

Absence Guide

Overview

Composite Legal Expenses Insurance provides advice to thousands of businesses and individuals each year through its legal advice helpline. The vast majority of calls to the helpline come from businesses seeking help on employment related matters.

Our expert lawyers have used their years of experience dealing with these matters to create this guide for you to use as a reference tool. The guide gives a general overview of some of the main issues that arise when dealing with absence in the workplace.

The guide has been condensed as much as possible to make sure you only get an overview of the area, for that reason it should not be viewed as comprehensive or as a substitute for specific legal advice.

If you have the benefit of a legal expenses policy with us, then the guide can be used in addition to the advice we provide and you should contact our advisors for advice in relation to any specific situations.

The guide refers to a number of template letters that can also be found on our website. These letters can be amended to suit individual circumstances.

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DEALING WITH ABSENCE

Absence from work

As an employer you will no doubt at some point have to deal with sickness absence. Staff are going to be ill from time to time and it will have an adverse impact on your business.

Managing sickness absence effectively can reduce the impact on your business and the starting point is to have a clear sickness policy in place.

A sickness policy would generally include:

- Reporting procedures
- Requirements to evidence sickness
- Details about sick pay (including statutory sick pay)
- Details about keeping in touch during absences
- Details about procedures that will be followed (return to work etc.)
- Where appropriate general details about expected attendance levels

General reporting requirements

Most employers will expect employees to contact them within a reasonable time before the start of their shift if employees are sick or unable to attend work.

If employees fail to attend work without explanation, it is important to try and contact the employee as soon as possible.

See **letter 8 for unauthorised absence.*

There is no legal requirement for a medical certificate during the first 7 days of absence. You can ask employees to fill in a form confirming their illness on their return, if they are off for 7 days or less. This is referred to as 'self-certification'.

Employees must give you a 'fit note' if they are off sick for more than 7 days in a row (this includes non-working days i.e. weekends, bank holidays and days employees wouldn't usually be expected to work). Doctors or GPs can provide 'fit notes'.

A 'fit note' will **only** confirm one of two situations:

1. Employees are **not** fit to work; or
2. Employees **may** be fit to work.

If an employee **may** be fit for work a Doctor or GP will usually suggest amendments to the employee's duties that could be made to enable the employee to return to work. If you as an employer are unable to make those amendments the employee will be deemed **not** fit for work.

When considering amendments, you must take into account your obligations under the **Equality Act 2010**, including the obligation to make 'reasonable adjustments' in appropriate cases, failure to do so could lead to a disability discrimination claim.

Discrimination can be a complicated area so it is important to take specific legal advice.

Types of absence

There will usually be two types of sickness absence that could have an impact on your business:

1. Long term ill health

2. Intermittent ill health

Dealing with long term ill health

There is no specific definition of long term ill health but generally it will involve absence that lasts or is likely to last for at least two months.

The first step will be to establish the reason for the sickness and the likely prognosis. The reason for the absence may be clear from the employee's 'fit note', although the prognosis could be more difficult to ascertain.

If it is clear at the outset the sickness is related to the workplace, then it would be worth encouraging the employee to utilise your grievance procedure to try and resolve any outstanding issues.

Obtaining a medical opinion is usually the best way to get detailed information about the nature of the employee's illness and may be able to give you an understanding of the prognosis. It should also give you an indication of whether there is anything you can do to assist a return to work.

The governments 'Fit for Work' scheme may be able to assist as it allows you, GPs and employers throughout England and Wales to refer employees or patients who have been, or are likely to be, off sick from work for four weeks or more for a voluntary occupational health assessment.

Alternatively, you can ask your employee for consent to contact their GP. The **Access to Medical Reports Act 1988** has to be taken into consideration as it gives employees certain rights when such a report is requested.

See **letter 9* (this should include a consent form and a summary of the employee's rights under the **Access to Medical Reports Act 1988**. These can be found immediately after **letter 9**)

Once you have consent from the employee you can write to their GP to obtain a report.

See **letter 10*

Once you have a report it will normally be appropriate to meet with the employee to discuss the content and establish if the employee agrees with the report.

See **letter 11*

At this point you should be in a position to understand why the employee is absent, how long they are likely to continue to be absent and if there is anything you can do to assist a return to work.

When considering amendments, you must take into account your obligations under the **Equality Act 2010**, including the obligation to make 'reasonable adjustments' in appropriate cases, failure to do so could lead to a disability discrimination claim.

If at this point you consider the employee is unlikely to be able to return for the foreseeable future and you are unable to make any adjustments to enable a return you may be able to consider termination on Capability grounds. Before going down this route you should consider any alternatives and we would suggest that you take specific legal advice to explore your options and consider any potential risk factors. If you decide termination may be an option a formal capability meeting will need to be held before the decision is made.

See **letter 12*

Dealing with intermittent ill health

Often intermittent absence will be disruptive and can be more difficult to deal with than long term absence. It can be useful to have a 'trigger' or a 'mechanism' in place to ensure certain levels of absence are investigated fully.

An example of this is a Bradford Factor scoring system – absence is effectively scored; more points are accumulated by short spells of absence than long spells of absence. The formula used is D (Days) x S (Spells of absence) x S (Spells of absence)

Therefore:

If an employee takes 5 days off in a row (one Spell) the calculation would be $5 \times 1 \times 1 = 5$ points.

If an employee takes 5 days off on 5 separate occasions (five Spells), so for example every Friday for 5 weeks, the calculation would be $5 \times 5 \times 5 = 125$

Usually employers will set their 'trigger' point and then any employee who goes above that 'trigger' score will have their absence investigated.

Of course, employees may be able to manipulate a system of this nature and therefore it has to be appropriately managed.

If concerns are raised about an employee's attendance the first step will be to investigate the reason for the absence. Usually an informal meeting will need to be held with the employee to establish if there is any underlying reason for the high level of intermittence absence.

If there is an underlying issue consideration should be taken as to whether or not any reasonable adjustments could be made to assist the employee. If the issue is disability related, then consideration should be given to obligations under the **Equality Act 2010**.

It may be that further investigation is needed in which case it may be appropriate to seek a medical opinion. It could be appropriate to obtain a medical report and consideration should be given to the **Access to Medical Records Act 1988** as outlined above.

If the matter cannot be resolved informally you may have to consider formal action. This will need to be done in accordance with a disciplinary procedure. When dealing with intermittent absence you will usually be following the staged warnings.

It will usually be inappropriate to skip warning stages and employees should be given clear warnings with details about what level of absence is acceptable, what will happen if there is a failure to improve and what you will do to assist with an improvement. Obligations under the **Equality Act 2010** must be considered.

Ultimately if attendance doesn't improve you may be able to consider termination on the grounds of Capability and/or Conduct and/or Some Other Substantial Reason, depending on the circumstances. It would be advisable to take specific legal advice before considering termination.