BREEDON consulting

Managers Guide: Managing Long Term Sickness Absence

Reviewing Absence

Long-term absence is often defined as absence of more than four weeks.

There are two stages to managing an employee's long-term sickness absence. The first is to manage the employee's absence from work and the second to manage their return to work.

The management of an employee's absence should be carried out proactively with the prime aims being to support the employee and facilitate their return to work as soon as possible.

To achieve this, as the line manager you should normally carry out regular reviews of the employee's length of absence, state of health and readiness to return, as well as whether or not anything can be done to facilitate their return. This should be done in discussion with HR, a medical expert and, where appropriate, with the absent employee.

The starting point will to have a supportive conversation with the employee as soon you know that their absence is likely to be long term. The aim of this conversation will be to identify how you and the company can support the employee and take care of any employment concerns.

Access to Medical Reports Act 1988

An alternative course of action is for you to ask for the employee's consent to request a medical report from their GP or specialist. In this case, you must abide by the relevant provisions of the Access to Medical Reports Act 1988.

This Act places certain restrictions on employers who wish to obtain medical information about employees from their own doctor and also gives individuals a range of rights in relation to any such medical report.

The Act applies to medical reports prepared by an employee's own doctor, specialist or consultant, but would not normally apply to reports prepared by an occupational doctor.

Employees have a number of rights under the Access to Medical Reports Act 1988 where their manager wishes to obtain a medical report on them:

- To be informed about their rights under the Act.
- To decline to give their consent for their manager to apply to their doctor for a medical report.
- If they have given their consent, to ask their doctor for a copy of the report once it has been prepared.
- To ask the doctor to amend the report if, in their opinion, it contains anything inaccurate or misleading.
- To refuse to allow the report to be released to their manager.

Where you wish to request medical advice about an employee from his or her own doctor, you must:

- write to the employee and ask for his or her written consent to write to the doctor;
- inform the employee of his or her rights under the Access to Medical Reports Act 1988;
- recognise that the employee has the right to decline to give consent;·enclose a copy of the employee's signed consent when writing to the doctor to request a report; and

where the employee wishes to see the report before it is forwarded to the employer, inform the employee that the application for the report has been made.

Keeping in Touch with the Absent Employee

An employee on long-term sickness absence may feel very isolated and greatly miss the social contact that work usually affords.

It will be very important for the employee to know that, even though he or she is off sick, support is available from you.

You should take positive steps to keep in touch so that the employee knows that the company is interested in their health and wellbeing, and that support is available.

You may, understandably, feel uncomfortable about the prospect of contacting an employee who is off sick in case the contact might be perceived as unfair pressure.

You should, however, also reflect on how the employee might feel if no contact is made. In many cases it is likely that the employee would conclude that his or her welfare was of no interest or value to the organisation and feel that he or she had in effect been abandoned or written off.

The first step would be to write to the employee indicating a desire to maintain contact and asking the employee whether he or she would prefer telephone contact, occasional visits at home (perhaps by a workmate), email communication or a combination of these.

The letter should make clear your interest and concern about the employee's welfare and progress and offer any support that is reasonable and practicable. Naturally it should be made clear that you do not wish to put pressure on the employee, and that the employee's wishes as regards contact will be respected.

Keeping in touch personally will also allow you to keep up to date with the employee's state of health and progress and their perspective on the likelihood of a return to work. This in turn will allow you to organise and maintain temporary cover more effectively.

Avoiding Disability Discrimination

An employee who is off sick for a lengthy period of time may be disabled for the purposes of the Equality Act 2010. If this is the case the employee will be entitled to protection against discriminatory treatment and to expect you to make reasonable adjustments.

The Act contains a very broad definition of disability, which includes both physical and mental impairments that last, or are expected to last, 12 months or more and are substantial in terms of their effects on the person's day-to-day life.

A wide range of physical and mental conditions and illnesses may amount to disabilities, depending always on whether or not the effect of the condition on the person is substantial and long term.

An important point to note is that a condition may amount to a disability even if, as a result of medication or another form of support, the person experiences no adverse effects on a day-to-day basis. The question that determines whether or not an employee is disabled is how the condition would affect the employee if he or she did not take the medication or use the support

Direct Disability Discrimination

You are under a duty not to treat employees less favourably because of a disability. For example, if you immediately decided to dismiss an employee, just because he or she had developed a particular illness, this would amount to direct disability discrimination and would be unlawful.

For direct disability discrimination to arise, it is not necessary for the employee complaining of less favourable treatment to actually have a disability. Direct disability discrimination can occur in the following circumstances:

It can occur where the employee is treated less favourably because of his or her association with a person who has a disability. For example, if a line manager denies an employee a promotion because she has a disabled husband, this may amount to discrimination because of her association with a disabled person.

It can occur where the employee is treated less favourably because of a perceived disability. For example, if a line manager mistakenly believes that an employee has depression and avoids giving him challenging work as a result, this may amount to discrimination based on a perceived disability.

Direct disability discrimination is lawful where there is an occupational requirement for an employee to have a disability. For example, if an employer is recruiting a person to act as a counsellor to people with multiple sclerosis, it might be permissible to require applicants to have multiple sclerosis because of their ability to relate to them and give practical advice. However, the application of an occupational requirement must be a proportionate means of achieving a legitimate aim. Therefore, there must be a genuine business need behind the requirement and no other, less discriminatory way, of achieving that same aim.

Indirect Disability Discrimination

It is unlawful for you to apply a provision, criterion or practice to all employees that puts an employee with a disability at a disadvantage, where it also puts people who share the employee's disability at a disadvantage compared with others.

However, you have a defence if the provision, criterion or practice is a proportionate means of achieving a legitimate aim. Therefore, you do not indirectly discriminate if there is a genuine business need behind the measure and there is no other less discriminatory way of achieving that same aim. A legitimate aim could be the health, welfare and safety of individuals, a business need, or economic efficiency, but the need simply to reduce costs will not be sufficient.

For example, you may have a policy that all employees who are sick must visit the company doctor after six weeks' absence, and if they do not, you instigate the incapability procedure. This could indirectly discriminate against an employee who is housebound because of his disability. You would have to consider making reasonable adjustments, for example requesting that the company doctor make a home visit.

Discrimination arising from a Disability

You are under a duty not to treat an employee unfavourably because of something arising in consequence of his or her disability. To be liable, you must know, or reasonably ought to have known, that the individual has a disability.

You will have a defence if it can demonstrate that this is a proportionate means of achieving a legitimate aim. To rely on the defence, there must be a genuine business need behind the measure and no other less discriminatory way of achieving that aim. A legitimate aim could be the health, welfare and safety of individuals, a business need, or economic efficiency, but the need simply to reduce costs will not be sufficient.

For example, dismissing an employee with a disability because she has been on long-term sickness absence for over a year, where it appears that she will not be able to return to work in the foreseeable future, may amount to discrimination arising from her disability.

However, it may not be unlawful if you can demonstrate that the dismissal was necessary to meet business needs and that it considered reasonable adjustments, for example the ability to work from home or with assistance.

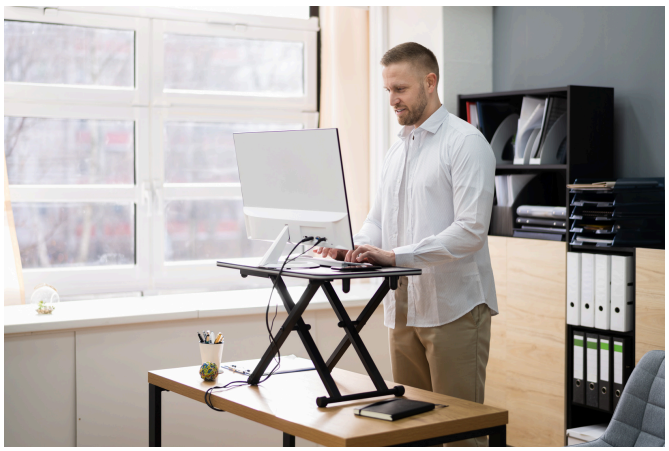
Duty to make Reasonable Adjustments

Employers are under a positive duty to make reasonable adjustments to support a disabled employee. This is the duty to take reasonable steps where a provision, criterion or practice or physical feature puts an employee at a substantial disadvantage, or to supply an auxiliary aid where an employee would be put at a substantial disadvantage without it. This means that you must take the initiative and consider what adjustments would be possible and practicable.

Although the duty to make reasonable adjustments is on the employer, it is nevertheless advisable for you to consult the employee concerned about possible adjustments. The employee will know more about their condition and its effects than you do, and will often be able to suggest adjustments that would be helpful. You should be open-minded and willing to take on board any reasonable suggestions from the employee for adjustments.

It would also be advisable for you to take into account any recommendations contained in a statement of fitness for work provided by the employee's own doctor.

Adjustments may be agreed on a temporary or a permanent basis.



Examples of Reasonable Adjustments:

- Transfer to another job, for example lighter work (although the employee's express consent would be required).
- Changes to job duties, for example exempting an employee with a back condition from doing heavy physical work.
- Changes to the method of doing the job, for example allowing an employee who cannot drive on account of a medical condition to travel on business by some other means.
- Changes to working hours, for example agreeing a reduction in working hours or an exemption from overtime working, allowing a later or flexible start time, or granting more frequent or longer rest breaks.
- Transfer to a different workplace, for example moving someone with limited mobility to a ground floor location or allowing partial homeworking.
- Adjustments to procedural requirements, for example allowing an employee who has returned after a period of sickness absence to take paid time off work to attend regular medical appointments, physiotherapy or rehabilitation.
- Additional or tailored training, coaching, mentoring or supervision, for example if the employee is moved to new job duties as a result of partial incapacity.
- Modification of premises, for example widening a doorway or relocating door handles or shelves if the employee has difficulty reaching them.
- Provision of an auxiliary aid, for example changing a key pad door entry system to a card swipe system where a blind employee is unable to use it.
- Modification of information, for example supplying documents in a large font where an employee is visually impaired.

Managing the Employee's Return to Work

As time goes on, you should seek to obtain further medical advice about the employee's fitness to work and continue to discuss the situation with the employee directly where this is possible.

Once the employee's doctor, or an occupational doctor, has indicated that the employee may soon be ready to return to work, you should turn your attention to the steps that might reasonably be taken to support the employee's return. You should take account of the doctor's advice in a statement of fitness for work that could help to identify any appropriate steps that you could take to help the employee return to work.

You should:

- consider a phased return to work and discuss the options with the employee (and an occupational doctor or the employee's own doctor if possible);
- discuss with the employee whether they will be fit to perform all the duties of the job or whether some adjustments may need to be made, and consult the doctor about this too;
- check if the employee is still taking any medication and whether or not there are any likely side effects, for example tiredness;
- if possible, arrange a social visit for the employee shortly before the proposed return date so that the employee can meet informally with colleagues and be brought up to date on a range of matters;
- discuss the employee's capabilities with them, either when they return to work or just prior to this, and review if any special arrangements or support need to be provided initially;
- plan to give the employee meaningful work to do so that he or she quickly feels useful;
- make sure that the employee is not overloaded with work or faced with a mountainous backlog;
- agree with the employee what support will be available during the first weeks or months after their return, and how progress will be monitored;
- consider arranging for one of the employee's colleagues to act as his or her "buddy" for a period, taking responsibility for helping the employee with any difficulties in the first few weeks after their return;
- take positive steps to ensure that the employee feels that their return to work is welcomed; and
- actively monitor the situation for a period of time to make sure that the employee is coping adequately with the day-to-day work and its associated pressures.

You should take into account that the employee may feel very anxious about returning to work after a lengthy period of absence and worried about how they will be perceived and treated by colleagues and management. This may be a particular concern if the employee's absence was the result of a mental illness.

It will therefore be extremely important for you to take positive steps to make the employee feel at home and facilitate their reintegration into the workplace rather than just expecting the employee to get on with things.

Fit Notes

In April 2010 the traditional doctor's sick note was replaced by a statement of fitness for work (fit note). The fit note allows medical practitioners to state either that an employee is "not fit for work" or that they "may be fit for work" taking account of specified advice from the practitioner.

The purpose of the fit note scheme is to facilitate return to work in circumstances where adjustments by you would help the employee resume working sooner than might otherwise be the case, as the employee's doctor will be able to suggest ways that you can help the employee return to work.

The fit note system gives medical practitioners the opportunity to highlight one of four options to help facilitate an employee's return to work. These are:

- a phased return;
- amended job duties;
- altered hours of work; and
- workplace adaptations.

The medical practitioner may also write in any other option that he or she believes may be appropriate in the circumstances and can add any other relevant information.

There is no legal obligation on you to comply with any recommendation made on a medical practitioner's fit note. Equally, any changes to employees' hours or job duties, whether temporary or permanent, should be made only with the agreement of the employee, and you and employee should agree how long the changes will last.

Nevertheless, you should take what the employee's medical practitioner has written seriously and give fair consideration - in consultation with the employee - as to whether or not any of the changes recommended can be accommodated. It may be that the employee can return to work earlier than would have otherwise been the case if a particular change is implemented.

If you are unable to facilitate the change(s) that the medical practitioner recommends, you should explain this to the employee and treat them as unfit to carry out his or her normal job.

You should be aware that, if an employee's condition amounts to a disability in law, a refusal on the employer's part to entertain an adjustment recommended by his or her medical practitioner could be considered by an employment tribunal if the employee were to make an allegation of disability discrimination on the grounds that you had failed to "make reasonable adjustments".

The medical practitioner can issue a fit note for a maximum duration of three months during the first six months of an employee's ill health or condition. If you and the employee decide that the employee is able to return to work sooner than indicated in the fit note, the employee does not need to return to the medical practitioner for formal confirmation.

Dismissal on the Grounds of Ill-Health

The dismissal of an employee on the grounds of long-term ill health should be a last resort only after all other options have been fully considered and discussed with the employee, and after all reasonable adjustments have been made to support the employee's continuing employment.

Long-term sickness absence can be a fair reason for dismissal. However, for a dismissal to be fair in practice you would have to show that the employee's long-term absence was sufficient to justify dismissal and that you acted reasonably in dismissing the employee for this reason.

Before contemplating dismissal, you should review the circumstances to establish whether or not proper grounds for dismissal exist. In order to ensure that a dismissal on the grounds of long-term ill health is capable of being fair, you should, as a minimum, ensure that you:

- consult the employee regularly and keep them in the loop about any proposals or plans regarding their ongoing employment;
- review the employee's absence record to assess whether or not it is sufficient when considered in context to justify dismissal;
- obtain up-to-date medical advice prior to taking any final decision;
- review whether or not there are any other jobs that the employee could do; and
- act reasonably towards the employee throughout.

There is no time limit in law after which it is fair to dismiss an employee who is absent from work due to sickness.

The key question is whether or not in all the circumstances you can reasonably be expected, in light of the requirements of the business, to wait any longer for the employee to recover and return to work. This will depend, among other things, on the size and resources of the business and the degree of disruption or difficulty that the employee's long-term absence is causing.

Often the best approach is routinely to review the status of the employee after a specified period of absence, for example three months or six months. At this point it may be appropriate to set a further time limit for a decision to be made about the employee's continuing employment.

Where this is done, it will be vital to inform the employee about the time limit and that a decision is to be made when that time arrives if he or she is still absent.

Get in touch

This document is intended as a guide. If you have any concerns regarding its content, or for further information about long term sickness absence, or anything else to help make managing your HR easier then please get in touch. We'd love to help.

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