Chapter 4

Managing sickness and absence

4.0 Managing sickness and absence

4.1 Introduction

4.1.1 Whilst sickness absence is a significant problem for many employers, it must be remembered that employees are entitled to take time off work when they are genuinely ill. If, however, persistent sickness absence is ignored it can lead to operational difficulties and low morale within the workforce. It should be highlighted that sickness absences relate to circumstances where employees cannot attend work or carry out their duties due to illness or injury. It is important to highlight this in any sickness absence policy so that employees can be held accountable if they have been absent, but not genuinely ill.

4.1.2 Employers can fairly dismiss employees who have a poor sick record providing the decision to dismiss is reasonable in the circumstances and a fair procedure has been followed. It is also important to consider whether any illness or injury amounts to a disability defined by the Equality Act 2010. An employer may have to modify its approach to a particular ill health issue if it appears that an employee may be disabled. See 6.4.9 Disability for a more detailed analysis of the rules on disability discrimination. It is also important to note when dealing with absence issues that records relating to employees' health are sensitive personal information which is protected by the Data Protection Act 1998. See 9.0 Data protection for further information on the rules relating to Data Protection.

4.1.3 This chapter covers:

- short and long term sickness absences;
- dismissal and disciplinary action relating to sickness absences;
- unauthorised absence;
- measuring and analysing absence;
- suspension from work on medical grounds;
- statutory sick pay (SSP); and
- company sick pay.

4.2 Procedures for dealing with short-term sickness absences

4.2.1 Short-term sickness absences are normally absences of 7 calendar days or less. They may be a one-off absence of short duration or may be short absences occurring on a regular basis. To avoid short-term sickness absences developing into a problem, it is important that an employer intervenes at a relatively early stage. Failure to do so may give signals to employees that having a poor absence record is acceptable. This can lead to sickness absence becoming an accepted part of workplace culture.

4.2.2 Short-term sickness absence monitoring procedures

4.2.2.1 Employers should have a sickness absence monitoring policy or procedure in place to ensure an effective and consistent approach is applied. It is not appropriate to deal with absence issues through the disciplinary procedure unless the employer has evidence that the illness or injury is not genuine or not the reason for the absence. If the illness isn't genuine then it is a misconduct issue to be dealt with through the disciplinary procedure. For detailed information in relation to disciplinary procedures please refer to Chapter 11.

When managing short-term sickness absence procedures the following steps are recommended:

- if an employee is incapable of working due to illness or injury he or she should be obliged to advise the line manager preferably in advance of the normal start time. The employee should provide details of the illness and the likely duration of the absence. Usually an employee who is not genuinely ill will find it more difficult to speak directly to his or her line manager. Such employees would prefer to leave voicemail messages or send texts. A prudent employer will prohibit notification of sickness absence by text or voicemail and only accept contact by a third party in exceptional circumstances;
- employees returning to work within 7 calendar days should complete a self- certification form, which briefly describes the nature of their illness and length of absence;
- employees absent for 7 calendar days or more should produce a fit note stating why they cannot work and how long they will be unfit to work. The fit note contains an option for the doctor to say the employee "may be fit for work". When this option is selected there are tick boxes which allow the doctor to select common ways of facilitating a return to work, these are: a phased return, altered hours, amended duties and/or workplace adaptations;
- unless there is a genuine reason related to the employee's illness why there should be no contact, employers should maintain contact with employees by telephone or email whilst they are absent. It should be made clear to employees that they will be contacted during any period of ill health absences and they have a duty to keep their employer informed on the progress of their condition. Regular contact by the company to all employees assists in preventing claims of harassment;
- employers should carry out return-to-work interviews, regardless of the length of an employee's sickness absence. This can be a deterrent to malingering employees who know they will be faced with a review meeting when they have not been genuinely ill;
- employers should communicate regularly with employees on their return to work to ensure that there are no ongoing problems.

4.2.2.2 Following these basic monitoring steps may help to minimise frequent, short-term absence and ensure that any problems are identified and tackled at an early stage. It is advisable to incorporate these measures into a sickness absence policy so that any failure on the part of an employee to comply with the procedures may be dealt with through the disciplinary procedure. If, despite these monitoring steps, an employee's absence record continues to be a problem then it may become necessary for the issue to be managed in a more formal way. Implementing an absence management procedure is explained in 4.3 Warnings and dismissal – frequent short-term absences.

4.3 Warnings and dismissal – frequent short-term absences

4.3.1 When an employer is faced with frequent, intermittent absences, there comes a time when it may be fair to dismiss an employee or take other forms of action such as demotion or transfer. Before contemplating dismissal or other action, employers must ensure that they have followed appropriate procedures. It is essential that an employee with a poor record of intermittent absence is provided with appropriate warnings that if no improvement is made to the level of absence, irrespective of the genuine nature of the ill health, dismissal may result. It is not appropriate to deal with sickness absence issues via a disciplinary or grievance process however the principles of sickness absence management tend to mirror the basic principles of disciplinary procedures. Meetings must be held with the employee being given every opportunity to put forward explanations for his or her poor attendance record. The employee must be given the opportunity to improve and must be made aware that if the poor attendance persists, dismissal may result. Pregnancy and maternity related sickness absences should be disregarded for the purpose of absence management. Care should be taken with absences that may be caused by a disability, see 4.3.6 Underlying health condition.

4.3.2 In terms of measures other than dismissal, employers should ensure that they have reserved the contractual right to demote or transfer in relation to sickness absence issues. If no such right exists any attempt to demote or transfer in the face of resistance from the employees may be a breach of contract.

4.3.3 At the beginning of an absence management process it should be explained to the employee that warnings or action which may be taken are not as a result of a belief that the absences are not genuine but rather on grounds of capability.

4.3.4 Informal Intervention

It may be that an informal discussion with the employee at a back to work interview or other meeting is all that is required to convey that the absenteeism is unacceptable. An informal warning to the effect that things must improve if formal intervention is to be avoided may suffice. If after such an informal meeting there continue to be instances of frequent, short term absence then it may be necessary to instigate formal absence management procedures.

4.3.5 Sickness absence management

4.3.5.1 The following are some basic principles to be followed in managing sickness absence:

- keep an accurate record of absences; and
- each time the level of an employee's short-term absences becomes an issue, employers must take action promptly:
- invite the employee to a meeting to discuss the absence record. It is sensible to allow the employee to be accompanied by a colleague or trade union
- representative at such a meeting although the employee has no legal right to be accompanied;
- inform the employee at the meeting that the absence record is unacceptable. Give the employee an opportunity to respond and explain the reasons for the level of absence; and
- issue the appropriate warning and inform the employee of the level of improvement required, for example, there should be no further short-term absences within 3 months of the date of the meeting. Warn the employee that any further absences during a specified time are likely to lead to further action being taken.

4.3.5.2 At the end of an initial absence review meeting the employee should be given a clear indication of the type of improvement required in attendance. Many employers choose to specify a level of permitted absence in a specific time period following the initial review meeting and detail the actions the employer will take if there is no improvement in attendance.

4.3.6 Underlying health condition

If following the initial review meeting it appears that there may be an underlying health issue linking the absences or that the absences are all related to one physical or mental condition, then it is essential that the employer seeks medical information in the form of a GP's or specialist's report. It may be prudent for the employer to arrange an appointment for the employee with its own occupational health expert. Whilst obtaining up-to-date medical information tends to be more critical when employers are considering dismissing employees who have been on long-term sickness absence, if in relation to intermittent short absences there is some form of disability resulting in the employee being unable to attend work then any dismissal that takes place without that medical issue being explored further is likely to be unfair and possibly in breach of the disability provisions of the Equality Act. For a more detailed analysis of disability discrimination see 6.0 Equal opportunities.

4.3.7 Further review meeting

If there is no underlying issue and the employee is absent again for a few days within a short space of time, or alternatively does not meet the attendance/absence target set at the initial review meeting, then it may be appropriate for the employer to convene a further absence review meeting. The format of this further meeting will mirror the initial meeting. It is vital that at this further review meeting the employer impresses very strongly on the employee that further absences may well lead to dismissal. Again, at this stage the employer should take care to establish that there is no underlying health issue that requires to be investigated. The employee should be given full opportunity to explain why his or her absence record is not improving. Essentially, a warning issued at or in the aftermath of a second review meeting is akin to a final written warning under a disciplinary procedure.

4.3.8 Final review meeting

If following the second review meeting there is further deterioration in the absence record or specific absence targets are breached within the relevant period, the employer should convene a further review meeting. The letter advising the employee of the further review meeting should state that one possible outcome of the review meeting is the dismissal of the employee on grounds of capability. Given that dismissal is a potential outcome the employee should be advised in the invite letter of his or her right to be accompanied by a colleague or trade union representative. It should also set out details of the employees absence and summarise or enclose any medical evidence which the employer is relying on. For full details of an employee's right to be accompanied see 11.5 Disciplinary hearing.

4.3.9 Dismissal and other sanctions

If this further review meeting results in the employee's dismissal then as with dismissals for misconduct, the employee should be advised of the right to appeal. The employee is entitled to be accompanied at any subsequent appeal. The letter confirming dismissal should set out the right of appeal. The employer must notify the employee of the appeal outcome in writing. An employee dismissed for his or her poor attendance record is entitled to notice or payment in lieu of notice. For further details of notice and pay in lieu see 14.3 Dismissal with notice. Employers should consider whether or not there are any appropriate alternatives to dismissal although persistent, intermittent absences are not usually linked to the nature of an employee's job. Such alternatives are demotion or redeployment. If the absences have been caused by some aspect of the job then that usually becomes clear at an earlier stage in the process. Although by the time of the third review meeting it is unlikely that an alternative measure would be appropriate, employers should still consider such alternative measures before moving to dismissal. This is particularly important if the employee appears to be disabled as there is a duty on the employer to make reasonable adjustments before resorting to dismissal. However, the duty is not triggered where the employee has not given any indication that they would be returning to work.

4.3.10 How many absences justify employer intervention?

It is for employers to decide the level of absence which will lead to initial and further intervention in terms of sickness absence management. They are however expected to act consistently and fairly. Reasonableness dictates that an employer should not seize upon the first instance of absence of say two or three days and immediately seek to issue some form of capability warning. Informal intervention should be tried first however if a pattern emerges over time of periodic absences for a variety of minor ailments then a problem may exist at that stage which should be dealt with formally. In deciding the level of absence that justifies intervention, employers should act consistently rather than singling out a troublesome employee whose absence record is no worse than other colleagues.

4.3.11 Absence management systems

There are a number of mechanistic and formal absence management systems which tend to be followed more by larger employers. These processes tend to be fairly mechanistic with little room for discretion. Once a certain number of days' absence occur in a prescribed time period a warning is automatically issued following a review meeting. Such systems tend to be fairly rigid and are sometimes driven purely by numerical calculation of absence. An employer who is thinking of putting in place an absence management process with specified numerical default absences should take advice. The application of any such procedures will always be subject to the disability provisions of the Equality Act and the general principles of fairness in relation to the law of unfair dismissal. Any employer who applies the rules of a mechanistic absence management process rigidly without consideration of the facts and circumstances of an individual case runs the risk of both discrimination and unfair dismissal claims.

4.4 Dealing with long term sickness absence

4.4.1 General issues

4.4.1.1 Long-term sickness absence is usually due to more serious illness or injury. The absence may be a one-off or may consist of a lengthy period of absence broken up by intermittent unsuccessful returns to work. Whilst long-term sickness absence is less common than short-term absence, when it does occur, it can be a major problem for employers, particularly when the likely duration of an employee's absence is not known.

Unless there is a genuine medical reason why there should be no contact, employers should ensure that they maintain regular contact with employees who are on long- term sickness absence so that they can:

- fully understand the nature of an employee's illness;
- be kept up-to-date as to an employee's wellbeing/recovery and get an indication of a likely date for return to work; and
- consider whether there are any steps which can be taken in relation to the job role or other working conditions or arrangements that might assist the employee to return to work.

4.4.1.2 Employers should also take all reasonable steps to deal with any problems in the workplace which may be causing or contributing to the employee's illness. For example, if an employee states that his or her absence is due to work- related stress, the employer should determine the cause of the stress and take all reasonable steps to deal with that issue. It may, for example, come to light that a lack of training is causing the employee stress in which case additional training may resolve the issue. If bullying or harassment appears to be the cause then that should be investigated and appropriate action taken.

4.4.2 Review meetings

The frequency of contact with employees on long-term sickness absence will depend on the employee's illness, the job they do and how long they have been certified as unfit for work. It is, however, best practice for employers to have a review meeting with employees who are absent for longer than one month and, thereafter, further review meetings at regular intervals or to tie in with, for example, test results or a medical report being received. These meetings should take place within an employee's normal working hours, however, depending on the nature of an employee's illness, employers should be flexible in terms of the timing and location of the meeting. For example, an employee suffering from work-related stress may find that a welfare meeting at the workplace makes the illness worse. In these circumstances, employers should consider visiting the employee at home or at a neutral location.

4.4.3 Agenda for review meetings

The employer should take the following steps at the welfare meeting:

- enquire after the employee's health;
- establish further details of the illness, symptoms and how/ why the illness prevents attendance at work;
- discuss whether a medical report is required;
- discuss any medical reports or test results received;
- discuss whether arrangements can be made for the employee to return to work and the likely date of return;
- offer appropriate assistance or support;
- discuss whether the employer can make any 'reasonable adjustments' to the employee's working conditions as required by the Equality Act;
- consider whether a phased return to work is appropriate and can be accommodated. For example, the employee will work 3 days in their first week back, 4 days in their second week back then return to full-time in their third week back; and
- discuss sick pay arrangements. If discretionary or contractual full sick pay is about to come to an end the employee should be advised of that fact.

4.4.4 Return to work

Before the employee returns to work, arrangements regarding a phased return, additional support or supervision and adjustments to working conditions should be confirmed in writing to ensure that the employee is aware of what to expect and there is a record of what has been agreed. On the day of return, a 'back-to-work' interview should be conducted. This should address the nature of the employee's illness, confirm the arrangements for the return to work and check that the employee is indeed fit to return.

4.5 Obtaining medical evidence

4.5.1 In cases of long-term sickness absence employers should undertake a full investigation into the nature of any employee's illness or injury and how this is likely to affect future employment. This may sometimes be necessary or appropriate with intermittent short-term absence. Where dismissal is being considered, it is essential for employers to obtain medical evidence on an employee's condition and the likely timescale for a return to work. If the employer requires an independent medical examination or occupational health assessment, the cost of obtaining this should be borne by the employer. It is of particular importance where the absence may be caused by a disability and is therefore protected by the disability provisions of the Equality Act (see 6.0 Equal opportunities for further details).

4.5.2 Access to medical reports

When obtaining a medical report, employers must consider whether the Access to Medical Reports Act 1988 ('AMRA') applies. AMRA only applies to reports prepared by a medical practitioner who is or has been responsible for the clinical care of the employee. Clinical care involves any examination, diagnosis or investigation in connection with any form of medical treatment of the employee. AMRA does not, therefore, apply to reports supplied to employers by an independent medical practitioner who has been asked to carry out an examination of the employee with a view to preparing a one-off report. This is because no medical treatment of the employee is involved. Neither does it apply to reports from occupational health physicians unless they have been involved in the medical care of the employee. AMRA will almost always apply to medical reports from employees' GPs.

4.5.3 Requesting a medical report

4.5.3.1 Before requesting a medical report the employer must notify the employee that it intends to make such a request and obtain the employee's consent. The letter should do the following:

- advise that the employer wishes to obtain a medical report;
- ask the employee's consent;
- notify the employee that he or she has the right to refuse to give consent; and
- ask the employee to confirm whether he or she wishes to have access to the medical report before it is sent to the employer;
- notify the employee that he or she has the right to request that the medical report be amended;
- advise the employee that the medical practitioner is not obliged to give him or her access to the report in the circumstances detailed at section 4.5.7.

4.5.3.2 Where an employee consents to the report being commissioned, the employer must inform the employee when the report has been requested. Where the employee is required to attend an appointment with, for example, the GP or regular consultant or other doctor, the employer needs to liaise with the parties to ensure that suitable arrangements can be made. When employers commission a one-off report from an occupational health specialist, the AMRA requirements do not apply, however the employee's consent is still required. Employers should also ask the employee's consent to medical records being released to the occupational health specialist where they have had no prior involvement in the employee's care. It is normal practise to attach a 'mandate' to the letter from the employer which is a separate letter to the employee's GP stating that the employee consents to records being released. The employee should sign and return this to the employer who in turn should send it to the GP.

Employers may consider inserting a clause into their sickness absence procedures or statements of employment particulars to the effect that employees have a duty to engage in all reasonable requests to attend occupational health examinations or interviews, such as "Employees are expected to co-operate with all reasonable requests to provide medical information/reports, and attendance at medical appointments arranged by the employer. Failure to do so may result in company sick pay being withheld".

4.5.4 Right to access the report

Under AMRA, employees have the right to access the report before it is sent to their employer. Employees should inform their employer that they wish to access the report when they give their consent for the report to be supplied. Employers must then notify the medical practitioner of this at the time of making the application.

The employee then has 21 days from the date of the employer's application to make arrangements with the medical practitioner to access the report. Even where an employee has not previously asked to see the report, he or she can still contact the medical practitioner within 21 days to have access to the report before it is supplied to the employer. If an employee has not contacted the medical practitioner within 21 days, the report can be supplied to the employer without the employee seeing it.

4.5.5 Amending the report

Employees must be given the opportunity to ask the medical practitioner to amend any part of the report that he or she considers incorrect or misleading. Should the medical practitioner not agree to amend the medical report then the employee has the right to require the medical practitioner to attach a report of the employee's own views in respect of any part of the report with which the employee does not agree.

4.5.6 Employee's refusal to consent to report being commissioned or supplied

Where employees either refuse consent to a report being prepared or refuse their consent to the medical report being released to their employer, then this is clearly a barrier to the employer making a thorough investigation into the medical condition. In these circumstances, it should be made abundantly clear to the employee that the employer will make a decision about future employment based on the information available. This could mean that the employer is unable to take account of the employee's current medical condition. Employees should not be pressurised into giving consent. Where an employer is considering a dismissal on the grounds of incapacity and the employee refuses consent, specific legal advice should be sought before the employee is dismissed.

4.5.7 Medical practitioner's refusal to give employee access to the report

Medical practitioners can refuse to give employees access to all or any part of the medical report if:

- disclosure would cause serious harm to the physical or mental health of the employee or others, or would indicate what the medical practitioner intends to do with the employee. For example, where the report contained reference to an intention to have the employee placed in a secure mental hospital;
- disclosure would be likely to reveal information about another person or reveal the identity of another person who has supplied information to the medical practitioner about the individual. This exception does not apply where the person has consented to disclosure or is a health professional who has provided information in a professional capacity.

The medical practitioner must inform employees if any part of the report is withheld from them. If the whole of the report is withheld, the medical practitioner must inform the employee of this but must not supply the report to the employer unless the employee has given his or her written consent.

4.5.8 Considering the medical evidence

On receipt of medical evidence, employers should consider the contents of the report together with information obtained from welfare meetings or other medical reports. The medical evidence is only one factor, albeit an important one, to be considered when deciding whether to dismiss an employee on long-term sickness absence.

Employers should consider whether the medical report provides sufficient information on which to make an informed decision about the employee's future employment.

Further information or clarification from the medical practitioner may be required before an employer can make a decision.

4.5.9 Conflicting medical opinions

Where medical evidence has been received from more than one source and there is a conflict of opinion, employers have the right to rely on the information which they reasonably believe to be the most credible. In practice this is not always a straightforward task. An employer faced with a conflict of medical opinion should seek legal advice before taking action.

4.5.10 Who decides if the employee has a disability

In relation to potential disability cases, a medical opinion that an employee is disabled is not conclusive. What constitutes a disability is a question of fact for tribunals. In addition, medical opinion as to what adjustments should be made for a disabled employee is not binding on employers although on most occasions it is sensible for an employer to follow the guidance or recommendation of a medical professional unless there is good reason not to. See Chapter 6, 6.4.9 Disability and 6.4.10 Duty to make reasonable adjustments for further information on what constitutes a disability and what is meant by reasonable adjustments for the purposes of the Equality Act.

4.5.11 Fit for Work Service

In January 2015 the government introduced the Fit for Work service to help employers manage sickness absences and return employees to the workplace. It provided telephone and online advice on occupational health issues and an occupational health assessment of the employee by a state-funded occupational health professional. However, due to a poor uptake of the service it closed to new referrals in 31 March 2018 in England and Wales and 31 May 2018 in Scotland.

4.6 Redeployment

Where it is decided that an employee cannot return to his or her current job, the employer should consider whether any alternative positions exist which could be offered to the employee. There is no requirement for employers to create a new position for the employee. In these circumstances, employers should consult with employees to seek their views on whether any available alternative positions are suitable taking into account the illness or injury. This is especially important if an employee has a disability, as employers are required to make reasonable adjustments. Reasonable adjustments can include a temporary or permanent change to an employee's job or duties.

4.7 Dismissal

4.7.1 How long an employer should wait before taking steps to dismiss an employee on long term sick depends on the facts and circumstances of each individual case. The additional cost and disruption caused by an employee's absence is an important factor. If the absence is having little or no detrimental impact on the business then the employer may be expected to be more patient. An employee should not normally be dismissed whilst he or she is continuing to receive company sick pay. For more details on company or enhanced sick pay see 4.9 Sick pay. If for example an employee is entitled to 4 months' full pay under the contract of employment then the employer has clearly contemplated that he or she may be off for such a period and is prepared to pay full salary. A decision to dismiss on capability grounds during this period of full pay is unlikely to be justifiable. That does not mean however that an employer is free to dismiss when company sick pay comes to an end. That is not the case. All of the following factors must be weighed up before coming to a decision to dismiss:

- after a lengthy period of absence the employee continues to be incapable of work due to ill health and there is no imminent likelihood of a return;
- adequate consultation has taken place with the employee to discuss the illness and prognosis;
- a medical report which confirms that the employee remains unfit to resume his or her duties has been obtained;
- consideration has been given as to whether any 'reasonable adjustments' are required, whether the employee's illness/symptoms can be accommodated and/or whether there is scope for redeployment; and
- the employer has fully consulted with the employee in respect of the dismissal and has given full and proper consideration to the employee's view.

The employer must ensure that they make an effort to explore all other options to avoid dismissal in instances where the employee's ill health has been caused or aggravated by the employer's actions. Failure to do so may make a dismissal unfair.

4.7.2 The medical report does not necessarily have to conclude that the employee is permanently unfit to return to work. It is sufficient after a lengthy period of absence for a report to conclude that the prognosis is unclear and it is difficult or impossible to say when the employee might return to work. Even after a lengthy period of absence, if a medical report concludes that it is probable that the employee will return to work in the short-term, the dismissal of that employee is likely to be unfair unless there are compelling reasons why the employer cannot wait any longer.

4.7.3 Other factors to consider

A number of other factors should be taken into consideration before dismissal:

- whether it is reasonable or possible to wait any longer for the employee to recover and return to work;
- what effect, including cost, the employee's absence is having on the business and other employees who may be carrying out additional work as a result of the absence;
- how long the employee has been absent from work;
- when the likely return date of the employee is, if known; and
- how other employees have been treated in the past in similar circumstances.

4.7.4 Dismissal procedure

Before deciding to dismiss, employers must first follow a fair procedure. Importantly though, the ACAS Code on Disciplinary Grievance Procedures does not apply to a dismissal on grounds of ill health. The procedure will involve providing the employee with advanced warning that if the illness and associated absence continues and if there is no likelihood of an imminent return to work then dismissal will be the likely outcome. Employers should take all reasonable steps to meet and consult with the employee in respect of the decision to dismiss. The employee should be advised of his or her right to representation at this meeting. See 11.5 Disciplinary hearing for a detailed analysis of the right to representation. The right to representation arises in these circumstances because the employer is considering dismissing the employee.

In practice, with certain illnesses it can be difficult for the employer to meet with the employee, however it is important that all reasonable efforts are made to have a meeting before dismissal takes effect. At the meeting it is sensible to review the medical position, the likelihood of an imminent return to work and to consider alternative work if that would assist. Finally if there is an underlying disability, it may be necessary to consider whether any reasonable adjustments could be made to assist the situation.

4.7.5 Entitlement to pay during the notice period

Dismissal on the grounds of capability is with notice or pay in lieu of notice if the contract of employment permits. If the employee is on sick leave during the notice period, he or she is normally entitled to receive full pay. This is the case even if the employee is only in receipt of statutory sick pay or no pay at all. There is, however, a peculiar rule that employees have a right to their normal pay during the notice period irrespective of the contractual sick pay entitlement unless the period of notice which their employer is required to give is at least one week more than the statutory minimum notice required. See 14.3 Dismissal with notice for further information on notice and pay in lieu of notice. For example, if an employee with six complete years' service is contractually entitled to six weeks' notice then the employee will have the right to normal pay if sick during the notice period. If, however, the entitlement to notice is seven weeks there will be no entitlement to normal pay as this is at least one week more than the statutory minimum. There may, however, be an entitlement to normal pay if there is a specific contractual right to full pay during the notice period irrespective of the circumstances.

4.7.6 Entitlement to accrued but unused holiday pay

If the employee is sick and prevented from taking holiday, they may be entitled to carry over accrued but unused holiday to the next leave year. If the employee is dismissed then they are entitled to a payment in lieu of that accrued but untaken holiday pay.

The case law supporting this position is based on the 20 days statutory entitlement derived from the European Working Time Directive. The additional 8 days entitlement under UK law would not have to be carried over. However, an employer will only be in a position to enforce this if the employee's contract of employment expressly states the European derived 20 days is taken first prior to the additional 8 days entitlement. Unless an employer has taken specific advice on this issue it is recommended that the full accrued but unused holiday entitlement carried over is paid in lieu on termination of an employee's contract.

Some contracts of employment allow for an employee to take annual leave during sickness absence or for an employer to force an employee to take annual leave prior to the termination of their contract. However, if an employee is on sick leave they cannot be forced by their employer to take annual leave.

4.8 Suspension from work on medical grounds

4.8.1 Employers are required to take reasonable steps to ensure the health and safety of employees and, as a result, may have occasion to suspend an employee from work who is at risk of harm or injury. An example of this is where an employee suffers a severe allergic reaction to a chemical that he or she is temporarily handling at work. Employees who have at least one month's continuous service have the right to be suspended on normal pay for up to 26 weeks. However, there is no right to pay if:

- the employer offers to provide the employee with suitable alternative work and the employee unreasonably refuses the offer. It should be noted that the alternative work does not need to be within the scope of the contract of employment for it to be suitable;
- the employee is sick (unless there is a contractual right to company sick pay); or
- the employee does not comply with reasonable requirements imposed by their employer to ensure that the employee is available for alternative work when required.

4.8.2 There is also a right to suspension from work on maternity grounds if the work normally carried out by the employee could be hazardous to the employee or her baby. See 7.2.5 Suspension on maternity grounds for further details.

4.9 Sick pay

4.9.1 Employees are entitled to receive statutory sick pay (SSP) if:

- they are sick for at least 4 'qualifying' days in a row. Qualifying days are days in which the employee is normally at work and do not include, for example bank holidays or weekends unless these are normal working days; and they have average earnings at least equivalent to the lower earnings limit for National Insurance contributions. This limit is reviewed annually. This is
- calculated before deduction of tax and National Insurance contributions. Average weekly earnings are calculated over an 8-week period immediately prior to the commencement of the sick leave. The calculation is based on actual earnings and includes bonuses, holiday pay, overtime and any other statutory payments that have been made in that period.

4.9.2 Examples

4.9.2.1 If an employee normally works Monday to Friday and falls sick on Thursday, the employee will not be paid SSP for Thursday, Friday and Monday (these being the first three days of absence). If the employee continues to be off sick, SSP will be paid from the following Tuesday.

4.9.2.2 These are usually the days the employee would normally be required to be at work, but the company can agree other days with the employee provided there is at least one qualifying day each week.

4.9.2.3 If an employee normally works Tuesday, Wednesday and Thursday and falls sick on Thursday then SSP will not be paid on the first Thursday, Tuesday and Wednesday. If the employee continues to be off sick, SSP will be paid from the following Thursday.

4.9.2.4 Employees are entitled to receive SSP for up to 28 weeks. The rate is reviewed annually and the relevant figure can be obtained from the "GOV.UK" website. As at the date of publishing, the current SSP rate is £95.85 per week. For qualifying absences of less than a week, the daily rate of SSP is calculated by dividing the weekly rate by the number of days in an employee's normal working week as shown in the formula below:

Formula

$$\text{SSP daily rate} = \frac{\text{weekly rate of SSP}}{\text{days in employees normal working week}}$$

4.9.2.5 If an employee has received SSP for a previous illness within the last 8 weeks then the second or subsequent period of illness of 4 days or more will be linked to the earlier period and for SSP purposes will be treated as one continuous period. Whilst the employee must be ill for at least 4 days, SSP will, in these circumstances, be payable from the first day of sickness absence. The previous period will, however, count towards the 28 weeks' maximum entitlement.

4.9.2.6 SSP is normally paid along with employees' normal pay. As SSP is treated as earnings it is subject to tax and National Insurance contributions. However, if employees only receive SSP, the earnings may be below the income tax threshold.

4.9.3 Company sick pay

4.9.3.1 SSP is the statutory minimum entitlement, however, employers occasionally choose to pay more than SSP. Employers should always specify that company sick pay is inclusive of SSP. It should also be made clear whether or not the payment in excess of SSP is contractual or discretionary. Often, employers pay full pay for a period of time followed by half pay. The written statement of employment particulars should include details of any company sick pay scheme. If there is no entitlement to company sick pay, the written statement or contract should state this.

4.9.3.2 It is open to employers to operate a discretionary company sick pay scheme. This can either be a formal scheme which provides that any right to sick pay is discretionary or may simply consist of employers choosing to make exceptions from time to time and paying sick pay in circumstances where employees would normally only receive SSP. In both instances, employers should be careful to exercise their discretion reasonably and in a non-discriminatory manner. Where employees have a contractual right to company sick pay it may be a breach of the contract of employment and unfair dismissal if the employee is dismissed before the expiry of their sick pay entitlement.

4.9.4 Sickness absence and accrual of holidays

Entitlement to paid annual leave continues to accrue during any period of ill-health absence irrespective of the length of the absence. For a more detailed analysis of the accrual of holidays during sickness absence, please see 5.13.9 Holiday entitlement and sick leave.