



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), which is payable to eligible employees and is governed by the Statutory Sick Pay (General) Regulations 1982 as amended.

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 GENERALLY

Staff sickness may be a considerable burden on a business, leading to additional staffing costs and increased workload for other workers. While it is very important that employers support members of staff who are unwell, sickness absence must be managed, otherwise it can cause problems in the workplace.

It is generally accepted that the longer an employee is off sick, the less likely they are to return to work, and for that reason it is better for all concerned to try to support them back to work as soon as they are able. In addition, sickness costs the employer money; SSP cannot currently be reclaimed (other than when sickness is due to Covid-19 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 absences being extended unnecessarily, or the benefit being abused.

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 and time off.

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 absence.

DISABILITY DISCRIMINATION

When considering the course of action to take in managing a sick worker, it is important for all employers to bear in mind the principles around disability discrimination. There is a common misconception that 'disability' involves some severe bodily injury that is obvious and long lasting, but that is not the case. Disability covers a huge range of medical conditions, both obvious and hidden, and many more people are covered than is generally recognised.

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 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. If an addiction to, say, alcohol, causes another condition, that may qualify as a disability in its own right.
- The Court of Justice of the European Union has decided that there is no general principle of EU law where 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 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.

What are the employer's obligations to a disabled person?

Most issues around disability arise because the worker is unable to work to the level expected or at all because of their condition. It is unlawful for an employer to discriminate against a person by treating them 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.)

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. It is worth pointing out, however, that if a worker were denied work because of their disability, this might lead to a claim being made. 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.

So, 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.

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 law 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 Equality and Human Rights Commission provides an excellent [resource for employers](#).

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. So, if the employer can explain that it is impracticable to take on a particular disabled person because of the cost involved and/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.

So, what does all this mean?

In practical terms, where an employer has an employee or worker who has a disability, they will need to take great care in managing them. Clearly the business may be affected by ongoing absence or performance issues, but in dealing with this, the business will need to ensure that reasonable adjustments have been considered and deployed to try to alleviate the problems.

The employer will only consider some detrimental action such as dismissal where all options have been explored, and where the worker has been fully consulted at all stages

of the process laid out below. Failing to do this opens the employer to an action in disability discrimination, which is difficult and expensive to defend and can attract significant damages awards.

MEDICAL RECORDS AND INFORMATION

Good medical evidence is crucial to every decision made about a person that relates to sickness, and will usually be necessary to determine whether a worker is covered by disability discrimination. 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, and the employer will be entitled to a copy of the report.

All records and medical information collected and held by the employer should be subject to a policy about retention of records. This is because the Data Protection Act 2018 (DPA) 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. Where the member of staff has sustained an accident at work, the employer will wish to keep records for at least three years. The Information Commissioner's Office provides [templates for data controllers](#).

If the employee wilfully refuses to cooperate with the employer's reasonable attempts to get information, it has been held by some tribunals to be gross misconduct, although employers would always be wise to get legal advice before considering such a course of action. 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 DPA.

Documenting absence

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 absences. It is usual for the business to have rules about reporting absence in a handbook or policy available to all staff.

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 private 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 and documented 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 may be sought 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 but the employer 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.

STAFF SICKNESS AND THE AFTERMATH OF COVID-19

MENTAL HEALTH AND COVID-19

Employers will be acutely aware of the toll that the pandemic has taken on mental health, and it is important that they think about how to protect as well as monitor employees carefully, especially those who are working from home. This has perhaps been exacerbated by the pandemic, but there has recently been much more recognition of the impact that poor mental health has on those who live with it, and as home working has increased, so isolation may prove to be a challenge for some staff. Although employers are entitled to assume that employees can cope with the normal stresses and strains of their chosen job, they have a duty to take reasonable care of the health and safety of their workers. This means that where the employer has notice of some ongoing issue or vulnerability (usually because the employee has told them about it, or has had significant sickness absence because of it), the employer will need to take reasonable steps to alleviate stressors caused by work.

Where an employer is already aware that the employee suffers from, say, depression, it will be important to keep in touch with them and take medical advice where necessary to support them. Many employers have access to an occupational health service, which may be able to help, or may seek to access the government's occupational health service discussed below. Otherwise, the general advice is to conduct risk assessments, be alert to the problems that working remotely may be causing, and provide whatever advice and

support seems most appropriate in the circumstances. The Health and Safety Executive provides a [template](#); Acas provides helpful [guidance and resources](#); and the CIPD has also published a [useful guide](#).

LONG COVID

Recent [Office for National Statistics estimates](#) suggest that around 2 million people (3.1% of the UK's population) have symptoms of long-Covid, with the most common symptoms being fatigue, shortness of breath, coughs and muscle aches. There has been some discussion about whether or not this could amount to a disability. In a recent employment tribunal case in Scotland, [Burke v Turning Point 2022](#), the tribunal was asked to determine whether an employee with long-Covid was disabled. Applying the statutory test (see below), the tribunal found that Mr Burke had a physical impairment caused by Covid-19 (long Covid/post viral fatigue syndrome), which had an adverse effect on his ability to carry out normal day-to-day activities (cooking, ironing, walking to the nearby shop, sleeping and concentrating for any length of time). This effect was more than minor or trivial and was long term as it was likely to last for at least 12 months. The tribunal therefore determined that his long- Covid amounted to a disability.

SICK PAY

Employees do not have a right to sick pay other than statutory sick pay (SSP), which must be paid by the employer after three days' absence ('waiting days'), although please note this has been temporarily changed as a result of the Covid-19 pandemic.

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 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 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 fit note, and may also provide additional medical information in the form of a consultant or GP's report, or can be required to do so by the employer.

Long-term sick employees will often 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.

The process of dealing with long-term sickness will necessarily involve a number of formal consultation meetings for the purpose of seeking information, keeping the situation under review, and where appropriate formulating a plan to return to work. Normally, where the employer becomes aware that sickness is likely to be long term, it will 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 they 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 ultimately 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 for medical incapacity

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 that they 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. If short term absence relates to disability, see earlier sections.

It is possible, where absences are single days, that the employer suspects that the employee is not genuinely ill and could be attending interviews or taking a 'duvet day', for example. Where such absences have a clear pattern, eg Fridays, Mondays or the day after a bank holiday, in the absence of a compelling explanation, the employer is entitled to treat the matter as a case of misconduct 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. 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.

All employers need to be careful about applying any hard-and-fast rule about absences to disabled employees. In the recent case of [Northumberland and Tyne & Wear NHS Trust v Ward](#), the employer had rules about absences, which meant that if an employee reached certain trigger points – ie numbers and frequencies of absence – they could ultimately be dismissed. The employer dismissed Miss Ward, a disabled employee, for reaching those thresholds, even though previously it had allowed her some latitude. As the employer could not demonstrate any change of circumstances leading to the change of policy, reintroducing a strict rule for her amounted to unlawful indirect discrimination.

This first meeting will be an informal one, designed to determine whether there are any health issues of which the employer should be 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 could 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 sustained within the organisation.

Sickness during the 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. It is worth noting that the law does provide that, where a woman goes sick in the last four weeks leading up to the expected date of childbirth, her maternity leave is automatically triggered at that point.

Reform

The government launched a wide-ranging consultation on SSP and workplace health, which closed on 7 October 2019, but has since been updated in October 2021. It is considering a number of proposals, including reform of SSP to make it more widely available and reintroducing rebates for small employers, as well as a right for employees to request workplace modifications on health grounds, even when they do not qualify as disabled under the legislation. There is also a stated wish to help employers by improving occupational health services and providing more support and information for employers seeking to manage absence. We await any information about how the government intends to proceed with this; consideration of this has almost certainly been derailed by the pandemic, and subsequent events.

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