

Technical factsheet

Dealing with sickness

This factsheet is part of a suite of employment factsheets and a pro forma contract and statement of terms and conditions that are updated regularly. These are:

The contract of employment
The standard statement of terms and conditions
Working time
Age discrimination
Dealing with sickness
Managing performance
Disciplinary, dismissal and grievance procedures
Unlawful discrimination
Redundancy
Settlement offers
Family-friendly rights
Employment status: workers

This area is governed largely by the employment contract and by case law on sickness.

Important issues that the employer needs to consider are:

- the law on disability discrimination contained in the Equality Act 2010, which applies to both employees and workers
- statutory sick pay (SSP) under the Statutory Sick Pay (General) Regulations 1982 as amended, which is available to employees.

Details of the Equality Act 2010 can be found at bit.ly/eq-act2010.

Details of the Statutory Sick Pay (General) Regulations 1982 can be found at bit.ly/ssp-82.

Staff sickness may be a considerable burden on a business, leading to additional staffing costs and increasing the workload for other workers. While all employers would want to

support members of staff who are unwell, sickness absence must be managed otherwise it can cause problems in the workplace. Sickness costs the employer money; SSP cannot now be reclaimed and, if the employer pays contractual sick pay over and above SSP, the cost is even greater. A failure to address sickness issues proactively can often lead to the benefit being abused or absences being extended unnecessarily.

In dealing with sickness, it is helpful to make a distinction between long-term absence and short-term frequent absence. Where either is the result of a condition that qualifies as a disability, the employer needs to take particular care in managing the sickness. There are a number of general issues that are relevant to all aspects of sickness, covered below, followed by a practical guide on dealing with these different kinds of sickness absence.

DISABILITY DISCRIMINATION

This area of law applies to employees and to workers. However, in practice the major issues in relation to absence tend to concern employees rather than workers as employees are required to provide continuous service to the employer. Most employees on long-term sick leave, and some who may be absent for short periods or whose work is affected by illness, may qualify as disabled. This imposes extra duties on the employer. All employers should be aware that any dismissal of a disabled person is risky, as compensation for disability discrimination is potentially unlimited and any tribunal will expect careful and considerate treatment of a person with a disability, in accordance with the law.

It is unlawful for an employer to discriminate against a person by treating that person less favourably than they treat, or would treat, others and that treatment is because of disability. The definition is wide enough to cover not only unfavourable treatment of a disabled person but anyone upset by the treatment of a disabled person, as well as someone who is perceived to be disabled or associated with a disabled person. (See *Technical factsheet: Unlawful discrimination* for further explanation of this.)

Where the employer is dealing with a disabled employee or applicant for employment, there are two elements to the duty:

- not to discriminate against a disabled person
- to make reasonable adjustments to accommodate the disabled person.

Who qualifies as disabled?

This definition goes far beyond the traditional perception of disability.

A disabled person is someone who has:

- 'a physical or mental impairment which has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities'
- In order for the disability to be seen to be substantial, it must have lasted or be predicted to last **at least one year** or for the rest of the person's life.
- It can cover any normal physically related illness or impairment that has a substantial effect on the person, eg heart conditions, angina, epilepsy, diabetes, chronic back problems etc, and the employee will need to provide medical evidence of the condition and its impact.
- 'Disability' can also cover mental conditions ranging from schizophrenia and bipolar disorder to anxiety disorders; depression can also be regarded as a disability. The law used to require that the mental illness was clinically recognised; while this is no longer necessary, the employee must produce clear medical evidence of their condition and the effect it has on their everyday life.
- It can cover disorders that recur, such as serious asthma and epilepsy, even though the person may not suffer any symptoms in between attacks, and it may also apply to 'progressive' conditions, where there are few symptoms now but the disease is 'likely' to result in substantial adverse effect in the foreseeable future.
- Learning difficulties such as dyslexia are now recognised as a disability.
- There are some conditions that are automatically regarded as disabilities, even though the employee may not currently be suffering any or many symptoms; these are HIV-Aids, multiple sclerosis and cancer.
- Some conditions are expressly excluded, including alcoholism, voyeurism and kleptomania, and in fact any addiction is excluded other than one contracted as a result of medical treatment eg barbiturate addiction.
- The Court of Justice of the European Union has recently decided that there is no

general principle of EU law that obesity amounts to a disability; however, it may qualify if it is so severe that it hinders the full participation of the individual in professional life on an equal basis with other workers. It should also be noted that often obesity causes other illnesses, eg diabetes or heart disease, which may bring the person within the definition anyway.

What activities must be affected?

It is not only activities at work that must be affected. In order to satisfy the definition It is essential that the employee should have substantial difficulties in activities in which they engage in everyday life, at home and at work. It is here that the employee's evidence and the medical evidence will be crucial: what activities are adversely affected? A recent case held that an employee who was able to live alone, walk, socialise, cook, go shopping and use his phone and email for social purposes was not disabled; the activities that were difficult for him were all to do with work because it was his workplace and his work that led to him suffering anxiety.

The first duty: do not discriminate

In an employment context, it is unlawful to discriminate against a disabled person, ie treat them unfavourably, in:

- making the arrangements for deciding whom to employ
- the terms on which you offer that person employment
- refusing to offer that person employment
- the terms that you offer the person compared with employees already working for you
- the employment opportunities afforded the disabled person, namely promotion, transfer, training or the receipt of any other benefit, eg facilities and services, which plainly includes fringe benefits; this also applies where you refuse to afford these opportunities
- dismissing them or subjecting a person to some other detriment.

The comparison here is with the treatment of any other worker so, in any situation where a disabled worker is treated unfavourably compared with others, it will be essential for the employer to be able to show that it has complied with the second duty to make reasonable adjustments and/or that it can justify its conduct towards the disabled person.

The second duty: to make reasonable adjustments

The Act places a specific duty on the employer to make reasonable adjustments to work arrangements and the working environment so as to level the playing field for disabled people. Where any employer is dealing with a disabled worker or job applicant, there will be a fundamental duty to make a **full and proper assessment** to enable it to decide what steps it would be reasonable to take to prevent a disabled person from being at a disadvantage.

The duty arises where the arrangements made for the work or the way the work is done, or the physical features of the premises or the equipment, place the disabled employee at a significant disadvantage compared with persons without that disability.

Examples of reasonable adjustments might include altering premises, allocating some of the disabled person's duties to another member of staff, altering working hours, redeployment to a more suitable job and supplying adapted equipment. However, the employer is only required to make reasonable adjustments bearing in mind its size and resources. If the employer decides not to make an adjustment, it must justify this based either on practicality or cost grounds, or on the basis that it would not have been effective in alleviating any problems connected with the disability.

The defence

It is never lawful to directly discriminate on grounds of disability, eg to have a rule not to employ people with epilepsy. However, less favourable treatment for disability-related reasons can be justified where the employer can make a reasonable argument for it. Thus if the employer can explain that it is impracticable to take on a particular disabled person because of the cost involved or for health and safety reasons, it may be possible to defend the action. If the employer can show that, despite any adjustments that it might reasonably be expected to make, the disabled employee cannot perform the role at all or cannot be taken on or retained without significant difficulties, a dismissal or a refusal to employ may be justified.

MEDICAL RECORDS AND INFORMATION

Good medical evidence is crucial to every decision made about a person that relates to sickness. It is wise for employers to have express provisions in contracts and policies requiring employees to see a company doctor or nominated specialist where they need information about the employee's medical condition. Where the employer is seeking information from the employee's GP, they will need to obtain consent under the Access to Medical Reports Act 1998. There are particular rules about GP records (because they often contain much extraneous detail and are more personal in nature); the employee is entitled to withhold consent to disclosure of them in the first place, or to review them before disclosure and to require amendment. This does not apply to reports requested and paid for by the employer from specialists or GPs that it has appointed. Guidance on the act can be obtained at bit.ly/fww-access.

All records and medical information that are collected and held by the employer should be subject to a policy about retention of records. This is because the General Data Protection Regulation (GDPR) requires that personal data is not kept for any longer than is necessary. Generally such records should be retained for six months after the end of employment, to allow for the possibility of legal claims. However, in certain industries, eg construction, where claims may be made for longstanding work-related conditions, there may well be a justification for retaining such records for longer, and where the member of staff has sustained an accident at work, the employer will wish to keep records for at least three years.

If the employee wilfully refuses to co-operate with the employer's reasonable attempts to get information, it has been held by some tribunals to be gross misconduct. It is certainly the case that, if the employee refuses to undergo a medical examination, the employer is entitled to take action on the basis of the evidence it has, and cannot be blamed if it lacks detailed knowledge of the employee's condition or is not aware that they have a condition that qualifies as a disability.

It is crucial that employers keep all medical information secure and ensure that any personal details are disclosed only to management where this is strictly necessary. All medical records are subject to the law in relation to sensitive personal data, which is governed by the GDPR.

Documentation

It is essential in every business to carefully record and monitor absence in relation to each employee. Without this, it is impossible to take any effective action to tackle absenteeism.

Employers should require the employee to notify their line management of their absence, its likely length and the reason for it as early as possible on the first day of absence. Once the employee has been absent for one calendar week, on the eighth day of absence they must provide a doctor's certificate stating the reason for the absence and the period for which they are signed off.

Return-to-work interviews

These are informal meetings, which can simply be a confidential chat at a desk or in the staff canteen, during which a manager may establish the reason for the absence, how the employee is now, and ensure that there is no assistance that the employer needs to provide. They will obviously be more detailed when the employee has been away for a longer period. They are a valuable tool as an opportunity for communication between employer and employee, and also a disincentive to casual absenteeism. Additionally, they encourage proper recording of sickness absence.

The line manager should record the reason for absence, checking that the employee is fit to come back to work. Employers suffering absenteeism problems will often use such interviews on each occasion of absence; others may decide to talk directly to the employee in this way only when there has been a longer absence of a few days or more.

Fit notes

Doctor's certificates are now colloquially known as 'fit notes' and must be obtained where the employee has been off work for seven consecutive calendar days, or more frequently if the employer requests them, although there will be a charge for this. On the standard form, the doctor will indicate either that the employee is not fit for work or that they 'may be fit for some work now'. If it is the latter, the doctor may also indicate adjustments that could be made to enable the person to return to work, eg working from home, part-time working etc. These suggestions are not binding on the employer, but it should consider them and whether they are reasonably practicable in the circumstances. If not, it would be advisable

for the employer to write to the employee explaining its position.

Fit for Work

Health Management has been appointed as the supplier to deliver Fit for Work in England and Wales (bit.ly/FFW-e-w). Fit for Work Scotland (bit.ly/FFW-scot) is delivered by NHS Scotland.

Fit for Work provides an occupational health assessment and general health and work advice to employees, employers and general practitioners (GPs) to help individuals stay in or return to work. Fit for Work has two elements:

- **assessment:** once the employee has reached, or is expected to reach, four weeks of sickness absence, they will normally be referred by their GP for an assessment by an occupational health professional, who will look at all the issues preventing the employee from returning to work
- **advice:** employers, employees and GPs are able to access advice via a phoneline and website.

The primary referral route for an assessment is via the GP. Guidance makes clear that referral should be the default option, unless individuals meet the criteria for when referral may be inappropriate.

Following an assessment, employees will receive a return-to-work plan containing recommendations to help them to return more quickly and information on how to access appropriate interventions.

A tax exemption of up to £500 a year per employee on medical treatments recommended by Fit for Work or an employer-arranged occupational health service has been introduced. Without such tax exemption, the payment would be treated as a taxable benefit in kind, liable to income tax and employer national insurance contributions.

Fit for Work is funded through the abolition of the repayment of SSP under the Percentage Threshold Scheme (PTS), which was removed on 6 April 2014 because the

practice has not encouraged active management of sickness absence by employers.

SICK PAY

There is no right to sick pay other than statutory sick pay (SSP), which must be paid by the employer after three days' absence ('waiting days'). Some employers choose to provide sick pay, usually for employees only, in addition to SSP. This is sometimes a contractual right and sometimes paid at the discretion of management. Sick pay is a valuable benefit and is useful in attracting and retaining staff; however, it can lead to abuse and encourage absenteeism. It is therefore particularly important for employers with generous sick pay schemes to manage absence in a proactive way in accordance with the principles below.

Sickness and holiday entitlement

It is now clear that an employee on long-term sick leave continues to accumulate their holiday entitlement during the period of sickness. The courts have also indicated that UK law is now to be interpreted so that employees who are on long-term sick leave are entitled to inform the employer that they wish to take holiday even while still absent and will be entitled to paid holiday while on sick leave. This will often be a major advantage for an employee who is on SSP as it will require the employer to pay the holiday entitlement at full rate.

The current state of UK law, which is governed by EU law in this area, is that untaken holiday can be carried over into the new holiday year if the employee does not take their holiday because of sickness. This would be the case either if their absence extends into a new holiday year or if, by the time they come back to work, there is no opportunity to take their holiday before the end of the year. This carry-over is restricted to the balance of the 20-day entitlement, so the eight UK holiday days and any additional holiday granted by the employer will not carry over and will be lost. The same probably applies where the sick employee is dismissed with holiday owing from a previous year or years. They will be entitled to expect payment both for accrued holiday in the current year and the balance from the previous holiday year(s), and this is the case regardless of whether the employee has given notice within the leave year that they wish to claim their holiday entitlement. A recent UK tribunal case has indicated that, with employees who have been off sick for an extended period, the 20-day carry-over of untaken holiday is restricted to 18 months' worth of entitlement, ie 30 days, and will stop accumulating at that point.

It was expected that the UK government would pass legislation confirming that the carry-over is restricted to the balance owing from 20 days' paid holiday and limiting the carry-over period as laid out above. However, Brexit now means that most of these legislative changes are probably on hold and many commentators think that, once the UK has exited the EU, these carry-over provisions will not be enacted into UK law.

It should be noted that where women are unable to take holiday due because of pregnancy, ie because they are on maternity leave, they continue to accrue holiday throughout and are able to carry the balance of their full statutory and contractual entitlement forward, rather than just the basic 20 days.

It is also clear from two European Court of Justice cases that an employee who falls sick either before or during their holiday is entitled to take that time off as sick and reschedule the holiday at a later date. This would of course be subject to them producing proper evidence of the sickness. This is likely to be most relevant for employers who pay sick pay over and above SSP, as it is their employees who will gain the most from being able to reschedule their holidays while still receiving their salary while off sick.

PRACTICAL APPROACHES TO DEALING WITH SICKNESS

Long-term sickness

This is where an employee is off sick for a continuous period, usually for a single cause. An employee is usually regarded as long-term sick when they are absent for a continuous period of four to six weeks or more, although there is no hard-and-fast rule and it can be defined by the employer. All employers should have a policy on such matters. The employee will have provided a reason for absence by way of a doctor's certificate, and may also provide additional medical information or can be required to do so.

Where an employer provides sick pay, it is not normally possible to terminate employment on the basis of incapacity during that sick-pay period. However, depending on the ability of the business to cover for the absent employee, and how important the post is, the employer is often in a position to consider termination where there is no immediate prospect of the employee returning to their job.

Most long-term sick employees will be covered by the law on disability discrimination, which is explained above, and therefore it is essential that the employer obtains proper medical evidence and considers all and any reasonable adjustments that may permit the employee to return to work in some capacity. There may well be some involvement from the occupational health advisers through Fit for Work at this point.

An appropriate course of action where the employer becomes aware that sickness is likely to be long term is to request detailed medical information. The employer will require details of the extent of the incapacity and a prognosis. Any reasonable adjustments that could be made are considered in consultation with the employee, and a decision is made as to whether the employee can come back to work in the foreseeable future. If so, then action will be taken to ensure that they return to work as soon as possible. If not, then the employer will consider termination on the basis that the employee is incapable of fulfilling their contract of employment.

The point at which the employer is able to consider dismissal depends on the circumstances. It would not normally be acceptable to dismiss an employee who is still receiving sick pay and/or where there is a possibility of them returning to work in the near future. However, if sick pay has run out, there is no clear prognosis or date for return, adjustments have been considered and/or tried, and the employee needs to be replaced for business reasons, the decision to dismiss is likely to be fair.

It has recently been held that, where an employee is absent and there is no prospect of return, then an employer with a general policy of dismissing such staff at six months' absence was entitled to do so. There was no requirement to alter that policy, since the duty to make reasonable adjustments in order to facilitate a return to work was not relevant; there were no adjustments that could be made, and no prospect of the employee returning under any circumstances. In all cases where the employer is considering dismissal of a disabled employee, it is recommended to seek specialist legal advice before proceeding.

Short-term frequent absence

This is where the employee is absent for one or a few days at a time on a number of occasions. In many ways this kind of absence is more difficult for an employer to deal with than long-term sickness as it is unpredictable and difficult to cover.

It is possible, where absences are single days, that the employer suspects that the employee is not genuinely ill and is either attending interviews or taking a 'duvet day'. Where such absences have a clear pattern, eg Fridays, Mondays or the day after a bank holiday, the employer is entitled to treat the matter as a case of misconduct in the absence of a compelling explanation and investigate it accordingly. Otherwise, it would be more sensible, even in the case of single-day absences, to deal with it according to the procedure below. Although some meetings are described as formal and others informal, it is still wise for employers to take careful notes of what is said and agreed at each stage of the procedure, and this should be confirmed in writing to the employee. The employer should also ensure that a 'back-to-work' interview is held after each absence to establish the reason behind it and obtain any other relevant information.

'Trigger point' – informal investigation

All employers should have a point at which they start to tackle frequent short-term sickness. Some employers use the Bradford Factor, which is a measure of the frequency of absence, and details of this can be found at bit.ly/brad-fact. Others will have a rule of thumb that, once an employee has been absent on, for example, four occasions within 12 months, then their line manager will arrange a meeting to discuss it. It may be unwise to publicise this as some employees may well 'work up' to the limit, regarding two or three days of sick absence as akin to an entitlement.

This meeting will be an informal one, designed to determine whether there are any health issues of which the employee is aware. It also has the effect of warning employees who are not genuinely ill that further absenteeism will have formal consequences.

If sporadic absence continues, the employer will arrange a formal meeting at which the employee will again be asked whether there are any medical issues of which the employer should be aware. They will be told that, if absences continue or if the employee now discloses a medical issue, the employer will organise a medical examination and report, designed to

determine the reasons for the absence. Often, the employee's attendance record will improve at this point; if this does not occur, they will be required to see a doctor or specialist as appropriate. The employer will act in accordance with any information in this report, particularly if the employee has a medical condition which means that they are disabled.

It should be noted that recent case law indicates that there is no strict requirement for the meetings to be compliant with the ACAS Code of Practice (as would be the case with disciplinary and performance management meetings); it is just a matter of following a fair procedure. However, most employers find it simpler and safer to follow the general guidance set out in the code.

If the report indicates that there is no medical condition, the employer will require an improvement in attendance and, if this is not forthcoming, may dismiss using proper procedure. (See *Technical factsheet: Disciplinary, dismissal and grievance procedures* or whatever procedure is laid out in its own employee handbook)

If, on the other hand, the report discloses a disability, the procedure should be a careful series of consultations designed to establish the extent of the medical problem, any reasonable adjustments or support that could be provided and the prognosis for a return to work. Only once it is established that there is no prospect of a consistent return to work in the foreseeable future or an acceptable improvement in sporadic attendance should a dismissal take place.

Ultimately, the employee will need to reach an acceptable standard of attendance at work, whether disabled or not, or a dismissal for incapacity is likely, on the basis that the level of unreliability cannot be tolerated within the organisation.

Sickness during disciplinary process

It is quite common for employees who are subject to disciplinary proceedings to go sick just before meetings are due to take place. Where the employer pays contractual sick pay in addition to SSP, it is common to insert a clause in the contract to the effect that contractual sick pay will not be paid if formal proceedings of this nature have been started. In any event, there is little that can be done, other than to wait for the employee to return and continue the process.

Sickness during maternity leave

Where a woman is sick during her maternity leave, the employer is not able to take any action in relation to that sickness, as this would be seen as a detriment that she has suffered by reason of her pregnancy. Once she has returned from maternity leave, she is treated exactly as other employees are, from that time onwards.

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