Dear Readers,

at the turn of the year the number of sick leaves goes up, and the statistics collected by the Social Security Institution (ZUS) suggest that as many as one in five may be the result of misuse. As this is a very current topic, we have decided to devote the entire December issue of PRO HR to it.
In particular, we will discuss the following issues:

- ✓ Electronic delivery of the sick leave certificate (e-ZLA) does not waive the employee's obligation to notify the employer of absence
- ✓ Misusing sick leave can cause the employee to lose their sick leave benefit during the entire period of incapacity for work rather than just for a portion of it that is covered by one sick leave certificate
- ✓ The recommendation "patient is not confined to bed" does not entitle the employee to undertake any activities of their choosing
- ✓ There is no obligation to provide an employee who is incapacitated for work in a certain job with a different type of work (with few exceptions).

We will be happy to answer all your questions and doubts concerning incapacity for work, absences and sick leaves. We prepare for our Clients comprehensive anti-absenteeism programs, including ones aimed specifically at the abuse of sick leaves, starting with prevention and communication and ending with consequences for the perpetrators. We support you in the implementation of these programs and we provide monitoring of their effectiveness. We are effective in resolving complicated sick leave abuse cases which can sometimes drag out for years.

legal advisor Robert Stępień

Loss of entire sick leave benefit

An employee who performs paid work during a period of incapacity for work, or who uses the sick leave in a way that is contrary to its purpose, loses the sick leave benefit for the entire period of incapacity for work.

legal advisor
Łukasz Chruściel

In a case we worked on for one of our clients, the court of first instance agreed with us that misusing a sick leave certificate should result in the employee losing their sick leave benefit during the entire period of incapacity for work, rather than just for a portion of it that is covered by the sick leave certificate (ZUS ZLA, or the so-called L4) that has been challenged.

Any other solution would work in favor of these employees who divide the period of incapacity for work into multiple shorter periods covered by individual sick leave certificates. This interpretation also facilitates the process of recovering sick pay, provided that there was no discontinuity between the period covered by sick pay and the period covered by the sick leave benefit.

We hope that this ruling marks a shift in jurisprudence in this respect. The general practice so far has been for the employee to lose the sick leave benefit entitlement only for the portion of the period of incapacity for work which was covered by the sick leave certificate for which abuse was determined.

Employees must notify employers of absence despite electronic delivery of sick leave certificates

In the case of absence from work, an employee has two independent obligations:

1. To notify the employer of the cause of the absence and its expected duration (which should be done immediately, and no later than on the second day of absence from work);
2. To justify the absence by presenting to the employer a sick leave certificate (as a rule, this obligation is now fulfilled through automatic delivery of the e-ZLA electronic certificate).

Agnieszka Nicińska, lawyer

The delivery of the electronic sick leave certificate to the employer does not result in the obligation to notify the employer of absence being waived. The mere fact that the employer receives the sick leave certificate in electronic form does not mean that the notification obligation has been fulfilled (all the more so that such a certificate is not necessarily delivered to the employer immediately, and the employer is not obligated to monitor the delivery of such certificates).

It is a good idea to specify the way in which employees should notify the employer of their absence in internal work regulations. The generally applicable laws are not very specific, which can lead to considerable practical problems.

EVENTS

WORKSHOP: **Personal files and other employee records: new rules and GDPR compliance**
8 January 2019, Warsaw

Conducted by: legal advisor Iwona Jaroszewska-Ignatowska, Ph.D., advocate Marta Kosakowska and advocate Paulina Szymczak-Kamińska.

A detailed program is available here.

This is a paid event.

CONFERENCE: **A company under the prosecutor's scrutiny. Criminal liability of collective entities.**
10 January 2019, Warsaw

Conducted by: advocate Dominika Stępińska-Duch, advocate Janusz Tomczak, Dominika Dörre-Kolasa, Ph.D., advocate Damian Tokarczyk, Ph.D.

A detailed program is available here.

This is a paid event.

Please submit your applications and questions to: prohrevents@raczkowski.eu

According to the generally applicable laws, the employee notifies the employer of absence in person or through another person, by phone or through other means of telecommunication, or by mail (in the latter case, notification is considered to have happened on postmark date). The decision on how to notify the employer is at the employee's discretion. The problem is that if the employee chooses traditional mail, the employer will receive the notification after a week or two. This is in fact the gist of the problem – while the decision on how to notify the employer lies with the employee, it cannot be totally arbitrary.

The employee should choose a notification method which will allow the employer to learn of the planned absence as quickly as possible. Such an approach will enable the employer to undertake appropriate actions aimed at minimizing the negative effects of the employee's absence.

Failure to notify the employer of absence or to do so in time is a breach of duty. Importantly, the information should be delivered immediately, and not on the second day of absence, as is commonly understood. "The second day of absence" is the absolute deadline for such notification, applicable in exceptional circumstances when it was not possible to do this earlier (i.e. immediately).

"Not confined to bed" does not mean that sick employees can do whatever they want

During sick leave, an employee can only perform activities necessary for day-to-day functioning (e.g. buying groceries) and to restore health (e.g. a medical visit or going to the pharmacy). They cannot do things that could delay recovery or make it more difficult. For sure, they cannot do things that can put as much or more strain on their health as performing work does. The "not confined to bed" recommendation does not change this in any way.

EVENTS

Business breakfast: **Poznań HR morning: GDPR in HR practice.**
10 January 2019, Poznań

Conducted by: legal advisor Daria Jarmużek and legal advisor Paulina Zawadzka-Filipczyk.

The program is available here.

This is a free event.

Business breakfast: **Employee Capital Plans - the employer's new duties | Second edition**
11 January 2019, Warsaw

Conducted by: legal advisor Łukasz Kuczkowski.

The meeting will take place on **11 January 2019 (Friday), 10:00 - 12:00**, at our offices at 17 Bonifraterska (21 floor) in Warsaw.

Detailed information is available here.

This is a free event.

Please submit your applications and questions to: prohrevents@raczkowski.eu

legal advisor
Robert Stępień

The objective of sick leave is to allow the employee to recover their health and go back to work as quickly as possible. Therefore, during sick leave the employee may only undertake activities that are consistent with this objective, i.e. are aimed at restoring capacity for work as quickly as possible.

The employee may also perform basic actions of daily life (e.g. shopping), but only to the necessary extent.

By way of example, they can do grocery shopping, but going to a hardware store will be an abuse of the leave.

During sick leave, employees should not undertake actions that are in conflict with its purpose, i.e. which could delay recovery or make it more difficult. For sure, they cannot do things that can put as much or more strain on their health as performing work.

By way of example, if an employee performs office work and is on sick leave due to spinal problems (they cannot sit for several hours in one position), but during sick leave they go on long car trips and participate in meetings not related to health recovery, this is clearly in conflict with the objective of the sick leave and constitutes abuse.

The same can be said of an employee who, being on sick leave due to the flu or common cold, will be found by the inspectors in the process of cleaning windows (with the ambient temperature close to 0 Celsius).

All of the above comments remain valid regardless of whether the recommendation on the sick leave certificate is “confined to bed” or “not confined to bed”. The latter recommendation does not allow the employee to undertake activities that are unrelated to recovery and could delay it. It is well worth ensuring that employees understand that. All too often, employees treat this recommendation as a green light for doing whatever they want.

EVENTS

WORKSHOP: **Personal files and other employee records: new rules and GDPR compliance**
5 February 2019, Poznań

Conducted by: legal advisor Łukasz Kuczkowski and legal advisor Katarzyna Wilczyk.

The program is available here.

This is a paid event.

PUBLICATIONS

Incapacity for work. What every employer must know – A GUIDE

Sickness related absence, medical exams and sick leave still have many secrets for companies. We invite you to read the guide prepared by our lawyers in cooperation with *Dziennik Gazeta Prawna*. The material is available here.

Authors: legal advisor Robert Stępień and Agnieszka Nicińska


Niezdolność do pracy
Co musi wiedzieć każdy pracodawca

Absencje chorobowe, badania i zwolnienia lekarskie to wciąż dla firm wiele niewiadomych

Contraindications for current job – what next?

When incapacity due to sickness for work lasts longer than 30 days, employees are subject to medical checkup in order to determine their capacity for work in their current position. It may happen that such an examination will result in contraindications being found for the employee to work in their current job. Here are some suggestions on what employers can do in such a situation.

legal advisor
Sandra Szybak-Bizacka

First of all, if there are any doubts concerning the decision, you should consider appealing to the Provincial Center for Labor Medicine (*Wojewódzki Ośrodek Medycyny Pracy, WOMP*). The employer has 7 days for that. When the decision is confirmed by WOMP, this reduces the risk that at a later stage the assessment of the incapacity of the employee for work will differ.

If incapacity for work is confirmed, you should check whether a disability certificate has been issued for the employee.

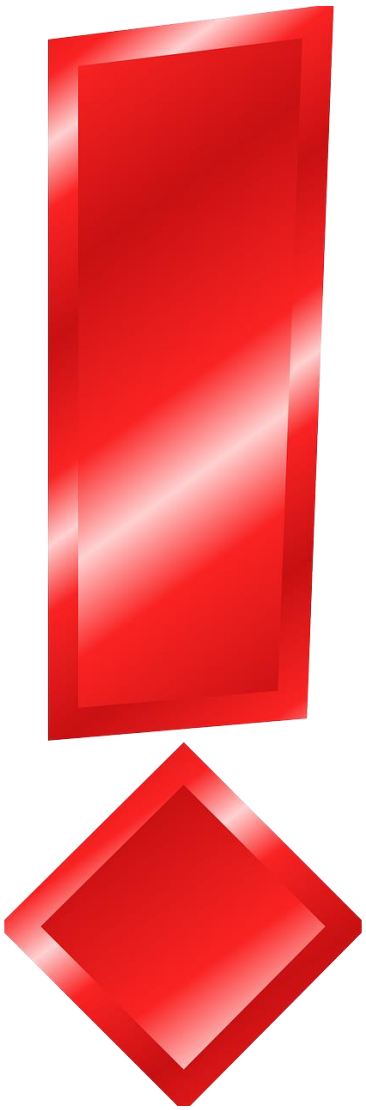
If this is the case, you should determine whether it is possible to adjust the employee's workspace to the needs resulting from the disability. You are only obligated to make changes or adjustments that will not result in disproportionate difficulties on your part. If the employee does not have a disability certificate, you are not required to adjust their workspace.

The next step is to verify whether the incapacity for work results in an obligation on your part to transfer the employee to another job. This is the case with incapacity caused by an occupational disease or an accident at work. There is no obligation to provide an employee a different type of work in other cases.

If there is no obligation to adjust the workspace, or if it is impossible, and there is no obligation to transfer the employee to another job, you can consider a voluntary offer of a new job or job contract termination. The termination can be issued without notice as per § 53 of the Labor Code (in situations where the maximum period for sick leave benefit has expired, plus the optional three month period of rehabilitation benefit), or with notice (due to the employee's loss of capacity for work and thus inadmissibility to work).

Questions frequently arise what to do with the employee from the moment when incapacity for work is determined until their transfer to another job, workspace adjustment or contract termination. Certainly, such an employee cannot be admitted to work in a job for which contraindications have been found. Until a decision is made, the best option would be to grant the employee leave from work. The laws do not say whether remuneration is due to the employee for such a period of time. According to jurisprudence, the employee should be paid as for temporary layoff, although in our opinion, there is no legal basis for that.

Employee sick leave – Ten commandments for the employer



1. The employee is obligated to notify the employer about a sickness-related absence immediately, i.e. on the first day of absence. The final deadline for that is the second day of absence, but only in those cases where it was not possible to make the notification immediately.
2. The obligation to notify of absence is independent of the obligation to justify it by presenting a sick leave certificate. The fact that the employer received the latter electronically does not mean that the notification requirement has been fulfilled.
3. The employee should notify the employer of absence in a way that guarantees that this notification reaches the employer as soon as possible. The employee should also make sure that the notification has been delivered.
4. The employee has not only the right, but in fact an obligation to verify sick leaves. While individual inspections may fail, systematic inspections will be effective.
5. The recommendation “patient is not confined to bed” does not entitle the employee to undertake all arbitrary activities. The employees should only do what is necessary to recover their health. They should not participate in activities that are in conflict with this objective, and in particular delay or can delay recovery.
6. Both failure to notify of absence in time and the use of sick leave contrary to its purpose are violations of the employee's duties that entitle the employer to take disciplinary measures.
7. Doing so does not require that the abuse of medical leave be confirmed by the ZUS.
8. Absence from work caused by sickness that results in disorganization of the work process can be grounds for termination of the contract of employment. Long-term absences will usually result in such disorganization and will thus justify termination. In the case of shorter, repeated absences, the key question is their impact on the process of work. If they result in significant difficulties, termination can be warranted as well.
9. Prior to granting annual leave to an employee directly after a long absence caused by sickness (longer than 30 days), the employer has the right to send the employee for medical checkup.
10. Misusing a sick leave certificate can cause the employee to lose their sick leave benefit during the entire period of incapacity for work rather than just for a portion of it.