that workers will be punished for being absent even though using leave they had accrued through previous good attendance.

The rigidity of such policies has also been a matter of union concern. It is obvious that workers are not alike physically or emotionally – yet such policies generally fail to consider individual differences. An employee who exceeds expectations in most critical performance categories could still be terminated, even if his absenteeism did not impair performance of his job.

Unions have also criticized such rules for:

- punishing workers for unavoidable absences
- disregarding work records and seniority
- disregarding work-related causes of absenteeism, such as stress
- not requiring consideration of mitigating factors
- denying employees a chance to rebut the charges against them
- being applied in a disparate manner
- being unnecessary, unreasonable, or too harsh
- arbitrary application – if the rule counts only "occurrences," it disregards the number of days, and if it counts only the number of days, it may punish more severely a worker with a few long-term occurrences based on a serious illness

### The Clash Between No-Fault Policies and Just Cause Principles

Discharge normally requires a finding that the employee is at fault. As explained in Elkouri and Elkouri, *How Arbitration Works,* several factors are ordinarily reviewed by arbitrators in termination cases:[2]

- the nature of the offense
- whether due process and procedural requirements have been observed
- the employee's past work record (e.g., absence/attendance records, performance evaluations, commendations, criticisms)
- the length of the employee's service
- the employee's knowledge of the rules and prior warnings about the consequences of non-compliance
- prior pattern of enforcement of the rules
- unequal or discriminatory treatment for comparable conduct
- whether management was also at fault

A no-fault policy like the North San Diego Transit policy ignores many of these traditional factors. For instance, an employee with 20 years of exemplary service could be treated the same as a one-year employee with a history of disciplinary problems because of only one factor – absenteeism. Also, no-fault policies may punish absenteeism which is indisputably unavoidable. In *Jenn Air Corporation* (1982) 80 LA 881, the arbitrator refused to excuse an absence due to severe weather conditions which made travel to work virtually impossible because the negotiated, no-fault rules precluded excuses based on bad weather.

Most arbitration decisions in cases contesting application of no-fault rules focus on whether the rules are unreasonable, unfair, arbitrary, discriminatory, or inconsistent with some law. Decisions considering reasonableness are almost evenly divided. Such policies have been struck down or not enforced at least 9 times and upheld approximately 12 times in decisions reported in BNA's *Labor Arbitration Reports* over the past few years.[3] For example, in *Hoover Co.* (1979) 72 LA 297, a rule requiring termination of employees with absences for 25 per cent of the workdays in 12 months was struck down as too harsh and unreasonable. On the other hand, a policy was upheld which penalized the first day of an absence by assigning it more "points," even though it did not consider whether the absence was due to bona fide medical reasons (*Nuodex, Inc.* [1986] 87 LA 256).

Only a handful of arbitration decisions acknowledge the inconsistency between strict liability rules for absenteeism and ordinary just cause principles. For example, in *Sun Maid Raisin Growers* (1979) 72 LA 133, the arbitrator concluded, with little analysis, that the policy did not conflict with the employer's separate progressive discipline policy. And just as surprisingly, only a few cases discuss the employer's asserted need for such policies. In *Stroh Die Casting Co., Inc.* (1979) 72 LA 1250, the arbitrator accepted without question the employer's stated justification for the policy.

Strict liability work rules are not unknown. Many just cause policies call for automatic termination for the most egregious offenses, but usually these offenses assume fault. Exposing an employee to automatic termination for a no-fault action is extremely rare. That arbitrators have generally not shown greater skepticism for such rules in the area of absenteeism may simply be a product of the failure of unions or grievants to properly raise the issue. In other areas of employer-employee relations, arbitrators have shown significant concern for strict liability or "per se" rules. For instance, attempts to control grooming through "no beards" policies have aroused serious doubt. See, e.g., *Allied Chemical Corp.* (1981) 74 LA 412.

In a more analogous area, arbitrators have appreciated the needs of disabled workers to receive special accommodation and have required rules to be applied with flexibility. In *Lever Bros. Co., Inc.* (1986) 87 LA 260, the arbitrator emphasized that the conduct of a mentally impaired employee should be excused because he was "helpless to prevent" the complained-of conduct. The arbitrator noted that in 38 reported arbitration decisions issued between 1974 and

1978, discharge of mentally impaired workers was upheld in only 10 cases. The opinion quoted with approval a study by Wolkinson and Barton in the *Monthly Labor Review*:[4]

> It has been estimated, for example, that emotional problems are responsible for approximately 20-30% of employee absenteeism, that one-fourth of any large work force is in serious need of help for psychological or social problems, and that at least 65% of all discharges result from personal factors rather than technical incompetence.

The arbitrator buttressed the need to accommodate problems occurring beyond the control of an employee with the recognition that termination of a mentally impaired worker was like an industrial kiss of death – most such employees found it extremely difficult to secure other employment for years. Termination for absence problems also has a stigma – many employers will be reluctant to hire an employee who was terminated for absenteeism because of doubts about the employee's reliability.

Given the particular problems posed by inflexible absence policies and their somewhat radical departure from established just cause doctrine, all concerned should subject such policies to closer scrutiny before adoption.

**The Duty to Negotiate Alterations in Absenteeism Policies**

If management and labor fully negotiate over absence problems, many of the pitfalls identified in this article may be avoided. Furthermore, the failure to negotiate may, in itself, present a legal complication for employers who seek to impose a no-fault system without bargaining with the recognized representative of their employees.

Under both the National Labor Relations Act and the Educational Employment Relations Act, the cases clearly hold that employers may not alter leave policies unilaterally without providing an opportunity to bargain.

Under EERA, the cases finding changes in absenteeism policies to be negotiable have arisen where a school district responded to a sickout by requiring proof of actual illness or by tightening the circumstances under which an employee may take leave.

In *Barstow Unified School District* (1982) PERB Dec. 215, 54 CPER 64, 6 PERC 13136, the Public Employment Relations Board found that a unilateral change in the requirements for sick leave verification violated the act if the verification was different from that required in the past. In *Sacramento City Unified School District* (1982) PERB Dec. 216, 54 CPER 65, 6 PERC 13150, PERB held that a unilateral change in personal necessity leave policies, which eliminated a number of previously acceptable reasons for taking leave was impermissible. The board rejected the district's argument that its action was justified by operational necessity to avert a threatened work stoppage. In so ruling, PERB has held that an absence or leave policy directly affects terms and conditions of employment and thus cannot be changed without bargaining, since changes are not part of the employer's "managerial prerogative."

The National Labor Relations Board has consistently found leave policies to be negotiable in the private sector, and PERB decisions have generally followed the reasoning used by the NLRB in such rulings. Because the scope of bargaining under the Meyers-Milias-Brown Act and the State Employer-Employee Relations Act (Dills) has been found to reflect that under the NLRA,[5] the NLRB cases also provide precedent for leave policies being negotiable in California state and local government.

Fifteen years ago, an NLRB decision holding that the unilateral revision and implementation of rules on absenteeism and tardiness violated the NLRA was enforced by the Seventh Circuit Court of Appeals in *Murphy Diesel Co. v. NLRB* (7th Cir., 1971) 454 F.2d 303, 78 LRRM

2993. The new rules required employees to submit a written excuse for absences or suffer progressive discipline. The collective bargaining agreement had no provision governing absences and tardiness and contained a management rights clause. The new policy was instituted because absenteeism and tardiness were deemed a substantial cause of a decrease in production. Nevertheless, the court held that the management rights clause did not permit the employer to adopt the rule since the clause made "no reference to rules on absence or tardiness. Any waiver of the union's right to bargain about conditions of employment must be 'clear and unmistakable.' " (*Id.* at 2995.)

Six years later, the NLRB decided *Master Slack Corp.* (1977) 230 NLRB 1054, 96 LRRM 1309. Immediately after a union election, the employer posted a sign announcing that absentee rules would be "rigidly enforced"; the board held that the action constituted a unilateral change in violation of the NLRA. Also, in *Electra-Flex* (1977) 228 NLRB No. 79, 96 LRRM 1361, the employer violated the act when it unilaterally instituted and enforced a written warning-notice disciplinary system.

Even with changes in board membership, the NLRB view has remained consistent. In 1981, in *Production Plated Plastics*, 254 NLRB No. 68, 106 LRRM 1143, the board held that the employer's change in a rule about multiple tardies (increasing the penalty) was an impermissible unilateral change. In *Ciba-Geigy Pharmaceuticals* (1982) 264 NLRB No. 134, 111 LRRM 1460, the employer failed to bargain in good faith by unilaterally instituting attendance control procedures which subjected employees to counseling interviews and discipline. More recently in *Our Way, Inc.* (1983) 268 NLRB No. 61, 115 LRRM 1011, the board held that the unilateral implementation of a stricter absenteeism and tardiness policy violated the act. In so holding, it rejected the employer's argument that it was free, in the absence of discrimination, to choose more efficient ways to enforce work rules.

Most arbitrators who have considered whether changes in policies are unilateral actions have followed the NLRB's lead. The most comprehensive description of managerial responsibility is by Charles J. Morris in *Keebler Co.* (1980) 75 LA 975. Relying on NLRB precedent, Arbitrator Morris ruled that the employer had no right to unilaterally change attendance rules. He explained that the contractual recognition clause obligated the employer to negotiate before adopting a no-fault absence policy, unless there was a clear and unmistakable waiver by the union of the right to demand negotiations. Arbitrator Concepcion reached a similar conclusion in a California public sector case in *City of Vallejo v. Vallejo Police Officers Assn.*, 71X CPER 16.[6]

Overwhelming authority thus indicates that public employers are not free unilaterally to institute stricter absenteeism policies without providing proper notice to the unions representing their employees and an opportunity to negotiate. Often, however, unions apparently have not demanded negotiations or have not pursued unfair practice charges for the refusal to negotiate, so that arbitrators have been faced with grievances over whether the adopted policy was reasonable on its face or as applied.

### Age and Disability Statutes and No-Fault Policies

Another legal issue that may be raised involves the relationship between no-fault policies and statutes prohibiting age or disability discrimination. The rigidity of such policies may create problems owing to distinctions among employees based on age and physical disability.

No-fault absenteeism policies may have an impermissible adverse impact on older workers under the federal Age Discrimination in Employment Act (ADEA), 29 USC §§621-634. Although there are few ADEA cases on the "adverse impact" of employment practices, the 2nd Circuit Court of Appeals in *Geller v. Markham* (1980) 635 F. 2d 1027, 24 FEP 920, cert. denied,

451 U.S. 945 (1981), held that the adverse impact theory developed under Title VII of the 1964 Civil Rights Act is applicable to age discrimination cases involving objective criteria. *Geller* used the theory to find in favor of a teacher who was rejected for employment pursuant to a school district's age-neutral, cost-cutting policy of not hiring teachers with more than five years of experience. The court held that the policy had an unlawful adverse impact on older teachers and that the school district's motive of cutting salary costs was not an adequate "business necessity" defense.

Similarly, a rigid, no-fault absenteeism policy, although neutral on its face, may well have a greater impact on employees in high stress occupations who become more susceptible to illness or injury as they achieve greater seniority. Such an impact could be held to violate the ADEA, or to support a finding that the policy is unreasonable in an arbitration setting.

The federal Rehabilitation Act of 1973 (as amended, 29 USC §§ 701-796i) bars discrimination by recipients of federal financial assistance against individuals with physical or mental impairments. To establish a *prima facie* case of unlawful discrimination, disabled individuals must prove that (1) except for their physical handicap, they are qualified to fill the position, (2) the handicap prevents them from meeting the physical criteria for employment, and (3) the challenged physical standards have a disproportionate impact on persons having the same handicap from which they suffer.[7]

Under this standard, an individual with a continuing medical problem who must be absent one day every month to receive medical treatment would arguably be able to establish a case of discrimination if penalized under a no-fault policy. Once an employee establishes a *prima facie* case of discrimination, the burden of persuasion shifts to the employer to show that its policy is "job-related" and that reasonable accommodation to the employee's handicap cannot be made because the accommodation would "impose an undue hardship on the operation of its program."[8] It is debatable whether an employer could meet this standard for imposing a no-fault absence policy on disabled employees. The propriety of applying no-fault policies to disabled workers was recognized by the arbitrator in *Nuodex, Inc.* (1986) 87 LA 256, where the discipline was reversed, provided the employee could establish that the illness which caused him to accumulate "points" was classified as a disability under state law.

### The Role of Job Stress and Occupational Health in Absenteeism

No-fault policies are based on the assumption that workers, not the nature of their job or other work-related factors, are to blame for poor attendance, and hence that "punishment" will have a deterrent effect and reduce the rate of absenteeism. However, studies show that job-related factors such as stress may be the cause of high absenteeism rather than employee abuse of leave policies. A no-fault policy does not distinguish between illness derived directly or indirectly from the work environment itself. For instance, a hospital nursing attendant might have a greater likelihood of developing an illness due to work-related contact with patients than a hospital records technician in the same bargaining unit.

During the last two decades, researchers have identified a relationship between job-related stress and absenteeism. In a 1973 study, it was found that absenteeism rates were higher in jobs characterized by high levels of stress, such as assemblyline jobs.[9] A growing body of literature in the health and safety field suggests that highly stressful jobs incur a greater risk in terms of an employee's health. The research indicates that stress reactions are induced by the work environment as opposed to being individual reactions.[10]

Stress is the "response of the body to any demand put on it." Job-related stress factors include lack of job security, lack of participation in decision-making, too much or too little work,

too much or too little supervision, little job satisfaction, rigid work rules, unsafe or unhealthy working environments, monotonous tasks, and other factors.[11]

Certain types of occupations may be more susceptible to illness and injury than others. At least three studies have recognized that bus drivers have experienced a significantly higher rate of cardiovascular disease than other employees. Studies of bus drivers in London, Rome, and San Francisco found that a higher rate of cardiovascular risk seem to result because of occupational factors.[12] A Swedish study concluded that urban bus drivers suffered greater stress than did rural bus drivers.[13] Employees in high-stress occupations, such as police, fire, and medical professions, may be particularly inappropriate candidates for no-fault absence policies – yet it appears that high-stress fields are often those where management attempts to adopt such policies.

The extent to which any of these factors may be present in a particular occupation when an employer adopts a no-fault absenteeism policy may be critical to whether the policy is deemed reasonable if challenged before an arbitrator.

***The San Francisco Muni experience.*** One example of a more responsible accommodation of competing interests of employers and unions may be found in San Francisco. Six years ago, the Metropolitan Transportation Commission of the San Francisco Bay Area evaluated the performance of the San Francisco Municipal Railway and recommended changes in its operation. In its evaluation, the commission found that absenteeism was a major problem of the transit system and recommended changes in absenteeism policies.

The Transport Workers Union of America, Local 250-A, which represents the city's bus drivers, vigorously objected to the conclusions in a lengthy written response to the commission's report. In addition to explaining the impact of job stress and health factors on attendance, the union argued that the decreased size of the work force had contributed to absenteeism. The union felt that as the work force size had decreased, work for remaining employees increased, as did pressure to perform and reduce absences.

In 1986, the city and Local 250-A negotiated a contract which included a limited no-fault policy, which takes effect only if staffing reaches a minimum level. Although not necessarily the ideal absence policy, it does take into account several of the criticisms discussed in this article. The policy specifically exempts absences due to long-term illness, industrial accidents, and assaults. Termination is never automatic – termination recommendations may occur only after all accrued leave has been exhausted, unpaid leave has exceeded specific levels, and a driver has been placed on probation. The San Francisco policy thus requires consideration of specific job-related stresses and to a limited extent "employer fault" (e.g., staffing levels). And it assures that a worker will not be penalized for using accrued leave.

## Conclusion

Despite the pitfalls, interest in no-fault absenteeism programs continues. As recently as October 1986, the Southern California Rapid Transit District was informed by a consultant that it needed to adopt stricter disciplinary procedures to help correct absenteeism problems.[8] Employee absenteeism was reported to be a major subject of a recent labor dispute in the Golden Gate Bridge and Transportation District.

There is a great desire on the part of management to reduce absenteeism. However, no-fault absence policies are not a simple solution because they may punish for absenteeism which is beyond the control of employees, particularly in industries and occupations where job stress and work-related illness is high. Such policies also may produce additional problems because they disregard traditional discipline factors. Any employer or union considering a no-fault absenteeism

policy should seriously evaluate the need for such a system, perhaps comparing current absenteeism rates to rates during prior years and to industry-wide rates. They should focus on the causes of absence, since a punitive system may have limited effect if the offense is not subject to the worker's control. They may wish to review the extent to which factors such as job stress, occupationally induced illness or injury, uncontrollable variables, and individual differences have affected absenteeism in deciding whether adoption of a no-fault policy is a reasonable response to absenteeism.

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[1]North San Diego Co. Transit Dist. and UTU Local 81 (1986), CSMCS No. 83-3-247, reported in *CPER* No. 70, p. 62.

[2]4th ed., 1985, pp. 654, 661-664, 670-688.

[3]Decisions upholding no-fault policies are: 71 LA 1, 71 LA 744, 72 LA 133, 72 LA 1250, 76 LA 827, 76 LA 935, 77 LA 249, 79 LA 916, 80 LA 22, 80 LA 365, 80 LA 881, 87 LA 256.

Decisions striking down or refusing to enforce no-fault policies include: 71 LA 1064, 72 LA 297, 72 LA 510, 74 LA 252, 75 LA 975, 79 LA 543, 79 LA 1209, 80 LA 782, 62 LA 1040.

[4]Vol. 103, No. 4, pp. 44-47.

[5]For ruling on scope of bargaining under MMBA, see *Fire Fighters Union v. City of Vallejo* (1974) 12 Cal. 3d 608, and *Building Materials and Construction Teamsters Loc. Union 216 v. Farrell* (1986) 41 Cal. 3d 651. For ruling on scope of bargaining under SEERA, see *California State Employees Assn. v. State of California (Dept. of Transportation)* (1983), PERB Dec. 361-S, 60 CPER 60.

[6]See also *Consolidated Paper, Inc.* (1982) 79 LA 1209; *Stauffer Chemical Co.* (1983) 80 LA 782.

[7]*Prewitt v. U.S. Postal Service* (5th Cir., 1981) 662 F. 2d 292, 301-302.

[8]*Prewitt v. U.S. Postal Service, supra.*

[9]J.N. Hedges, "Absence From Work. A Look at Some National Data," *Monthly Labor Review* (July 1973), pp. 24-31.

[10]Studies in experimental laboratory settings, as well as at the work place, suggest that occupational stress is a causal factor in both heart disease and mental illness. See C. Cooper and J. Marshall, "Occupational Sources of Stress: A Review of the Literature Relating to Coronary Heart Disease and Mental Ill Health," *Journal of Occupational Psychology* (1976) Vol. 49.

[11]*Transit Workers Absenteeism, Report of Transit Workers Union, Local 250-A* (1981), p. 28, citing work of Janet Bertinuson, Labor Occupational Health Program, University of California at Berkeley.

[12]*Transit Workers Absenteeism, supra*, at pp. 30-31.

[13]See Burtle Gardel, "Stress Research and Its Implications in Sweden," *Working Life* (October 1980), No. 20.