

Dealing with sickness absence

Sickness absence can cause employers a great deal of lost time and money, and can also cause low morale, resentment and stress for employees who have to cover for those off sick. This guide summarises the ways in which employers can manage sickness absence, the potential legal claims which may arise, and the importance of having a sickness absence policy.

Please note from 6 April 2010 a new Statement of Fitness for Work, or "Fit Note" was introduced replacing the previous "sick note". This requires a more proactive approach by the employer and we have produced a separate guide on Fit Notes which is also available on our Guides and Information Sheets page on the employment pages of our website, www.bllaw.co.uk.

Short-term sickness absence

The types of short-term sickness absence which tend to cause problems may come in different forms:

- genuine, frequent but unrelated illness/injury
- genuine, frequent illness/injury which has an underlying medical cause
- suspected malingering/abuse of sickness absence system

Depending on which of these it is, it will need to be treated in different ways. Employers should also be alert to the possibility that absences could be caused or exacerbated by factors such as stress, bullying or harassment where the employer must investigate further and take urgent action to prevent other types of claims.

Genuine, frequent but unrelated illness/injury

If intermittent short term absence of this nature is at an unacceptable level normally a system of warnings and reviews is used in order to try to bring the employee's absence back to an acceptable level. To ensure that this process is fair, various requirements have to be adhered to. However, the employer should first consider whether in fact there might be an underlying medical cause (eg disability) or malingering involved – see below.

If the employer contemplates dismissal in respect of such absences, again a fair procedure must be followed (see our guide to Disciplinary Procedures). Alternatives to dismissal should first be considered if they might improve the situation. If the employee is dismissed, the employer will have to demonstrate that it acted reasonably in treating the employee's absences or poor attendance record as sufficient reason to dismiss.

Genuine, frequent illness/injury which has an underlying medical cause

An employer who wants to take action in relation to short-term absences should take care, through investigation, to examine the reasons for the absences as this may suggest an underlying condition which

could constitute a disability with the resulting obligations under the Disability Discrimination Act 1995 (DDA). If it is thought that this may be the case, it would be advisable to obtain a medical report (see below). If the medical report indicates that the employee does have a disability under the DDA, a system of warnings is unlikely to be appropriate and could result in a claim of unlawful discrimination.

Suspected malingering/abuse of sickness absence system

There may be instances where an employee's conduct is inconsistent with the condition stipulated on a doctor's certificate. For example you would not expect an employee certified as having a bad back to be seen laying a patio while on sick leave. Similarly, suspicious patterns of absence might occur on Mondays, or days coinciding with outside hobbies, or when a particular task or duty has to be carried out. The employer should exercise extreme care when dealing with such matters. If well-founded, the matter could be dealt with as a disciplinary issue (see our guide on Disciplinary Procedures), but please contact us before you start this process so you can make an informed decision on whether and how to proceed with this difficult route.

Long-term sickness absence

Where an employee has been on sickness absence for an extended period of time an employer may be considering terminating the contract of employment. Special considerations apply to carry out this process fairly. In addition, many conditions resulting in long-term absence could also constitute a disability under the Disability Discrimination Act 1995 and as such an employer should take particular care to follow procedural requirements, as well as the consideration of "reasonable adjustments", in order to avoid any damaging discrimination claims.

Medical Reports

Medical reports are extremely important in the process of dealing with long-term sickness absence, and sometimes also in the case of short-term sickness absences. There are specific legal requirements to be followed in how such a report may be obtained, depending on whether the report is from a doctor appointed by the employer or from the employee's own doctor. In either case, the employee's consent is required. There should therefore be a clause in every employment contract requiring an employee to consent to such a report where it is reasonably requested. The request for a report must also be carefully drafted to ensure that all the relevant questions are asked.

Dismissal for long-term sickness absence

Having obtained the medical report and consulted fully with the employee, the employer will have to consider a number of factors to determine whether dismissal is appropriate and reasonable in each case.

The dismissal of an employee on grounds of ill-health should be a last resort after all other options have been considered and tried where appropriate. Before deciding to dismiss, consideration should also be given to any potential risks if the employee's entitlement to contractual sick pay has not yet been exhausted.

A fair procedure must be followed (see our guide to Disciplinary Procedures) and the employee must be kept informed at all stages of the process.

Records

Throughout all these processes the employer should retain all absence records, correspondence, notes of conversations and messages, together with any medical evidence which might be needed in the event of an Employment Tribunal claim. However this information must be kept confidentially and in accordance with data protection legislation.

Potential claims

Unfair Dismissal

With some notable exceptions, an employee only needs to have one year's service to make a claim for Unfair Dismissal. The compensatory award for unfair dismissal in most cases is limited to £65,300. An employer has to show that it had a fair reason to dismiss and followed a fair procedure.

In relation to sickness absence, dismissal of an employee without cause where Permanent Health Insurance is available (which relies on continued employment) is likely to be an unfair dismissal.

Disability Discrimination

Unlike a successful claim for Unfair Dismissal, compensation for a successful disability discrimination claim is unlimited, and an employee does not have to have been employed for any length of time in order to bring a claim. Particular care is therefore required. The legal definition of "disability" under the DDA is fairly wide and not always the same as medical definitions. As well as the duty not to discriminate unlawfully against a disabled employee (whether directly or for a reason relating to their disability), employers are under a positive duty under the DDA to make "reasonable adjustments" for disabled employees. Because of the complex nature of the DDA and the potential financial exposure, action should not be taken without our advice in cases where a disability is or might be involved.

Personal injury

Employers should be aware that, in particular where an employee is absent due to, for example, work-related stress, an employee may bring a personal injury claim against the employer. Consideration of this type of claim is outside the scope of this information sheet, but please ask us for further details where appropriate.

Sickness absence policy

Dealing with sickness absence of whatever kind can be a very tricky matter, with many potential pitfalls. It is highly recommended that employers have a carefully-drafted sickness absence policy to minimise the risk of claims. The policy will help ensure that the way an employer deals with sickness absence is consistent and transparent to employees and it can also act as a deterrent against abuse of the system. If enhanced sick pay is offered this requires careful drafting to prevent abuse of the system and excessive costs to the employer.

Contact

For further information or advice, please contact the employment team at employmentinfo@bllaw.co.uk

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