



absence

Brachers Bitesize

How to Manage Sickness Absence

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Today's session

- 01** Statement of Fitness for Work
- 02** Problem areas and managing sickness absence
- 03** Claims a sick employee might bring
- 04** Links with disability discrimination



Statistics

Introduction and statistics

- Sickness absence in the workplace can have a huge impact on businesses and appears to be on the rise.
- Data from the Office for National Statistics (ONS) shows that in 2021 absence rates were 2.2% a rate which was last seen in 2010.
- According to a Labour Force Survey (LFS) an estimated 36.8 million working days were lost to work-related ill health and non-fatal workplace injuries in 2021/2022.
- Sickness absence can have several negative impacts on a business:
 - Extra cost
 - Reduction in customer satisfaction
 - Having to find, train and pay for temporary cover
 - Loss of morale and / or motivation from other employees
 - Reduced productivity
 - Increased sickness absence across the workforce

Statement of Fitness for Work For social security or Statutory Sick Pay

Patient's name

Mr, Mrs, Miss, Ms

I attended your case on: / /
and, because of the following condition(s):

I advise you that:

- you are not fit for work.
- you may be fit for work taking account of the following advice:

- If available, and with your employer's agreement, you may be fit for work on a phased return to work.
- altered duties.

Fit Notes

Statement of Fitness for Work

- Statements of Fitness for Work (also known as ‘fit notes’) are used as evidence of an employee’s fitness for work.
- An employee be assessed as not fit to work or may be fit to work taking account of advice such as a phased return, amended duties, altered hours or workplace adaptations.
- Fitness for work is in general terms, not specifically in relation to the employee’s current job.
- A fit note will confirm the period of time it covers and the dates are inclusive. It will also state whether the healthcare professional is likely to need to assess the employee again at the end of the current fit note period.

Statement of Fitness for Work (continued)

- Fit notes can be issued by doctors, nurses, occupational therapists, pharmacists and physiotherapists.
- Healthcare professionals do not usually issue fit notes during the first 7 calendar days as employee's can self-certify.
- Employee's continue to require a fit note even when they have exhausted their entitlement to Statutory Sick Pay (SSP) or company sick pay (if offered).
- Fit notes cannot sign an employee back to work. However, employee's can return to work before the expiry of a period covered by a fit note if they feel ready. Ensure you take steps to ensure this is appropriate.



Managing Sickness Absence

Problem areas and managing sickness absence

Reminder of Statutory Sick Pay (SSP)

- To be eligible for SSP a person must:
 - be classed as an employee and have done some work for the employer;
 - earn an average of at least £123 per week; and
 - have been ill for at least 4 days in a row.
- SSP can be paid for up to 28 weeks of the year.
- An employee will not qualify for SSP if they have received the maximum 28 weeks in a year or are getting statutory maternity pay.
- The standard rate of SSP increased on 6 April 2023 to £109.40 per week.
- Anyone eligible for SSP must not be paid less than the standard rate.

Problem areas and managing sickness absence (continued)

Pregnancy-related illness

- Dismissing an employee or subjecting her to detriment as a result of a pregnancy or maternity-related illness occurring during her 'protected period' is unlawful.
- The 'protection period' is covered by section 18(6) of the Equality Act 2010.
- If you have a policy of initiating a sickness absence procedure when someone reaches a certain level of aggregated sickness absence, it is important that you do not take into account any absence related to pregnancy or maternity that falls within that 'protected period'.
- Any pregnancy-related absence in the last four weeks before the expected week of childbirth (EWC) will automatically trigger statutory maternity leave and any entitlement to SSP will stop.

Problem areas and managing sickness absence (continued)

Elective or cosmetic surgery

- Queries over whether this should be treated as sickness absence or if the employee should be asked to take annual leave.
- Key consideration is to establish whether the surgery or procedure is purely elective or cosmetic rather than actually for medical purposes.
- It is always best to ascertain the true position and investigate the matter, obtaining medical evidence if necessary.
- Examples where employers have got it wrong:
 - *Fry v Russell Williams Textiles Ltd*
 - *Mutter v Turning Point Scotland*

Problem areas and managing sickness absence (continued)

Returning to work early

- An employee can return to work before the expiry of their fit note, however, employer's should always take steps to ensure it is appropriate.
- Keep a record of your discussions with the employee and reasons for the decision (whether that be to allow them to return to work or not).
- Consider whether a risk assessment may be required before the employee returns to work.
- It may be appropriate for the employee to return to the healthcare professional who may be able to provide a fit note indicating that the employee 'may be fit to work'.
- Make sure employees do not feel under pressure to return to work before they are fit to do so.

Problem areas and managing sickness absence (continued)

Annual leave while on long-term sickness absence

- An employee who is on long-term sickness absence can book a period of annual leave.
- This may be beneficial to the employee if they have exhausted all their entitlement to company sick pay (if offered) or are receiving only SSP.
- It is usually in the employer's interest to agree an annual leave request as this stops the employee from accruing significant amounts of leave while on sickness absence.
- If annual leave is not used the employee could take it when they return to work (including carrying it over to the next year) or be paid the accrued holiday pay on termination of employment.

Problem areas and managing sickness absence (continued)

Real illness or fake illness

- ‘Malingerer’ refers to an employee who is absent and gives illness or injury as the reason for absence but the employer:
 - does not believe the employee's explanation for the absence;
 - discovers later that the employee was not, in fact, ill or injured but was on holiday, and/or;
 - does not consider that the illness is serious enough to justify absence from work.
- An employer should gather proper evidence and not act on suspicions.
- If an employee is faking an illness to take time of work this is a conduct issue and would be dealt with through a disciplinary process.

Problem areas and managing sickness absence (continued)

Real illness or fake illness (continued)

- Before dismissal an employer should ensure they carry out reasonable investigations and genuinely and reasonably believe there has been dishonesty.
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- Examples of things employers could do to help:
 - keep accurate records of sickness absence;
 - conduct return to work interviews after each absence;
 - ask for medical evidence in the form of a report from a GP or OH report.
- Investigations should be thorough and handled sensitively.



Poll 1

Do you think indolence (laziness) is a genuine reason we have seen on a fit note?



Poll 2

Do you think being bitten by a duck is a genuine reason we have seen on a fit note?



Poll 3

Do you think the person needs a holiday is a genuine reason we have seen on a fit note?



Poll 4

Do you think the person has an aversion to their manager is a genuine reason we have seen on a fit note?



Poll 5

Do you think getting a cold from a puppy is a genuine reason we have seen on a fit note?

Claim form

You must complete all questions marked with an ******

| Official Use Only | | | |
|-------------------|--|---------------|--|
| Tribunal office | | | |
| Case number | | Date received | |

1 Your details

1.1 Title Mr Mrs Miss Ms

1.2* First name (or names)

1.3* Surname or family name

1.4 Date of birth / /
Are you? Male Female

Potential Claims

Claims a sick employee might bring

- The type of claim an employee might bring will depend on:
 - whether the employer caused/was responsible for the sickness/injury;
 - whether the employee is classed as disabled under the Equality Act 2010;
 - whether the sickness is pregnancy-related; and
 - whether the employer ultimately decides to dismiss the employee by reason of their incapacity or conduct in relation to their sickness absence.

Claims a sick employee might bring (continued)

Personal injury

- If the employer caused/was responsible for the sickness/injury, the employer could be liable under:
 - the tort of negligence;
 - health and safety legislation;
 - failure to provide a suitable working environment;
 - the implied duty not to act without reasonable and proper cause and in a manner calculated or likely to destroy the relationship of trust and confidence;
 - discrimination and harassment.

Claims a sick employee might bring (continued)

Unfair dismissal

- Qualifying employees (those with 2 years continuous service) have the right not to be unfairly dismissed.
- There are five potentially fair reasons to dismiss and for sickness absence purposes, the relevant reasons are capability, conduct and some other substantial reasons (SOSR).
- Capability (section 98(2)(a) Employment Rights Act 1996)
- Conduct (section 98(2)(b) Employment Rights Act 1996)
- SOSR (section 98(1)(b) Employment Rights Act 1996)

Claims a sick employee might bring (continued)

Unfair dismissal (continued)

- An employer must act reasonably when dismissing an employee and follow a fair process. The leading case on fairness in ill-health dismissals is *East Lindsey District Council v Daubney*.
- Factors to consider:
 - nature of the employee's illness;
 - prospects of the employee returning to work and the likelihood of recurrence of the illness;
 - need for the employer to have someone doing the work;
 - effect of the absence on the rest of the workforce;
 - extent to which the employee was made aware of the position; and
 - employee's length of service.

Claims a sick employee might bring (continued)

Pregnancy related claims

- Dismissing an employee or subjecting her to detriment as a result of a pregnancy or maternity-related illness occurring during her 'protected period' is unlawful.
- Could result in a claim for pregnancy discrimination as well as unfair dismissal or detriment.
- Employers should establish the nature and likely cause of an employee's illness to identify and deal with any work-related causes or triggers.
- Risk assessment should be carried out and regularly reviewed.



Disability Discrimination

Links with disability discrimination

- An employee may be protected by disability discrimination law under the Equality Act 2010.
- Disability is one of nine 'protected characteristics'.
- There is no minimum qualifying period for discrimination claims and no upper limit on compensation.
- A person is disabled if they have a physical or mental impairment, and the impairment has a substantial and long-term adverse effect on their ability to carry out normal day-to-day activities (section 6(1) Equality Act 2010)
- It is not always clear whether an employee is disabled so it may be necessary or prudent to obtain a medical report.

Links with disability discrimination (continued)

- Direct discrimination - treating someone less favourably, because of disability, than others whose material circumstances, including abilities, are not materially different.
- Discrimination arising from disability – treating someone unfavourably because of something arising out of their disability, unless that treatment is a proportionate means of achieving a legitimate aim.
- Indirect discrimination - applying a provision, criterion or practice (PCP) that puts an employee (and other persons with that disability) at a particular disadvantage, unless that PCP is a proportionate means of achieving a legitimate aim.

Links with disability discrimination (continued)

- Reasonable adjustments - failing to comply with a duty to make reasonable adjustments where these would help overcome a substantial disadvantage. This duty is unique to the protected characteristic of disability.
- Victimisation - dismissing or subjecting an employee to detriment because they have done a “protected act” such as complaining about discrimination or supporting another employee in their complaint.
- Harassment - unwanted conduct related to disability, which has the purpose or effect of violating the employee’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them.
- The scope of possible reasonable adjustments is almost limitless. The EHRC Employment Statutory Code of Practice contains a non-exhaustive list of examples, as well as factors that might be taken into account in deciding whether a particular adjustment is reasonable in a given case.



Questions

Thank you