LAWEXPRESS
Greater legal clarity

Please Note:
The Employment Rights Act 2025 is now law but the changes are planned to roll out gradually throughout 2026 and 2027. Changes will be incorporated into our documents and contracts as and when they are implemented and more detail is available. The documents reflect the law as it currently stands.

LONG TERM SICKNESS ABSENCE

Staff members will inevitably be off sick from time to time. Most employees feel bad about letting down their colleagues and most employers are reasonably sympathetic about their staff's welfare.

However, some employees will take advantage of any uncertainty about the rules and how they should be applied. In all cases it is important that employers are aware of the key rules provided for in the relevant legislation and principles that the law has developed through the courts and tribunals.

Issues concerning absence can be complex. Whilst this information contains general guidance it is not a substitute for legal advice. Please call the helpline for further information.

Employee sickness and injury raises several issues for employers and employees, including the right to sick pay and other benefits, the need for investigations and medical reports, and the impact of issues of unfair dismissal and/or disability discrimination.

The main issues an employer will need to consider when dealing with sick employees include:

- Entitlement to Statutory Sick Pay (SSP) and/or contractual sick pay, including deciding whether qualifying conditions have been met.
- The reason for absence, how long it is going to last and when they will be able to return.
- Whether the sickness has been caused by workplace factors such as an accident at work or stress.
- Whether the employee is frequently absent and/or has an underlying health condition.
- Whether any reasonable adjustments may need to be made in the workplace.
- Whether any dismissal is appropriate and, if so, ensuring a fair process is followed.

Pay whilst off sick

An employee when off sick may be entitled to contractual sick pay as detailed in their employment contract. If the contract is silent about this, the employee will be entitled to SSP only, this is payable from the first day of illness.

The current rate payable can be found here.

Certifying Absence

Where an employee is absent for longer than seven days they will need to produce a fit note from their doctor. This should be accepted as conclusive proof of incapacity and will state the reason for the absence. For a period of absence of up to seven days an employee can self-certify the reason for their absence.

A fit note will certify the period of time the employee will be absent and may also indicate that they can work with 'amended duties'. Where the "may be fit for work" option is selected, there are tick boxes for the GP to suggest common ways to facilitate a return to work: a phased return, altered hours, amended duties and/or workplace adaptations. This is intended to help discussions

between employer and employee about ways of getting the employee back to work. There is also space for further advice or information, including how the employee's condition will affect what they do.

If the employer does not have any such work available, the employee will have to remain absent on sick leave.

Please note this suggestion from a doctor is not to be confused with the issue of 'reasonable adjustments' where an employee may have a long-term disabling condition.

Monitoring Absence

Return to work interviews
Investigations into the reasons for an employee's absence should always be handled sensitively and are best initiated by way of holding a return to work interview. It is up to the employer whether it decides to hold a return to work interview for every absence, no matter how short, or only hold them in cases of longer absence, for example, a week or more.

The purpose of the interview is to be able to keep a record of the reason for absence and to ensure an employee can account for the absence and is aware that the absence is not unnoticed. It is also an opportunity for an employer to identify any patterns for short term illnesses.

An employer's approach to return to work interviews should be applied consistently to ensure that individual members of staff do not feel "singled out" or make allegations that they have been treated in a discriminatory fashion. However, there should be sufficient flexibility so that where a manager wishes to dispense with the requirement for an interview because the reason for an employee's absence is obvious, was anticipated or unavoidable, is unlikely to recur or lead to any problems at work, they should be able to record this decision.

Absence Management
Some employers use formal absence management systems which calculate levels of absence and send reminders to employees when they reach critical stages. Such systems are usually detailed in a staff handbook and supported/enforced by disciplinary action. Typically, such systems allocate points for periods of absence and when certain prescribed thresholds are reached the scheme will recommend a course of action.

Employers are often wary of dealing with individuals who have been off sick for a prolonged period, especially where the cause of their sickness is not clear or they are awaiting diagnosis. Long term sickness absence is generally recognised as such when an employee has been absent for 4-6 weeks. In circumstances such as these employers should not allow the situation to drift until it reaches the point where the employee has been off for so long that dismissal starts to look like the only viable option. This can lead to issues of unfair dismissal and disability discrimination.

Lengthy absence without monitoring the situation can frequently leave an employee feeling isolated and reluctant to engage with an employer. This is particularly the case if the reason for absence is related to mental health matters. It is recommended that employers stay in touch with absent employees, for example acknowledging the fit note and perhaps calling to check all is ok. Of course, there may be some employees who do not wish to respond but it is good practice to keep lines of communication open.

Finding out more

Welfare meeting
Where an employee is off long term (more than 4-6 weeks) it is recommended that they are invited to a 'welfare meeting' The purpose of the meeting is to find out more about the absence and what can be done to assist and support the employee returning to work.

Some of the points for discussion may include:

- How is the employee generally and how are they managing during the period of absence.
- When do they think they may return, arrangements for future contact, further medical reviews and further welfare meetings.

- How the employer is managing whilst the employee is absent.
- Whether the employee has a disability as defined by the Equality Act 2010.
- Whether the employee believes they can return to their job without adjustments or if they think some changes need to be made and/or if a phased return will assist.
- What alternatives the employee may wish to explore: redeployment or application for employment benefits.
- Whether or not an up to date medical report should be obtained from the employee's GP.

Obtaining a medical report from a GP

The purpose of obtaining a medical report from an employee's GP is to find out more about the medical condition (specified on the fit note) with which the employee is suffering. It is not intended to allow full access to the employee's complete medical records. To obtain the necessary consent the employee needs to sign a form of consent. If the employee does not sign this the doctor will not provide the report.

When the consent has been signed it should be sent with an accompanying letter to the GP. A fee will also need to paid and it may be advisable to enquire about this before making the request so payment does not cause undue delay.

Once the medical report is prepared by the GP a copy will be sent to the employee and they may even have the right to prevent you from seeing a copy if they choose. The report may form part of further discussions with the employee.

Confidentiality of medical information
Information about a person's health is particularly sensitive and constitutes "special category data" under data protection legislation. Special category data should be handled fairly and transparently. The employer should ensure that the employee is clear about the purposes for which the information will be used and to whom it will be disclosed. As a separate but related point, the employer should treat information received about a person's health with sensitivity and should not use it in a way which would breach trust and confidence.

Is the employee suffering with a disability?

It is important for an employer to know if an employee is suffering with a condition which could be classed as a disability under the Equality Act 2010.

This is defined as an illness or condition which:
- Is long term – capable of lasting 12 months or more; and
- has a significant and negative impact on the employees day to day life.

This could affect a number of conditions, mental or physical. Cancer, multiple sclerosis, and HIV infections are all classed as disabilities from the day they are diagnosed.

Meeting and consulting with an employee regarding medical evidence

If the employer has obtained a medical report, it should meet the employee to discuss the report and consult with the employee before taking any action on the basis of its recommendations. Consultation involves an ongoing exchange of information and views concerning the employee's illness between the parties and full evaluation of any available medical evidence.

This is especially important where there is any conflict between the evidence put forward by the employee and that obtained by the employer.

It is usually sensible to write to the employee in advance, setting out the nature of the meeting so that the process can be concluded more quickly, otherwise the employee can legitimately ask for more time to get any necessary information (such as further medical reports). It may be necessary to hold more than one meeting. These meetings can also be referred to as welfare meetings.

The following issues may fall to be considered:

- Whether contractual sick pay is going to be paid, continued or discontinued.
- Whether the individual is fit to return to work and

any arrangements for a phased return.
- Whether, if the individual has a disability, any reasonable adjustments need to be made.
- Whether, if the individual is not fit to return to work, they may be entitled to ill-health retirement or permanent health insurance under the terms of their contract.
- Whether there is a reasonable prospect of the employee being able to return in the near future.
- Whether further treatment is planned and when.

What action is appropriate, will always be a matter of degree, depending on the specific circumstances. For example, employers should examine the reason for any absence during the period given for improvement, the likelihood of further absence and the impact of the absence on the employee's department and colleagues.

Employers' actions should also be consistent with their treatment of other staff in similar positions.

Capability termination

What is capability termination?
It is sometimes the case that an employee does not recover sufficiently to be able to resume their role in the workplace. When this happens and how long an employer may have to wait to reach that conclusion will depend on many factors such as:

- The nature of the illness and the nature of the business in which they are employed.
- The length of time an employee has been employed. The general principle being the longer the time they have been employed the longer an employer is required to keep their role open.
- How long it may be before they are able to return as evidenced by any medical report.
- The nature of the sickness absence and if any adjustments can be made to the employment to facilitate a return to work.
- How much SSP or contractual sick pay or other benefits are left to be paid.

If/when an employer considers 'there is nothing more which can be done' they will need to arrange a capability/absence review meeting. This meeting is one at which all the relevant facts relating to the employee's continue absence are considered and where one of the outcomes of the meeting could be the termination of the employee's contract.

Invitation to a capability review meeting
An employee being invited to a capability review meeting will have the right to be accompanied (by a trade union representative or a fellow worker) as one of the outcomes of that meeting could be their dismissal.

If it is difficult for the employee to attend their workplace or another of the employer's premises, the employer should consider holding any meeting at the employee's home, at an alternative neutral venue or remotely by video.

Where the employee is seriously ill or disabled, employers should consider permitting the individual to be accompanied by a friend or family member (even if this is not expressly permitted in any contractual policy). It may not be feasible for the individual to be accompanied by a work colleague if the colleague would have to take additional time off work to travel to the employee's home. If the individual is unable to explain their case because of a disability, then a tribunal may view it as a reasonable adjustment to require the employer to allow a member of the family, a friend or a professional representative to attend the meeting.

The capability review meeting
The purpose of the meeting is to review all the relevant information with the employee.

This may include:
- General discussion on how the employee is coping including if there is any improvement in their condition.
- How long they think it will be before they can return to work.
- Any changes in their medical condition since the doctor's report.
- Any planned surgical interventions.
- Can they make any suggestions about anything the employer can do to help them back to work.
- Any changes or amendments to the workplace or working hours.
- Anything the employer can specifically help with.

- Is their fit note likely to be renewed again when it finishes?

At the end of the meeting, it will be for the employer to consider what can be done to help the employee return and, if not, whether consideration should be given to dismiss.

Consider reasonable adjustments or alternative employment
Throughout the employee's absence, and in consultation with the employee, the employer should consider whether there are any reasonable adjustments open to the employer to enable the individual to return to work in some capacity in the foreseeable future. This is good practice in most cases but is a specific requirement if the employee is suffering with a disability as defined by the Equality Act 2010.

The employee should be asked for their suggestions, however, it is safest to take medical advice if there is doubt about the prognosis of an employee or the scope of any adjustments that could be made and whether or not they would enable an individual to return to work at some stage.

Employers should consider whether there is another job within the business that might be more suitable for the employee. Any discussion of redeployment should be approached sensitively, as an employee may see it as a criticism of their abilities, or a demotion. If the job is in another office the employer will need to consider any relocation arrangements. Any changes should be made with the employee's consent and should never be imposed without agreement.

Reasonable adjustments may also need to be made to the procedure itself. For example, meetings could take place at the employee's home or other convenient location, the employee might require more notice of meetings than provided for by the employer's policy or more time to read material and prepare for meetings.

However, provided an employer is reasonably flexible it will not be expected to hold off from taking decisions indefinitely.

Review meeting outcome
After the meeting the employer should take some time to consider all the issues before making a decision on the outcome, particularly if they are considering dismissing the employee.

In particular, consideration may be given to:

- The length of service of the employee.
- The reason for the continued absence.
- If there is likely to be any improvement in the employee's condition.
- How long they have been absent and what impact this is having on the business.
- If any changes or adjustments can be made to the workplace enabling the employee to return.
- The effect of the continued absence on the employer's business.

If the employer considers that everything has been done and there are no further options available, after taking into consideration the above it may be reasonable to terminate the employment. It is strongly recommended that before any such action is taken that the matter is discussed with the helpline.

Any termination will require notice in accordance with the employee's contract or statute and the payment of any accrued holiday for the period of their absence.

Pay during any notice period is detailed in the FAQ's below.

The employee must also be given a right of appeal against the decision.

Rights of Employees on Termination

Managing absence can always be difficult and the process needs to be fair and have regard to the Equality Act 2010 as stated above. When considering dismissal the process must satisfy the fairness principle which applies to all dismissals. An employee with can challenge the dismissal as unfair if they have qualifying service. The length of this service used to be 2 years but with effect from 1 January 2027 this is being reduced to 6 months.

This change means that anyone employed prior to 30 June 2026 will have 6 months service on 1 January 2027 and anyone employed after that date will have qualifying service once they have been employed 6 months.

FAQ's

What if an employee wants to return to work but is still signed off?

An employee wishing to return to work prior to the expiry of a fit note which states that they are unfit to do so poses similar issues to a fit note suggesting that an employee "may be fit for work". An employer may be uncertain about the employee's fitness to return and concerned that their return could present a health and safety risk to the employee or others. Where an employee indicates an intention to return to work before their fit note has run out, it may be appropriate to obtain medical advice and undertake a risk assessment prior to sanctioning their return to the workplace.

A GP is unable to use a fit note to confirm that an employee is fit to work. The form only gives the GP the option of either stating that the employee is unfit to work, or that they "may be fit". There is therefore no obvious mechanism for a GP to confirm an employee's fitness to return. If an employee recovers earlier than anticipated then their GP may be willing to provide a letter to that effect, but they will often charge a fee for doing so. If the GP does provide such a letter, then this alone may provide sufficient comfort to the employer that the employee is fit to return and allay any health and safety concerns.

If the employee is unable or unwilling to provide evidence that they are sufficiently recovered, then the employer is not obliged to allow them to return to work. Equally if an employee does provide evidence of their fitness to work but the employer continues to have reasonable concerns about their return to work then it may be appropriate to ask them to remain at home whilst the situation is clarified.

How much to pay an employee during phased return or other non-standard working hours?

Unless this is specifically addressed in the contract, how much pay the employee should receive while they are performing less than their full contractual hours is a matter of agreement between the parties. It is common for the parties to agree a pro-rata rate of pay for the work done.

It is unlikely that, in the absence of an express agreement, the employer would have a contractual duty to pay full pay for partial performance of the contract. It also seems unlikely that this would be required as a reasonable adjustment in disability cases.

A day on which work is done, even a half day, would not count as a day of incapacity for statutory sick pay purposes, so SSP would not be available to top up the employee's pay on those days. Neither would it be likely to be available if the employee works a partial week (with some days worked and some days not worked at all), because the employee would have to be off for three waiting days before SSP entitlement started again.

What happens if the employee's absence is pregnancy related?

Pregnant employees have a "protected period" lasting from conception until the end of the statutory maternity leave period of 52 weeks. Dismissing an employee or subjecting her to any detriment as a result of a pregnancy or maternity-related illness occurring during her protected period is unlawful and could also amount to a claim for sex discrimination.

Generally, periods of absence for pregnancy related reasons should be ignored for absence management purposes.

Whilst it remains important for an employer to complete return to work interviews after a period of absence, these may be used as the basis of support rather than sanction.

If the employer has a policy of initiating a procedure that may lead to dismissal once an employee reaches a certain level of aggregated sickness absence, the employer must not take into account any absence related to pregnancy or maternity that falls within the protected period.

Sickness absence falling after the end of the maternity leave period (for example, for post-natal depression) can be treated in the same way as any other form of illness and may therefore be taken into account to the same extent as any other illness. However, employers should exercise caution, as it is still open to a tribunal to consider the fairness of the employer's decisions when deciding whether to make a finding of unfair dismissal.