

OVERVIEW

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FAQS

- A** Sickness procedure
 1. Is it compulsory to have a sickness absence policy?

No. There is no legal requirement to have a sickness absence policy. However, a policy helps to ensure consistency in treating sickness absence. Communicating a sickness absence policy makes employees aware of the attendance levels and reporting procedures that are expected of them. In addition, it informs them that the disciplinary or capability policy will be instigated, where necessary, which can act as a deterrent against short-term sickness absence that is not genuinely related to health.

Many employers have a contractual sick pay policy that provides sick pay above statutory sick pay. This policy should include details of when company sick pay is paid and any conditions relating to payment, including who the employee should notify if they are sick, the timeframe in which to notify and what evidence of sickness is required.
 2. Can employers address all types of sickness absence in the same way?

No. The way that sickness absence is treated will usually depend on the nature of the absence and whether the absence is genuine.

Sickness absence may be intermittent or frequent short-term absence, where the reasons are either related or unrelated. Alternatively, sickness absence may be long-term.

Where reasons for short-term absence are related or the absence is long-term, the employee may be suffering from an underlying medical condition that could amount to a disability under the Equality Act 2010. If the employee is disabled, the employer has an obligation to make reasonable adjustments.

A genuine medical condition will normally be treated as a capability issue. Where there is no medical condition and no satisfactory explanation for the absence, it is normally a conduct issue that should be addressed through the disciplinary procedure. Regardless of the nature of the absence and illness, the employer should follow a proper procedure.

3. How many days must an employee be absent before the employer can start taking action against the employee?

This is an issue for every employer to decide. There is no minimum period that must pass before the employer can start taking action in relation to an employee's sickness absence. However, proactive management at an early stage is the key to managing sickness absence effectively.

Any policy must be applied fairly and consistently to all employees to avoid a risk of discrimination claims. If the employer does adopt a different policy for a particular employee, the reasons for this should be documented. The employer should follow a proper process in dealing with any absence.

4. What is a proper process?

A proper process initially involves:

- informal discussion with the employee to discuss their absence(s);
- obtaining medical advice to gain a better understanding of the employee's illness.

If the employer is unable to resolve its concerns about an employee's absence(s) through informal action, it will need to consider formal action. This includes:

- formal meetings to discuss the employee's illness(es) and absence(s), and to seek a resolution;
- considering reasonable adjustments to assist the employee to return to work (or be at work for longer periods) even if the employee is not disabled under the Equality Act;
- obtaining further up-to-date medical advice.

Normally, dismissal should not be considered until the employer has tried to resolve its issues in relation to the employee's absence(s) through an informal and then a formal process.

5. At what stage should medical advice be sought?

There is no minimum period before the employer can seek medical advice. However, any policy should be applied consistently to all employees to avoid claims of discrimination. If the employer adopts a different policy for a particular employee, the reason(s) for this should be documented.

For short-term absences, it is usually appropriate to seek medical advice when the employee's absences are more frequent than is acceptable to the employer and there is no indication that the employee's absences will improve.

For long-term absence it is usually advisable to seek medical advice after around one month's absence.

Before taking any formal action, up-to-date medical advice should be obtained.

6. When should the employer start a formal process?

- **For short-term absence**, the employer should usually consider a formal process when the employee's absences are no longer acceptable to the employer and the employee's attendance has not improved.
- **For long-term absence**, the employer may want to consider starting a formal process once it has received the medical report, if it indicates that the employee is unlikely to return in the immediate future.

7. What is the proper procedure for dealing formally with short-term sickness absence?

A proper short-term sickness absence procedure includes:

- following sickness or absence policies and procedures, and where applicable the capability or conduct procedure (depending on whether or not there is an underlying health issue or satisfactory explanation for the absence(s));
- establishing the duration, frequency, nature and pattern of the absences;
- investigating the absences further, including seeking medical evidence to establish the cause of the illness(es);
- considering any reasonable adjustments to reduce or stop the absences. This is an obligation if the employee is disabled under the Equality Act, but should also be considered in relation to other employees;
- writing to the employee to invite them to a meeting to discuss their absences. The employee should be given sufficient information to prepare properly for the meeting;
- consulting with the employee about their absences, including the evidence gathered during the investigation, the medical evidence and any reasonable adjustments being considered;
- allowing the employee to be accompanied at any meeting where formal action or dismissal is being considered;
- considering alternatives to dismissal;
- following up after the meeting with a letter setting out the issues discussed, reasonable adjustments considered, timescales for improvement and any formal warning, together with details of potential future action if there is no improvement within the specified timescale;
- ensuring that both contractual and statutory notice obligations are met in the event of dismissal; and
- advising the employee of their right to appeal any decision.

For further information on a proper procedure for sickness absence, see our Guidance Note: How to Deal with Sickness Absence.

8. How does the process differ for long-term sickness absence?

For cases of long-term sickness absence, the procedure that should be followed is essentially the same, save that the employer will need to focus on steps to facilitate a return to work rather than to reduce the absence. In particular:

- consider any reasonable adjustments to reduce or stop the absences. This is an obligation if the employee is disabled under the Equality Act, but should also be considered in relation to other employees;
- follow up after the meeting with a letter setting out the issues discussed, reasonable adjustments considered and timescales for return to work, together with details of potential future action if the employee does not return within the specified timescale.

B

Sickness recording and monitoring

1. The employer's workforce has a poor absence record. What can it do to improve this?

- **Monitor absence data.** This allows patterns and potential problem areas to be identified, figures to be compared between departments and any procedures invoked consistently. The data can be used to determine trigger points for commencing informal action on sickness absence. However care should be taken that the employer is not discriminating against disabled employees and those taking pregnancy-related absences. Disability-related absence should only be taken into account if the employer has made all reasonable adjustments and it is a proportionate means of achieving the employer's aim of reducing sickness absence.
- **Allocate responsibility for dealing with absence.** This could be HR, or the employees' line managers or department heads. This ensures that absences are dealt with.
- **Be proactive in the management of absenteeism.** Review details of employees' sickness absence and look for patterns, question employees about their absence appropriately and consider whether informal action is necessary.
- **Have a sickness absence policy.** Introducing an effective policy ensures that managers (and others responsible for dealing with sickness absence) know what is expected of them, absences are dealt with consistently and effectively, and employees know the standards of attendance and reporting that the employer requires.
- **Training:** Managers should be trained to deal with sickness absence (see Section E below).
- **Use return to work interviews** (see Section D below).

2. Is the employer allowed to monitor absence?

Yes. Absence monitoring is an important tool to provide an accurate picture of the level and patterns of absence in different departments/areas of the business. This can help identify problem areas or patterns of behaviour.

3. Does the employer need to keep individual sickness absence records?

Yes. As well as monitoring overall employee absence, the employer should keep individual employee records of sickness absence.

In addition, the employer should retain all correspondence relating to an employee's sickness absence, including emails, file notes and messages, together with any medical evidence. It should keep a detailed record of all conversations, meetings and considerations that have been taken into account when making decisions in relation to an employee's absence. These should be made at the time of or as soon as possible after the event. These will be disclosable in a tribunal claim and will be relevant to whether the employer acted reasonably at the time of any dismissal.

4. Are there any data protection requirements in relation to sickness absence records?

- Medical information is 'special category personal data' for the purposes of the GDPR, and should only be processed by an employer in limited circumstances, such as where it is necessary for the employer to carry out its legal obligations or exercise rights in connection with employment. All records, correspondence and medical evidence should be stored confidentially and in accordance with the employer's record-keeping policy. They should only be used for the purposes for which they are collected, and in accordance with the employer's data protection policy and the relevant privacy notice.

→ Sickness and injury records that contain specific information about an employee's illness or injury should be kept separately from absence records that merely record that an employee was not present at work. Access to the information should be limited, particularly the specific information about the nature of the employee's illness (as opposed to the absence record).

5. **Can the employer keep individual absence records without the employee's agreement?**

The employer does not need an employee's consent if it uses special categories of personal information (such as medical information) in accordance with its data protection policy and the relevant privacy notice, to carry out its legal obligations or exercise specific employment law rights. In limited circumstances, it may be appropriate for the employer to approach the employee for written consent to allow it to process certain particularly sensitive data.

c **Employee meeting and contact**

1. **Can the employer contact a long-term sick employee at home?**

Yes. It is important to keep in personal contact with an employee on long-term sickness absence throughout their absence, unless the medical evidence provides otherwise.

The employer should decide who is the most appropriate person to contact the employee.

Contact should usually be by telephone or a pre-arranged visit to the employee's home.

2. **What if an employee does not turn up for a meeting to discuss their sickness absence?**

→ Consider the reasons for the employee's no-show.

→ Consider whether there are any reasonable adjustments that could be made (see questions 3, 4, 5 and 6 below).

→ Try to rearrange the meeting within a reasonable period, which would usually be within 5 days.

3. **As part of the employer's formal sickness absence process, the employer is trying to meet with the employee but they are refusing to come into the office for the meeting. What can it do?**

If an employee is disabled under the Equality Act, the employer is under an obligation to make reasonable adjustments to ensure that the disabled employee is not put at a substantial disadvantage as compared to non-disabled employees by any procedures of the employer. This includes the employer's policies and procedures on sickness absence, capability, conduct and meetings.

Even if the employee is not disabled, consider adjusting the employer's procedure to accommodate the employee's illness. If the employee does not want to come into the office, suggest holding the meeting at the employee's home or at a neutral place, which may be near the employee's home.

4. **A long-term sick employee wants to bring their spouse to the meeting. Are they legally entitled to do this?**

The employee's right to be accompanied arises where a formal warning or other action is proposed. The right is to be accompanied by a colleague or trade union official.

However, if the employee is disabled under the Equality Act, the employer is under an obligation to make reasonable adjustments to its policies so that the disabled employee is not substantially disadvantaged compared to non-disabled employees.

It is therefore likely to be sensible to agree to the request unless there is a specific reason not to.

Even if the employee is not disabled, consider allowing them to be accompanied by their spouse as a reasonable adjustment to the sickness absence process.

5. **The employer is trying to arrange a meeting with one of its employees as part of the capability procedure but the employee says they are too sick to attend. What should it do?**

Obtain up to date medical evidence on the employee's illness.

Consider reasonable adjustments to the meeting, including holding the meeting at the employee's home or at a neutral place near the employee's home, and allowing the employee to be accompanied by a family member (see above).

If the medical evidence provides that the employee is likely to be well enough to attend the meeting within a reasonable time frame, consider whether it would be reasonable to delay the meeting.

6. **Can the employer hold a capability procedure meeting in the absence of the relevant employee where the employee persistently refuses or is unable to attend the meeting?**

Prior to making any decision about holding a meeting in the employee's absence, the employer should consider:

- any rules the employer has for dealing with failure to attend disciplinary/capability meetings;
- the employee's sickness absence record, general work record, work experience, position and length of service;
- up-to-date medical evidence on the employee's illness and ability to attend the meeting;
- the meeting history, including the number of attempts made by the employer to rearrange the meeting;
- any reasonable adjustments that have been or could be made to the meeting arrangements;
- any representations by the employee;
- how similar cases in the past have been dealt with.

If the employer considers that it is not reasonable to delay the meeting, it may decide to hold the meeting in the employee's absence, relying on the evidence available to it at the time. If the employer takes this decision, it should warn the employee in writing prior to the meeting that it is considering taking this action and of the possible outcome of the meeting. The employee should also be invited to make representations in writing instead. At the meeting, the employer should ensure that it has up-to-date medical and other applicable evidence.

D

Return to work

1. **Some employers use return to work interviews. What are these?**

Return to work interviews are held with employees on their return to work after a period of absence.

Depending on the employer's resources and the employee's absence history, the interviews can be informal meetings with the employee's line manager or formal meetings with HR.

The interviews should be used consistently for all employees so that an employee does not feel singled out or consider that they may have been discriminated against. This does not mean that such interviews have to be held for each

employee after each period of absence. However if an employee is not interviewed because, for example, the reason for the absence is unlikely to recur, this should be documented.

2. How can return to work interviews assist in sickness absence management?

They can be used to manage short-term and long-term absence, and can be an effective way to encourage reliable employee attendance. They show employees that all absence is noticed. This may discourage employees from taking absence where perhaps the illness is not sufficient to warrant the length of absence taken or taking any absence at all.

They can assist the employer to monitor sickness absence and proactively manage it. The employer may be able to make adjustments or identify issues at an early stage.

3. What should be discussed at the return to work interview?

- Welcome the employee back.
- Check that the employee is well enough to be back, and whether there are any special arrangements that need to be made initially.
- Update the employee on any changes while they were absent.
- Find out whether the employee has a chronic illness or injury, or whether in fact the absence is unrelated to their own health, for example because of caring responsibilities.
- Consider whether there are any work related reasons for the employee's absence.

E

Training, recruitment and sickness cover

1. What should training for managers include?

- An understanding of the employer's policies and procedures for dealing with sickness absence and how to implement them.
- How to question employees sympathetically and appropriately about their illness and their likely return date, and to know when issues need further enquiry or to be followed-up, for example questions about any medical treatment.
- Recognising when an illness may have been triggered by an incident at work, which may require further investigation or where there are warning signs of an underlying illness.
- Ensuring that all managers deal with employees consistently, both within their own departments and throughout the employer.
- Understanding the extent to which medical information and other personal data can be shared.
- Knowing when it is appropriate to seek assistance, for example from HR, and when an informal discussion should be initiated.

2. Can the employer employ someone else to cover an employee's period of sickness absence?

Yes. It is for the employer to manage its business effectively, which includes ensuring it has adequate employment resources. However, the employer may want to notify the absent employee of the steps that it is taking to avoid any potential claims, for example for breach of trust and confidence, and to maintain good employee relations.

If an employee is recruited as temporary cover for the sick employee, this should be made clear to the temporary employee, for example by employing them on a

fixed term contract if the absent employee is expected to return within a particular time frame.

3. **Does the employer have to advise an employee on long-term sickness absence of any internal vacancies?**

It is good practice for employers to advise all employees of any vacancies or promotion opportunities in the organisation, whether they are at work or absent. In addition, employees on sick leave may be disabled under the Equality Act. Employers are under a specific duty to make reasonable adjustments for disabled employees to avoid them being put at a substantial disadvantage. Advising disabled employees on long-term sick leave about vacancies or promotion opportunities may be a reasonable adjustment. Equally, failing to do so could amount to discrimination arising from disability.

Getting in touch

When you need a practical legal solution for your next business opportunity or challenge, please get in touch.

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