Absence Management

The law is stated as at 06 April 2010

- **What legislation governs absence management?**

Numerous pieces of legislation have an impact on absence management. Some important examples include:

  - Disability Discrimination Act 1995
  - Employment Rights Act 1996 as amended
  - Employment Rights Dispute Resolution Act 1998
  - Employment Relations Act 1999
  - Employment Act 2002
  - The Employment Act 2002 (Dispute Resolution) Regulations 2004
  - Employment Act 2008
  - The Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2008
  - The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 (SI 2010/137).

For details of the way in which disciplinary, dismissal and grievance procedures may be used to assist employers in certain cases of absence management see the Colaw Discipline and grievance procedures **Resources** page. This resources page provides information on the repeal of the statutory dispute procedures in Great Britain on 6 April 2009, the role of the organisation's own procedures and the Acas code of practice on disciplinary and grievance procedures.

The Working Time Regulations 1998, maternity and other family-friendly provisions and health and safety legislation may also all have an impact on absence issues.

- **How can an employer minimise the occurrence of short-term absences?**

Absence management remains a vital issue. According to the CBI it cost employers in the UK £19.9 billion in 2007, taking into account direct and indirect costs. Commentators do not all agree on the statistics or the effects of a downturn on health and absence issues. On the one hand, when there is less overtime and more free time overall, health can improve. However for those overworked or worried about redundancies there may be increased absences resulting from ill health.

Some absence is always inevitable regardless of the economic climate: particularly with young workers, statistically, some short term absences will occur. Motivation, good health and job satisfaction is crucial, and is the best way to manage short term absences. The following factors will help:

  - Pro-active manager led absence systems and procedures.
  - Good physical working conditions.
  - High health, safety and welfare standards.
  - Pro-active measures to support staff.
  - Training and teamwork.
  - Improving absence record-keeping systems.
  - Providing facts and figures on absence to line managers.

- Pro-active absence management policies, including return to work interviews.
- Enforcement of policies on equal opportunities and discrimination.
- 'Work-life balance' policies including flexible working hours and varied working arrangements, if compatible with the needs of the organisation.

The Business link website provides guidance on managing sickness and absence.

- Go to Business link

- **How should an employer treat short-term absence?**

In order to manage sickness absences issues it is important to fully understand the extent of the problem. Employers need to distinguish between lateness, short-term absences and long-term absences.

Where the absence consists of lateness or short but persistent and apparently unconnected absences then, after suitable investigation, disciplinary action may be appropriate in some cases. For information on disciplinary and grievance procedures, including the repeal of the statutory procedures on 6 April 2009 and the role of the new Acas code of practice on disciplinary and grievance procedures see the CoLaw Discipline and grievance procedures **Resources** page.

The key steps in proactively managing short-term absence are:

- Investigation of the level, causes and reasons for absence.
- Careful monitoring trends in the particular workplace. Keeping records with accurate information and statistics to fully understand the pattern and reasons for absences.
- Discussing any particular problems with the employees concerned. Considering the use of return-to-work interviews with line management and completion of self-certification forms even for one day of absence.
- Consider praise and financial rewards for employees with the best attendance rates.
- Authorise reasonable absences to cover medical appointments, including ante-natal care. All pregnant employees, regardless of service, are entitled to reasonable, paid time-off for ante-natal care.
- Allow for authorised absence whenever appropriate to cover specific religious observances of minority groups.
- Consider requesting a medical report to establish if there is any underlying medical condition to support the level of absence; there may be a hidden condition and links to disability discrimination which may not be immediately apparent.
- Working with employees in connection with GPs' advice to help the employee get back to work where appropriate
- If there are no good medical reasons for the absences, the employee should be counselled and told what improvement is expected and warned what the consequences will be if none is seen.
- If there are grounds to suspect that the employee’s reasons for the absence are not genuine, investigate carefully, discuss with the employee, pursue formal disciplinary action where appropriate, including written warnings and compliance with the organisation’s own procedure and the Acas code of practice on disciplinary and grievance procedures (Acas code).

- Disciplinary action in accordance with the organisation's procedure, the Acas code and in compliance with any provisions relating to disciplinary issues in the employee's employment contract may be appropriate, but always treat each case on its merits. For example, if absences were due to domestic problems now resolved it is unlikely that the level of absence will continue, so is it appropriate to discipline?
- Consider what can be done to assist employees with personal or family problems. Would counselling help?
- If there are medical reasons for the absence, consider any links to the Disability Discrimination Act 1995 (DDA). For example, does the absence relate to hospital appointments or treatment required? If this is the case, section 6(3) of the DDA requires an employer to make reasonable adjustments which includes allowing time off for treatment.
- If the employee has a recognised illness or medical condition that is not a disability but their absence rate is unacceptably high, it may be possible to dismiss fairly for some other substantial reason after following due process. The employee's length of service and the availability of suitable alternative employment are relevant factors to consider before reaching a decision.

The Business link website provides guidance on managing absence and sickness.

- Go to Business link

- **What do employers need to know about the use of fit notes (previously known as medical certificates or sick notes)?**

Sick notes, medical certificates or 'fit' notes arise when employees are ill or injured. General practitioners (GPs) provide these as proof to the employer that the employees are genuinely sick.

From 6 April 2010 'fit notes' (or fitness for work statements) were introduced to replace the old sick notes. The old sick note system had been in operation since 1948 and was seen to be in need of modernisation to help address the vast number of employees on long-term sickness absence or incapacity benefits. It is hoped that the new system will encourage employees back to work more quickly and ulitmately will reduce the numbers receiving incapacity benefit.

As well as a change of name, there are several practical differences in the approach to be taken over the provision of these notes. However, it is fair to say that the most important change is a conceptual shift focusing on the work employees can do, rather than what they cannot do. A table summarising the detailed changes appears below.

It is important to emphasise that employers' duties to pay statutory sick pay and make reasonable adjustments under the Disability Discrimination Act 1995 (DDA) remain unaffected. Employers should be wary of contravening the DDA if the employee's health problems qualify as a disability.

Changes

The key difference between the old sick notes and the new ones is that previously GPs had to say if the individual was, or was not, fit to work. Now GPs can advise that the employee is either:

- not fit for work, or
- may be fit for work taking account of the' following advice'

It is the second option which reflects the fundamentally different approach. An employee may have some health problems, but this does not necessarily prevent them from working. If the GP opts for the second option this means the GP's view is that the employee's condition does not necessarily prevent them working. The aim of the fit note is to give employers and employees' greater flexibility in managing sickness absence. The GP should have tried to suggest ways of helping an employee get back to work, outlining on the note the work that patients can do in spite of their illness. The GP should give advice about the effects of the employee's health condition and some suggestions about the types of adjustment employer could consider to help the employee back to work.

The employer can then discuss with the employee appropriate adjustments such as:

- a phased, gradual return to work,
- altered hours,
- flexible hours,
- time off for treatment,
- amended duties, and/or
- workplace adaptations.

Employers are not bound to follow the GP's advice and if it is not possible for an employer to provide support for the employee to return to work the employer can use the statement for sick pay purposes as if the GP. had advised 'not fit for work'.

The fit note does not include the option for GPs to advise an employee that they are fully fit for work. The Government emphasises that it is a myth that an employee needs to be fully fit for work; employees do not need to be 'signed back' to work by a GP. If an employer does want a medical opinion stating that an employee is fit for work this is a matter for a private arrangement with a GP or occupational health specialist.

On the fit note the GP should have stated how long their advice will last for. The employer should then agree a return to work plan with any appropriate adjustments in place for a temporary period. If the employee cannot then return to their normal duties, long term changes may be necessary taking into account the provisions of the DDA. In the first six months of any health condition, the maximum period a GP can issue a fit note for is three months (reduced from the previous six months).

Table summarising the differences between the old sick notes and the new fit notes

	Old sick notes	New fit notes
Note used to show why an employee cannot work due to an illness or injury.	Yes	Yes

Note used only after the 7th calendar day of sickness.	Yes	Yes
Information on the note is advice to employees and is not binding on employers.	Yes	Yes
The GP has an option to say employee is fit for work.	Yes	Yes
The GP has an option to say employee may be fit for work with some support.	No	Yes
GPs expected to provide more information on how the employee's condition may affect their work.	No	Yes
GPs expected to suggest common ways or simple adjustments to help the employee return to work.	No	Yes
The note can be produced electronically and then printed and can be given after a telephone consultation or report from other healthcare professional.	No	Yes

Possible problems

There will inevitably be some problems with fit notes while employers, employees and GPs adapt to it. Predicted difficulties include:

- difficulty for GPs making the judgments between 'unfit for work' and 'may be fit for some work' as they may not know enough about the nature of the work,
- disagreements between employees and employers concerning the nature of adjustments which are appropriate,
- employees refusing to return to work once adjustments have been made, leaving the employer to decide whether to invoke disciplinary or capability processes, or stop paying statutory sick pay,
- other employees may feel disadvantaged if another employee achieves a variation to their working schedule on what the other employees see as spurious health grounds,
- DDA claims may be generated as a result of refusals to carry out adjustments in appropriate cases,
- possible increased risk of personal injury claims from members of staff who injure themselves while back at work following a fit note saying they may be fit to return.

Implementation

To try and minimise the risk of the above problems occuring employers should review their absence, return to work and flexible working policies to ensure they are compatible with the fit note system. There should be an appropriate emphasis on returning to work as soon as is practicable. Other documentation which may need checking or amending include standard contract clauses on sickness absence reporting, self-certificate forms, letters inviting an employee to attend a meeting following a period of sickness absence and structures for return-to-work interviews.

Line managers should also be trained in the new system particularly on how to manage the need for appropriate adjustments and the length of time those should last for and managing other employees expectations or concerns over such arrangements.

Fit notes and statutory sick pay (SSP)

SSP has not changed and remains payable for any sickness absence of four days or more provided that the employee meets the qualifying conditions. Difficulties may arise where a GP has advised that an employee may be fit for work, but the employee remains off work because the employer cannot provide the necessary support. In such cases employers should treat the note as a 'not fit for work' note and pay SSP in the same way.

The Government emphasise in their guide for employers that SSP is only a minimum provision and that if an employer is considering a return to work which involves reduced hours, it may be cost effective for the employer to consider paying voluntary sick pay for the hours not worked due to illness or injury, even when SSP does not apply.

Further guidance

There is a range of guidance and advice available on fit notes. The Department for Work and Pensions has published guidance for employers in partnership with several organisations. This guide includes information on the changes to the note, a sample fit note and case studies.

Department of Work and Pensions

- **Can an employer use an absence management procedure which freezes an employee's pay rise because of their frequent short term sickness absence record?**

Provided that it is properly managed, an employer may adopt an absence management procedure which freezes an employee's pay rise because of their frequent short term sickness absence record. However, great care should be taken to manage the process carefully. Linking sickness absence to pay rises can lead to disability discrimination claims and great care should be taken to ensure that an employee with a potential claim does not have their pay reduced under the procedure.

The following points should also be taken into account:

  - A capability based disciplinary process should be in place explaining the levels of absenteeism which are unacceptable and the consequences of sickness absence over a specified level (based on carefully kept records) over a set period.
  - Compliance with the the Acas Code of practice on disciplinary and grievance procedures and the organisation's own procedures, together with a full disciplinary investigation and hearing should be adopted - see below.
  - Employees may claim they have a contractual right to a pay rise depending upon what has happened in the past. Although this is unlikely it should be considered
  - Staff motivation issues may arise as a result of the policy and a financial incentive to reward good attendance may produce better results than a deduction system.

Employers must remember that high levels of absenteeism are usually a key indicator of an unhappy employee culture. Colleagues who carry the burden of an increased workload may

also become demotivated or leave, therefore positive proactive absence management is more likely to have an effect than threats of a pay freeze alone.

For information on discipline and grievance procedures, including the repeal of the statutory dispute resolution procedures on 6 April 2009, the role of the new Acas code of practice on disciplinary and grievance procedures and the transitional arrangements see the CoLaw Discipline and grievance procedures **Resources** page.

How should an employer manage long-term sickness absence?

Managing long-term sickness absence is a difficult process and has the potential to result in claims for unfair dismissal, disability discrimination, stress related personal injury, breach of contract or a payment to settle such claims.

Long-term absence is nearly always the result of physical or mental ill health. High absenteeism or large staff turnover, frequent interpersonal conflicts or complaints by workers are signs that may also indicate a problem of work-related stress. Large organisations may be able to address these problems through more flexible working policies. Carefully monitor trends in the particular workplace. As with all types of absence it is important to keep records with accurate information and statistics to fully understand the pattern and reasons for absences. In smaller organisations there may be a real need to replace the employee which must be handled cautiously and by following both the company's own capability, disciplinary and dismissal procedures and the Acas Code of practice on discipline and grievance. The issues to be considered during the process and in meetings with the employee include:

- Just how much damage is being caused by this absence?
- How long will the absence continue for?
- What was the employee's GP's initial advice on the fit note and what is the GP's or the organisation's doctor's prognosis now?
- Will there be a full recovery or will a return to the same work be imprudent?
- Is alternative work available, with re-training if necessary?
- How long has the employee been working for the organisation?
- Have all possibilities been discussed with the employee and their representative?

Employers often wonder if it is appropriate to contact employees when they are off sick. If reasonable contact is kept with an absent employee this may facilitate a return to work as soon as the employee has recovered. However an employee may feel harassed or bullied by their employer if contact is made too often. In order to maintain contact as part of a pro-active absence management procedure the following points should be borne in mind:

- The sickness absence procedure should govern how often the employer will make contact with someone on sick leave.
- Medical advice should be obtained in appropriate cases and the organisation's policy should explain this - see the question below on medical reports.
- Employers should be pro-active in keeping in touch with employees throughout their absence.
- The sickness absence procedure should specify that employees must maintain reasonable contact with the company during absences. If employees know what to expect, they will not think that the company is harassing them by maintaining regular contact.

- Employers need to be tactful,sensitive and use common sense. Some employees may resent the intrusion (or be genuinely be too ill to come to the telephone), others may feel abandoned if the employer never gets in touch at all.
- Line managers should be the main point of continuity and contact for an employee telephoning in sick.
- In some cases home visits may be appropriate.
- Matters to discuss with the employee include referrals for medical reports and if any temporary adjustments would help the employee return to work.
- Employers should be up to date with the disability discrimination legislation and make reasonable adjustments where appropriate.

For information on the new fit note see the question above.

The Business link website provides guidance on managing absence and sickness.

- Go to Business link

- **Can an employer dismiss an employee because of long term sickness absence?**

If the time eventually comes when all procedures have been exhausted, all avenues explored and the job can no longer be kept open, the employee should be fully consulted and informed about possible dismissal. In reaching a decision to dismiss, the organisation's capability or dismissal procedures must be followed and employers must at least comply with its own procedures and the Acas code of practice on disciplinary and grievance procedures.

If an employer chooses not to follow such procedures then they must budget to include compensation to the employee should they choose to bring a claim.

Dismissal by reason of capability (including medical incapability) is one of the potentially fair reasons for dismissal in accordance with section 98 of the Employment Rights Act 1996. However, any dismissal for this reason must be handled fairly as well.

If, however, the absences are unauthorised and there is no medical condition, it is more likely the reason for dismissal will be conduct.

In all cases it is necessary to follow a fair procedure. Failure by an employer to identify the correct reason for dismissal may contribute to a finding of unfair dismissal.

Having identified the reason for dismissal, a tribunal will then consider if the employer followed the appropriate procedures. It is also important that the employer acts fairly in treating the illness as the reason for dismissal. The action taken must always be within the band of reasonable responses. Factors a tribunal may consider relevant are:

- The nature and length of any illness or disability.
- Past service and record.
- Any demonstrable improvement in the attendance record.
- The effect of continued absence on colleagues and the effect of the absence on the employer's services. Can cover be easily arranged? Tribunals must consider the size and administrative resources of the business when assessing whether the actions were reasonable.

- Whether there are there any offers of alternative employment. This perhaps has more relevance in relation to long-term sick employees but will be relevant in the context of an employee who may have a disability. Section 6 of the Disability Discrimination Act 1995 requires an employer to make reasonable adjustments and this can mean looking at alternative employment.

An example of the importance of obtaining good medical evidence is *First West Yorkshire trading as First Leeds v Haigh [2008] IRLR 182, EAT*. In this case a bus driver suffered a suspected stroke and lost his PSV driving licence. The bus company dismissed him without any medical reports to confirm the nature and prognosis for his condition. The employers were held to have unfairly dismissed him. The case also shows that prior to dismissing an employee on long term sick absence an employer should:

- take reasonable steps to consult the employee,
- take reasonable steps to ascertain whether any applicable pension scheme provides for an enhanced pension on ill health retirement, and
- consider the possibility of alternative employment.

By contrast if the employee is malingering and pretending to be unfit for work there is no universally applicable requirement for the employer to obtain a medical report - *Corus UK Ltd v A.M. Mainwaring (unreported, UKEAT/0053/07 22 June 2007, EAT).*

- **How can an employer obtain a specific medical report from the employee's doctor?**

The Access to Medical Reports Act 1988 requires express consent from an employee before a company can approach the employee's GP for a medical report.

An employer should draft a consent form for the employee to sign making it clear that they are giving consent to the GP to supply a medical report. In accordance with the Data Protection Act 1998 details of sickness absence and medical reports are classified as sensitive personal data and should therefore not be disclosed to third parties without express consent. (See question below on seeking consent from employees for processing data relating to sickness absence and the question above on the new fit note). Also, there are strict rules about patient confidentiality and therefore no GP will disclose information unless they are sure the employee has consented to its release.

The employer should send the consent form to the GP along with a list of questions relating to the illness/absence and details of the role of the employee in the business. The more information that is supplied to the medical practitioner, the more likely it is they will be able to make an assessment and comment on the suitability of the role and any reasonable adjustments.

- **If an employee who has been absent for apparent sickness refuses permission to contact his doctor, can the employer proceed straight to disciplinary action based on their absence record?**

An employer must explain to the employee why they are seeking medical evidence ie that it would be of assistance in determining the employer's duty of care (for example, to make reasonable adjustments if there is a disability). As long as this has been done then, yes, an employer is entitled to make a decision based on the facts available to them. If the evidence

suggests that the absence level is unacceptable and the employee has been asked about, but has not disclosed information regarding any underlying medical condition, then disciplinary action may be appropriate provided it complies with the organisation's own procedures and the provisions of the Acas code of practice on disciplinary and grievance procedures. For information on the Acas code of practice on disciplinary and grievance procedures see the CoLaw Discipline and grievance procedures **Resources** page.

However, a word of caution. Ignorance is no defence under the Disability Discrimination Act 1995 (DDA). For example, if an employee is always off sick with epileptic fits but will not permit access to medical evidence, an employer cannot say they did not know that the employee had a medical condition covered by the DDA - it should have been obvious from the condition. For more information on disability-related absences, see the CoLaw Disability Discrimination **Resources** page.

- **Is an employer required to seek consent from employees in order to process data relating to sickness absence?**

Data relating to the reasons for sickness absence is sensitive personal data according to the Data Protection Act 1998. Part 2 of the *Employment practices data protection code* dealing with employment records suggests that absence records should be recorded separately from sickness records.

Part 4 of the *Code* dealing with medical records and health information established the general principle that employers should only collect information relating to the health of individual workers if:

  - express, freely given consent has been provided by the worker(s) concerned, or
  - the collection is necessary to enable compliance with the employer's legal obligations, for example to prevent breaching the health and safety regulations and/or anti-discrimination rules.

Collection of medical records and health information relating to individual workers not covered by the above is likely to be unlawful and a breach of the Data Protection Act 1998.

The Code is available on the Information Commissioners's website.

  - Go to Information Commissioner's website

For more information on an employer's obligations in processing and storage of sensitive personal data.

- **Can an employer rely on a term in the contract of employment that allows them to dismiss after 26 weeks of continuous absence as a defence to a claim for unfair dismissal and disability discrimination?**

The fact that the contract contains such a provision will mean there is no breach of an express term of the contract should dismissal occur, but it will not necessarily mean that the dismissal will be fair. As well as contractual terms, employers should also be careful of the implied duty of trust and confidence. In considering the issue of fairness, a tribunal will consider the process

followed by an employer.

In managing long term sickness absence it is **always** prudent for an employer to seek medical advice to assess whether the employees condition amounts to a disability in accordance with the Disability Discrimination Act 1995 (DDA). The definition of what constitutes a disability can be split into three parts:

- The employee must be suffering from a physical or mental impairment.
- The impairment must have a substantial adverse effect on the ability to carry out normal day-to-day activities. Substantial means more than minor or trivial.
- The effect must be long term, in other words have already lasted for at least 12 months or be likely to last that long.

If a medical report identifies a disability, in accordance with Section 6 of the DDA an employer has a duty to make reasonable adjustments. This duty is quite broad and may cover physical adjustments to premises, or the provision of equipment to assist the employee in carrying out their duties. It can also mean adjustments to the role itself by removing certain duties and reallocating them, changes in hours or place of work, or the provision of further training and supervision. It could also include transferring to any other vacant post subject to suitability. see the CoLaw Disability Discrimination **Resources** page.

- **If an employer dismisses an employee before the contractual or statutory entitlement to sick pay expires, is the dismissal automatically unfair?**

This fact in isolation will not render any dismissal automatically unfair. However, the fact that a dismissal has occurred before a contractual entitlement has expired may have a bearing on a finding of unfair dismissal. The dismissal may attract increased compensation if the Acas code of practice on disciplinary and grievance procedures has not been followed. (For information on the Acas code of practice on disciplinary and grievance procedures see the Colaw Discipline and grievance procedures **Resources** page.

An employer cannot automatically presume that it is fair to dismiss upon the expiry of sick pay entitlements: an employer must always demonstrate that a fair procedure has been followed.

Dismissal of an employee during a period of long-term sickness can also give rise to a claim for breach of contract. The courts have held that a term should be implied in the contract that prevents an employer dismissing arbitrarily thus preventing an employee from attaining contractual benefits.

For example, in the case of *Aspden v Webbs Poultry and Meat Group (Holdings) Limited [1996] IRLR 521 HC* the High Court held that an express term permitting the employer to dismiss on notice after a prescribed period of absence should be subject to an implied term that such a clause would not be exercised in a manner that would deny an employee other benefits under the contract - in this case, disability benefits.

This **does not** mean that an employer can never dismiss an employee with permanent health insurance. For example, in the case of *Hill v General Accident Fire and Life Assurance Corporation plc [1998] IRLR 641 CS* Mr Hill was dismissed by reason of redundancy while receiving permanent health insurance. He brought a claim on the basis that such a dismissal was in breach of contract. The Court of Session held it was necessary to include Mr Hill in the

selection pool for redundancy and that to exclude him would have been disadvantageous to those not on sick leave. As the employer had followed due process the dismissal was not unfair.

- **Are there any future developments expected in the area of absence management?**

The current economic climate is likely to increase pressure on staff which can produce absence management issues in the longer term. Recent trends in absence management ethos in addition to all the matters referred to above, encompass a greater focus on health issues in the workplace

There are also a number of future legal developments which will affect absence management. These are summarised under separate headings below:

Sick notes to 'fit notes'

The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) Amendment Regulations 2010 (SI 2010/137) came into force on 6 April 2010. See our question above on fit notes. There is likely to be a period of adjustment whilst doctors, employers and employees adapt to the new system and some case law maybe generated. An evaluation of the fit note system will be published in 2012-2013 to see if there have been improvements in health and reductions in sickness absence with consequential savings for the NHS and state benefits system. Following this review further changes may follow.

Age discrimination

In the immediate future, absence from work will start to be affected by the protection afforded to older workers, the eventual rise in the retirement age and the growth in the number of older workers.

This change in the constitution of the workforce will make pro-active absence management and flexible working policies even more crucial.

Stress

Stress is a major cause of absences from work. The most recent statistics available from the Health and Safety Executive reveal that work-related stress, depression or anxiety accounted for an estimated 11.4 million lost working days in 2008 - 2009.