



SICKNESS ABSENCE
WHAT EMPLOYERS NEED TO KNOW

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Introduction

The subject of sickness absence invariably involves both legal issues and human resources considerations. Sometimes it is difficult for employers to remember and apply all of the necessary issues and considerations when dealing with sickness absence cases.

Sickness absence policies

Sickness absence policies are useful in that they help employers and managers properly manage sickness absences by providing guidance on what steps should be taken and when, and also help ensure that all employees are treated consistently.

Planning

Any sickness absence is likely to present an employer with organisational problems, including the effect that it has on colleagues. To this end, employers should have contingency plans in place, which include arrangements for the supply of cover where necessary.

Written statement of particulars of employment

Employers must provide employees with particulars of '*any terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay*'. These particulars must be included in the employee's written statement of particulars of employment or be set out in another document which is referred to in the statement, such as a sickness policy. Written statements of particulars of employment are often incorporated into written contracts of employment.

Sickness absence situations

Sickness absences can be long or short term, one-off or recurring, disability or maternity related, and can even be alleged to have been caused by overwork, bullying, harassment or other conduct of the employer or colleagues. Employers and managers need to know how to properly deal with each of these situations, because a failure to

do so can result in a claim for unfair dismissal, discrimination, negligence and breach of contract, and liability under The Health and Safety at Work Act 1974 and various other statutes and regulations.

Non-genuine sickness absences

Sometimes an employer may suspect that an employee is not genuinely sick. In such a case the employer must carry out an investigation, which will invariably include the obtaining of medical advice. If the investigation reveals that the employee is not genuinely sick then disciplinary action may be appropriate.

Sickness absences 'caused' by the employer

Where an employee alleges that any sickness absence has been caused by overwork, bullying, harassment or other conduct of the employer or colleagues, or an employer suspects that this may be the case, the employer must carry out an investigation. The investigation will invariably include the obtaining of medical advice, and will seek to establish whether the sickness was, in fact, caused by work-related matters.

If a causal link is established then the employer must take the necessary action, both in relation to the absent employee and other employees who may be at risk. Such action will involve the elimination or control of the underlying problem, and may include the recruiting of additional staff, the provision of additional training, and providing access to counselling services.

In addition, any allegation of overwork, bullying, harassment or other conduct of the employer or colleagues must be treated as a grievance under the 'new' ACAS Code of Practice. Employees making verbal allegations should be invited to reduce the allegations into writing.

Sick pay

Employers are under no statutory obligation to pay a wage to employees who are absent from work on account of sickness or injury. Instead, employers need only pay statutory sick pay (SSP). However, if the employee's terms and condition of employment include provision for contractual sick pay then the employer must pay such sick pay in accordance with such terms and conditions.

In each case of sickness absence the employee's contract of employment, and any sickness policy, must be carefully checked for the existence and extent of any contractual sick pay provision. However, even where no such express provision exists the law may imply contractual sick pay if the circumstances justify it. For example, if historically an employer has voluntarily paid all its employees a normal wage during short periods of sickness absence then the law is likely to treat this as a contractual entitlement.

The employer should always take steps to protect itself against allegations of discrimination, and this is best achieved by having a properly drafted sickness policy and following it in all cases of sickness absence.

Statutory sick pay (SSP)

The SSP scheme is complicated and falls outside the scope of this Article. Details can be found in the relevant HM Revenue & Customs (HMRC) guidance. However, in summary eligible employees receive no payment for the first 3 days of sickness absence and thereafter they will receive SSP for up to 28 weeks. After 28 weeks employees must rely upon any benefits paid by the Department for Work & Pensions (DWP). SSP paid out by employers may be reclaimed from HMRC.

Notification of absence

A condition of entitlement to SSP is that employees must notify their employer of any date on which they are unfit for work within 7 calendar days of that date. A failure to comply with this condition can result in SSP being withheld.

Because of the administrative problems that employers would face if they had to wait up to 7 days to be notified of a sickness absence, contracts of employment often provide for more onerous notification requirements, such as requiring notification by a certain time on the first day of absence. Such contractual provisions will be relevant to contractual sick pay and conduct matters, but will not override the SSP scheme.

Evidence of incapacity

Another condition of entitlement to SSP is that employees must produce evidence of incapacity. Unlike a failure to give notification, a failure to comply with this condition does not entitle the employer to withhold SSP, although an employer may encounter difficulties reclaiming any SSP paid out if it has no evidence of incapacity to pass on to HMRC.

During the first 7 days of absence notification will typically be a self-certification form, because employers have no statutory right to request a doctor's certificate during this period. Thereafter the evidence will typically be a doctor's certificate, or such other evidence as the employer may reasonably request.

Again, contracts of employment often provide for more onerous requirements, such as requiring production of doctor's certificates for all periods of sickness absence. Such contractual provisions will be relevant to contractual sick pay and conduct matters, but will not override the SSP scheme.

Contractual sick pay

Contractual sick pay is a contractual arrangement under which an employer pays to an employee absent on account of sickness or injury a sum of money in excess of SSP. The terms of the arrangement are a matter for the employer and the employee to agree between themselves, and they should be comprehensively set out in a contract of employment, or at least in a sickness policy.

It should be made clear that any SSP paid out will be deducted from any payments made under the arrangement. The requirements for the notification of sickness

absence and the production of evidence of incapacity should be set out, and the right to require the employee to submit to a medical examination should be reserved. Provision for the recovery of contractual sick pay from damages where the absence was caused by third party negligence is also often reserved.

Withholding contractual sick pay

An employer may only withhold contractual sick pay if the terms of the arrangement expressly permit it. In the absence of such provision in the contract of employment or any sickness policy, any withholding would likely amount to an unlawful deduction from wages.

Discretionary sick pay

Provided there is no unlawful discrimination, in the absence of a contractual entitlement an employer is free to pay such sick pay to such employees for such periods as it may in its discretion decide.

However, if the employer pays discretionary sick pay it should be careful not to set a precedent which could create an implied contractual entitlement. Where discretionary sick pay is paid the arrangements should be set out or confirmed in writing, and the discretionary nature of the payments should be highlighted as such.

Stopping discretionary sick pay

When an employer is paying discretionary sick pay there may come a time when it wishes to stop making payments. In such cases the employer should be prepared to commercially justify its decision with such considerations as cost and the financial position and resources of the employer.

In any event, the employer should give an employee reasonable notice before it stops making payments.

Exhaustion of sick pay

An employer does not have to wait until statutory or contractual sick pay has been exhausted before it can dismiss an employee for incapability. Of more importance is when the employee is likely to return to work. If a return is imminent a dismissal for incapability is likely to be unfair.

Holiday during sickness absence

Recent case law and directions from the European Union have resulted in a change in the law which significantly favours workers at the expense of employers.

Statutory holiday continues to accrue during any period of sickness absence, even rolling over from one holiday year into the next. The treatment of any contractual holiday in excess of the statutory minimum holiday entitlement will depend upon the contractual arrangement.

Statutory holiday can not be taken during periods of sickness absence. Instead, a worker must take the holiday after he or she has returned to work. If the worker does not return to work and the employment is terminated the employer must pay the worker a payment in lieu of the holiday accrued but untaken due to the illness or injury. Pay in lieu should be calculated at the worker's normal rate of pay.

Maintaining contact

Where an employee is genuinely sick the employer should maintain an appropriate level of contact with the employee during the absence. What is appropriate will depend upon the circumstances, and an employer should avoid pressurising an employee.

Maintaining contact is a matter of good practice, which should help facilitate the earliest return to work. If it becomes necessary to obtain medical advice the employer may need to seek the employee's consent to do so, and thereafter the employer and the employee may need to discuss that advice. The employer and the employee will need to cooperate in connection with the payment of statutory and any contractual sick pay, and the availability of any benefits, such as private health insurance or early ill-health retirement. Indeed, the maintenance of contact will even help the employer establish whether the employee is likely to be able to return to work, and hence determine whether the employee's employment should be terminated.

Return to work

When an employee is due to return from long term sick leave the employer should manage the return to work, holding a return to work interview where appropriate.

It may be necessary for the employee to return to work gradually, perhaps working part time for a certain period of time before returning to full time work. It may be necessary to make temporary or permanent adjustments to the employee's duties, hours of work or workplace, but only if such adjustments are reasonable in all the circumstances.

The employee's terms and conditions of employment may need to be revised to take account of any changes which may have taken place whilst the employee was on sick leave, including workforce and length of service related wage rises and enhancements to benefits in kind.

Employees returning from long term sick leave should always be given the opportunity raise any concerns about the return and any steps that the employer may have taken in connection with it.

Disagreement over return to work

Sometimes an employer and an employee may disagree over whether the employee should or could return to work. The exposure for an employer is greatest when an employee argues that he is fit to return to work, but for various reasons the employer has reservations.

The question of whether an employee is capable of performing his duties safely is one for the employer to answer. In almost all cases the employer would need to resort to medical evidence to answer this question. Unless the employer can justify otherwise, it will have a legal obligation to permit the employee to return to work, and to pay the employee his normal wage.

Most contracts of employment entitle the employer to require the employee to carry out additional or other duties, and so in practice if an employer has concerns it can minimise its exposure by reorganising duties.

Medical evidence

It is difficult for an employer to make a decision about an employee on long-term sick leave without obtaining a medical report. Neither the employer nor the tribunal is likely to be a medical expert, and so neither is well placed to authoritatively comment on the physical or mental condition of an individual.

Contracts of employment often provide the employer with a right to require the employee to attend a medical examination. The cost is invariably borne by the employer. A refusal to cooperate may amount to misconduct.

When requesting a medical report the employer must comply with the requirements of the Access to Medical Reports Act 1988, which requires the employer to inform the employee of his or her legal rights in a prescribed form.

Once a medical report has been obtained the employer should meet with the employee to discuss its content and findings.

Pregnancy-related illness

As a general rule, any absence resulting from a pregnancy-related illness can be treated in the same way as any other sickness absence. This includes absences occurring after the birth, such as absences resulting from post-natal depression. However, in the interests of fairness and reasonableness an employer should show compassion and leniency in such situations.

Once maternity leave starts, and for its duration, the statutory maternity leave and pay rules will apply. All SSP entitlements stop during the period of maternity leave. Whether any contractual sick pay entitlements also stop will depend upon the terms of the arrangement.

The statutory maternity leave and pay rules provide that during the period of pregnancy and maternity leave the employee cannot be dismissed or subjected to any detriment for a pregnancy-related reason or a reason connected with the birth. Such a dismissal would also be sex discrimination. In addition, when aggregating periods of sickness absence for the purpose of deciding whether to dismiss an employee, all absences related to pregnancy or maternity should be ignored.

Pensions and early ill-health retirement

Where an employee on long-term sick leave is a member of a pension scheme which provides for early ill-health retirement an employer must consider the option of early ill-health retirement under that scheme before any decision to dismiss is made. A failure to do so could result in a finding of unfair dismissal.

Similarly, an employer should check to establish whether the employee is entitled to any benefits under any permanent health insurance scheme.

Reasons for dismissal

Employees who are absent on account of sickness or injury can be fairly dismissed for one or more of three reasons.

Most dismissals will be by reason of the employee's *'incapability'* to do the job.

Where the absences are short term, intermittent and persistent, and the absences have a significant detrimental impact on the employer's business, then the dismissal may be by reason of *'some other substantial reason'* (SOSR).

Unauthorised absences or failures to comply with sickness procedures may justify dismissal by reason of *'misconduct'*.

Fairness and reasonableness

Every dismissal, including a dismissal related to sickness absence, must be fair. In addition, an employer must act reasonably in treating the absence as a sufficient reason for dismissal.

In order to act fairly and reasonably an employer must consider many factors before making a decision, including the nature of the employee's sickness or injury, if or when the employee is likely to return to work, the need for cover for the employer, the effect of the employee's absence on the business and on colleagues, and the employee's length of service and service history.

Generally, a tribunal will seek to establish whether in all the circumstances it was reasonable to expect the employer to keep the employee's job open for any longer.

Consultation

The employer should consult with the employee at every stage. The consultation should ensure that the employee is aware of the employer's reasonable expectations, and warn the employee of the likely consequences of continued sickness absence.

ACAS Code of Practice

On 6 April 2009 the ACAS Code of Practice on Discipline and Grievance Procedures (Code) came into force. A commentary on the Code is outside the scope of this Article.

The Code is not intended to apply to illness and injury and other '*capability*' situations. Instead, guidance notes which accompany the Code state that in genuine illness or injury situations the guidance contained in appendix 4 to the notes and in the ACAS advisory booklet entitled Managing Attendance & Employee Turnover should be followed.

The Code does apply to '*misconduct*' and poor performance situations. Hence, non-genuine illness or injury situations should be dealt with as a '*misconduct*' matter under the Code. Then the prescribed 3-step procedure will apply: write to the employee to explain the issues; meet with the employee; and afford the right of appeal.

In any event, in the interests of natural justice and to ensure procedural fairness and reasonableness an employer will invariably need to follow the basic 3-step procedure. Any failure to follow this procedure exposes the employer to a finding of unfair dismissal.

Sometimes an employer may be faced with what appears to be a genuine illness or injury situation and so does not follow the Code, only to later discover that the situation was not a genuine one and that there may be a misconduct issue. In such a case the employer must ensure that the Code is followed in respect of the misconduct issue.

Short-term intermittent absences

Short-term intermittent absences are perhaps the most problematical absences for an employer and are worthy of special mention.

Such absences should be monitored, and when the employer deems appropriate the employee should be warned that the absences are becoming an issue. If there is no improvement then a formal warning may be appropriate. The guidance notes to the Code and the relevant ACAS advisory booklet encourages the following of a fair and reasonable procedure, and places emphasis on improvement rather than punishment. Warnings should be accompanied by reasonable attendance targets and details of the action the employer will take if the targets are not met.

Depending on the circumstances, it is likely several warnings will be required before the employee can be dismissed. At all times the employer must act fairly and reasonably. Any failure to do so will expose the employer to a finding of unfair dismissal.

Notice pay

Any dismissal of an employee who is absent on account of sickness or injury will likely be on full notice. The general rule is that an employee should be treated as normal during the notice period, and so receiving his or her normal entitlements. Accordingly, an employee on sick leave during the notice period should only receive any SSP and contractual sick pay to which he or she may be entitled.

However, a special rule provides that where the contractual notice period does not exceed the statutory minimum notice period by at least one week the employee is entitled to full pay during the statutory notice period. Employers should beware of this unusual rule, which can often be overlooked.

Disability discrimination

No Article covering sickness absence would be complete without mention of the subject of disability discrimination.

Individuals who are absent from work by reason of illness may be protected under the Disability Discrimination Act 1995 (DDA).

An employee with less than one year of continuous service may bring a DDA claim when he or she does not qualify to bring an unfair dismissal claim. Compensation awards under the DDA are unlimited and can take account of injury to feelings.

In summary, for the purposes of the DDA an individual is disabled if he or she has '*a physical or mental impairment which has a substantial and long-term effect on their ability to carry out normal day-to-day activities*'. It is not necessary for a medical expert to diagnose an individual as disabled. Individuals exhibiting clear signs of physical or mental impairment can be found to be disabled without the benefit of a medical report. However, medical reports are often relied upon, and are particularly helpful to determine the extent of any reasonable adjustments that must be made.

Discrimination take several forms: treating an individual less favourably, for a reason related to his or her disability, than others to whom that reason does not apply (*disability-related discrimination*); treating an individual less favourably, on grounds of his or her disability, than others whose material circumstances, including abilities, are not materially different (*direct discrimination*); failing to comply with a duty to make reasonable adjustments for an individual's disability (*reasonable adjustments*); victimising an individual (*victimisation*); and subjecting an individual to harassment (*harassment*).

With regard to reasonable adjustments, '*where any provision, criterion or practice applied by or on behalf of an employer, or any physical feature of premises occupied by the employer, places a disabled individual at a substantial disadvantage in comparison with persons who are not disabled, the employer has a duty to take such steps as are reasonable, in all the circumstances of the case, to prevent the provision, criterion or practice, or physical feature, having that effect*'. Relevant factors include: the effectiveness of the step in ameliorating the disadvantage; the practicability of taking the step; the financial and other costs which would be incurred by the employer, and the extent to which the step would disrupt any of the employer's activities; the financial and other resources available to the employer; the availability of external financial or other assistance; the nature of the employer's activities; and the size of the employer's undertaking.

Please note that this area of the law is a complex subject and you should not take or refrain from taking any step without full legal advice on the particular facts of your case. The content of this Article is of a general nature and no liability is accepted in

*connection with it or if any reliance is placed on it. Sykes Anderson LLP is not regulated to give financial advice. For more details on how to deal with sickness absences, contact **ALAN MASSENHOVE** at alan.massenhove@sykesanderson.com or on **020 3178 3770**.*

June 2009

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