

Managing ill health and disability



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The management of ill health and disability raises problems that employers have to grapple with on a daily basis. Minimising the cost and inconvenience of ill health in the workforce, whilst ensuring compliance with legal obligations, requires both a clear understanding of the relevant legal principles and a co-ordinated approach.

This Inbrief provides a summary of the varied and sometimes complex issues to consider when dealing with ill health and disability. It highlights the employment practices you may need to review to ensure that your organisation both achieves consistency and keeps on the right side of the law.

Interviews, contracts and policies

When considering who to appoint to a position within your organisation, it is important to remember that your obligations under the Equality Act 2010 extend to job applicants as well as to those who are already working for you. The duty to make reasonable adjustments, for example, applies to the application and interview process. There are also restrictions on asking job applicants questions about their health before offering employment.

Employment contracts may need to be amended to include the right to require your staff to attend an independent medical examination at your request (whether or not they are off sick).

If you offer private medical insurance or permanent health insurance (PHI), be careful to ensure that any contractual commitment to provide these benefits is clearly stated to be dependent on the terms of the policy. Otherwise, you may find yourself having promised to pay benefits which the insurer says are not covered.

Having a clear policy on sickness absence and reporting which your employees know about and understand is vital. This ensures that your employees keep you informed about their absence and makes it clear what will happen when they are off sick. We also recommend that you have an irregular attendance procedure – that is, a policy which sets out how your organisation will deal with persistent short-term sickness absences.

Absence monitoring and return-to-work interviews

In order to stay on top of sickness issues, it is important to be proactive and not wait for problems to arise. Accurate records of absences should be kept up-to-date and under review. This will enable you to spot patterns which may demonstrate an underlying problem – whether it be a disciplinary issue, a genuine health problem or a disability.

Once you have accurate monitoring in place, you can set thresholds which will trigger you to consider whether an individual's absence needs to be investigated more closely.

Return-to-work interviews play a dual role. Firstly, they can deter employees from "pulling a sickie": they know they will have to explain their absence face-to-face the next day, not just over the phone. Secondly, these interviews help you pick up on and address any underlying issues, such as a disability or even concerns about working relationships with colleagues.

Disabilities

In terms of managing disability, the key aspects to keep in mind are:

- ▶ Address possible disability issues as soon as they arise. The triggering event might be a long-term absence or a pattern of short-term absences – but it need not involve any absence at all.
- ▶ Obtain good quality and appropriate medical input at an early stage.
- ▶ Identify and implement any reasonable adjustments.



- ▶ Balance the employee's right to confidentiality with the need to prevent disability-related harassment. Ideally, agree with the disabled employee what he or she should say to colleagues to explain any absences or changes in role which might otherwise lead to resentment.

Long-term sickness absence

It is common for employees to be signed off work for several weeks at a time. Before you know it, the absence has run into months. Once again, proactive management of the situation is crucial to minimise the cost and inconvenience of the absence and, at the same time, avoid claims by ensuring your legal obligations are complied with.

Absences will often be of uncertain duration and for complicated reasons, with little medical information available. The point at which you consider that an absence has become long-term and requires action will depend on how much you know about it:

- ▶ If your employee has broken their leg and will be in traction for the next six weeks, there is little you can or should do until they are out of hospital and ready to return to work.
- ▶ On the other hand, an employee signed off for a month with "work-related stress" will almost always require early intervention.

The first question is - do I have enough information about the reason for the absence? It is often impossible to gauge the impact of an illness – two people with the same condition may be affected in different ways.

It is often helpful to seek the employee's consent to write to their GP to ask for clarification of the reason for the absence, any information about the prognosis and whether there is a link between the condition and the employee's work. You may then decide to get a full report from an independent doctor. Where there is very long-term absence, you may need to do this more than once.

Getting the employee back to work may be possible by investigating part-time work, working from home, reduced responsibilities and so on. You should maintain an ongoing dialogue with the employee about such matters.

If you have a PHI policy, take care to diarise the point at which the employee might become entitled. You can then make a claim at the earliest opportunity.

Persistent short-term absences

Persistent short-term absence has a very disruptive impact on business. There are a number of approaches you can take:

- ▶ Consider incentives for good attendance (although remember it is important not to penalise people who are absent due to a disability).
- ▶ Ensure that you have systems in place to monitor absence trends, so you can take action as soon as a pattern develops.
- ▶ Speak to the employee to establish whether the absences are linked to an underlying health problem or a work-related problem.
- ▶ Consider whether medical input is needed. Is there a disability issue? If so, you will need to consider reasonable adjustments.
- ▶ If there is no disability or clear explanation for the absences, explain to the employee that the

level of attendance is not satisfactory and set a period within which to show an improvement.

- ▶ Meet the employee again at the end of the review period. If there has been insufficient improvement without adequate explanation, give a written warning that - if there is no improvement in a final review period – the employee may face disciplinary action up to and including dismissal.
- ▶ If there is still no improvement, you can hold a disciplinary meeting which could potentially lead to dismissal (on notice) – but make sure you comply with the requirements of the ACAS Code of Practice on disciplinary procedures as, although the Code does not apply to genuine ill health dismissals, it does apply if the dismissal is due to culpable conduct.



Getting medical input

Being in possession of sound medical information is very important when managing ill-health issues. Typically, a GP's fit note will be vague and of minimal assistance in ensuring you have taken all the steps you need to. Fit notes can be provided by some other healthcare professionals (including nurses, pharmacists and physiotherapists), but may still not provide sufficient detail.

Options for medical reports include a more detailed report from the employee's GP or consultant, or a report from an independent GP or consultant (paid for by the employer). You need to obtain proper medical consent - the appropriate form depends on who is providing the report.

How useful a report is will often depend on the questions asked of the doctor. In preparing your request for a report take care to address all relevant issues - the diagnosis; the current and likely future impact of the illness on the employee; the prognosis; and what adjustments may be necessary to enable a return to work.

PHI

PHI is generally a highly valuable benefit. If a claim is accepted, the insurer will pay some or all of the sick employee's salary until they are fit to return. As mentioned above, it is crucial that this is dealt with carefully in your contractual documentation and that you make sure PHI claims are progressed as soon as potential entitlement under the policy arises.

Employers who provide this benefit are required to take all reasonable steps to pursue the claim to the insurance

company. Particular care should be exercised if you wish to terminate an employee's contract at a time when this will have the effect of precluding a PHI claim or terminating PHI payments.

Personal injury

Where employees suffer an injury, including a psychiatric illness (for example, clinical depression), as a result of their employer's negligence, they can bring a claim for personal injury in the civil courts. If successful, they can recover significant damages. Employer's liability insurance usually covers such claims.

The main question which normally determines whether the employer is found to be responsible is whether the injury to the employee was reasonably foreseeable. Foreseeability depends upon what the employer knew or, crucially, should have known.

An employer is usually entitled to assume that an employee can withstand the normal pressures of the job, unless it is made aware of some particular problem or vulnerability. So, for example, where an employee has already had time off work with stress, you should monitor the employee carefully when they return to work and take all reasonable steps to alleviate any stress they are under. These "return to work" situations commonly result in successful claims as the employer is on notice of the employee's vulnerability.

Disciplinary and grievance hearings for employees off sick

The instigation of disciplinary and grievance processes very often coincides with employees suddenly being signed off sick – often with "stress" or "depression" being cited on the GP's certificate. This scenario can be frustrating, particularly where medical information is limited.

However, it does not necessarily spell the end of the disciplinary or grievance process or mean that it must be suspended indefinitely. The key is to keep the momentum going, whilst taking every possible step to avoid an implication that you are contributing to the employee's ill health.

You can write to the employee to acknowledge receipt of the certificate and ask for confirmation whether they intend to attend the scheduled hearing. You could offer to conduct the hearing over the phone at home, or at a neutral venue if this would assist. If the employee does not feel able to attend you may wish to seek medical information, particularly if they are signed off again or for a long time.

It is sensible to reschedule the hearing if this happens, most likely until immediately after the expiry of the current medical certificate. The next steps will depend on the reason for the absence and the medical evidence available. But you should eventually be able to tell the employee that the hearing will be heard in their absence, allowing the opportunity to submit any comments in writing to be considered.



When can we dismiss?

It is possible to dismiss an employee who is on long-term sick leave, but you should not consider doing so until you are satisfied that you fully understand the nature of the illness and prognosis and have assessed and implemented any reasonable adjustments if the employee has a disability.

Dismissing an employee for persistent short-term absences can also be achieved as long as you have investigated the cause(s) of the absences, made clear to the employee that improved attendance is required and then given adequate opportunities to improve.

How can we help?

Lewis Silkin is happy to help you deal with any disability or ill-health management issues. We also offer various sickness audit products to help your organisation take stock of its current position on sickness, review any difficult ongoing cases that you are dealing with and work with you to build and implement a co-ordinated approach to the management of disability and ill health in your organisation.

For more information on this subject please contact:



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