

EMPLOYMENT LAW NEWSLETTER

April 2010

Sick Notes and Fit Notes

The transition from sick notes to fit notes (officially “Statement of Fitness to Work”) took place on 6 April 2010. The sick note system was much criticised for being too easy for an employee to manipulate with information on the sick note about the reason for the absence being too brief. The Government’s intention with regard to the new fit note was therefore to focus attention on what the employee can do rather than on what they cannot.

However, whether, in practice, the new fit note system will change things significantly remains to be seen. A doctor will still owe a legal duty to their patients to protect them against any perceived threat to their health caused by going back to work. However, the doctor will now be able to say that the employee “may be fit to work” (without necessarily being specific) and may recommend, e.g. a phased return to work, amended duties or hours or other changes that may help in getting the employee back in the workplace again, and this should in turn provoke a constructive discussion on the subject between employer and employee.

In some cases it may be necessary for the employer to obtain a medical report, especially where the employee might be disabled (as defined), or to engage an occupational health expert to advise on how the return to work could be managed.

Fit notes will also be computerised rather than handwritten.

It would be beneficial for employers to review their contracts of employment and sick pay arrangements. For example, to include an obligation for staff to take on revised or amended duties when fit to do so and also to cover what would happen regarding sick pay if someone returned to work part-time as part of a phased return.

New right to request time off to train

Employees working for large organisations (250 plus employees) may now request time off to train. With effect from April 2011 this right is to be extended to employees of all organisations, whatever their size.

To have the right to make the request, the employee must first have completed 6 months service with their employer and the training required must be both for the purposes of improving their effectiveness at work and the performance of their employer’s business.

Certain employees are excluded from the right, including agency workers, school aged children and certain employees between 16 and 18 depending on their qualifications. They may have other rights to request training.

An application can be made once in any 12 month period and must contain information about the training sought and how the employee thinks it would improve their effectiveness in the employer's business and in the performance of the employer's business.

Within 28 days of receiving the request, the employer must have a meeting with the employee to discuss the application and then give his decision within 14 days. If the request is agreed, the employer must confirm certain details in writing to the employee including those relating to the employee's pay during training and how the cost of training is to be met.

There is no right to normal pay during the period of training, if the request is granted, but such training is "time work", under the National Minimum Wage ("NMW") and so employees on low rates of pay may have the right to receive extra payment for the time spent training to ensure they are receiving the NMW during the training reference period.

The request can only be refused on certain grounds, which include (but are not limited to):

- that there will be no improvement in the employee's effectiveness or in the performance of the employer's business;
- burden of additional cost;
- detrimental impact on performance, quality, ability to meet customer demand or inability to reorganise work.

The employee has 14 days in which to appeal, setting out his grounds, and, if he does, the employer must either accept the appeal or hold an appeal meeting within 14 days.

Further information may be obtained from the Government's website, if you Google "Time to train: request time at work to learn new skills".

Holidays and Sickness

Recent cases in the UK and European Courts have clarified how the entitlement to take holiday interrelates with sickness. In the past, it has been held that if an employee is on long term sick leave, they cannot elect to take part of their sickness period as holiday (so as to get paid when sick pay has run out) because, it would seem, you cannot take one type of leave when you are already on another type of leave. That question has been left open by the European Court of Justice but it has nevertheless held that an employee on long term sick leave must be given the opportunity to take holiday at another time. This could mean the employee being allowed to carry forward the unused entitlement to the following holiday year in these circumstances, notwithstanding that it is contrary to the Working Time Regulations.

In a different case, the European Court held that, where an employee was injured just before taking his holiday, he was allowed to take his holiday at another time, even though his employer had opposed this. This principle was said to apply even when an employee was sick during his holiday, so that he could take his wasted days at another time. This may, however, be subject to the employee repaying his holiday pay for those days and taking sick pay instead.

Forthcoming Changes

Maternity/Paternity Leave

Parents of children due (and adoptive parents notified of a match) on or after 3 April 2011 will be able to divide the 12 months maternity leave period between them. That is, the father will be entitled to up to 6 months additional paternity leave provided that the mother has returned to work. To the extent that additional paternity leave is taken during the mother's 39 week maternity pay period, it will be paid leave, paid at the same rate and in the same way as Statutory Maternity Pay. Parents will be required to 'self-certify' by providing details of their eligibility to their employer. Employers (and HMRC) will be able to carry out further checks of entitlement if necessary.

Equality Bill

This Bill completed its passage through Parliament on 6 April 2010. It pulls English anti-discrimination laws together in one place. The majority of its provisions will take effect in October 2010 and further details will be provided in our newsletter closer to that time.

New Rates

- the basic rate for Statutory Maternity Pay, Maternity Allowance, Paternity and Adoption Pay has increased from £123.06 to £124.88 per week.
- Statutory Sick Pay remains at £79.15 per week.
- a week's pay for redundancy purposes remains capped at £380.
- the maximum compensatory award for unfair dismissal has reduced to £65,300.

FURTHER INFORMATION

Please contact James Dyson or Alison Gair on 0118 912 0300 should you have any queries regarding the above or, indeed, if we can provide you with any assistance on any employment matters.

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