From sick note to fit note

On 6 April 2010 the medical statements which doctors use to sign people off work because of illness or injury changed to statements of fitness to work.

Fast facts

- On the new statements doctors can advise that the person is 'not fit for work' or 'may be fit for work taking account of the following advice'. In the case of the latter, doctors can detail support which may benefit the employee, for example a phased return, altered hours, amended duties or workplace adaptations and any other comments, including the functional effects of the employee's condition.

- During the first 6 months of a health condition the maximum period that advice can cover is 3 months as opposed to the current 6 months.

- There is no longer a 'fit for work' option on statements as it is not necessary for employees to be signed back to work, though the existing procedures for certain types of work must still be followed.

- If an employer receives a statement advising that the employee is 'not fit for work' they should pay statutory sick pay (SSP) if applicable and/or occupational sick pay as per the employee's contractual terms.

- If an employer receives a statement advising that the employee 'may be fit for work' they should discuss this with the employee, consider the advice on the statement and how it affects the job and the workplace and any other action that could help a return to work, discuss the options with the employee, and if a return is possible agree a date, adjustments and date for review, then monitor and review as agreed. In order to minimise the risk of disputes it is advisable that employers be specific about how long adjustments or support will last. In some cases, including where the employee has a disability, more permanent adjustments may need to be made.

- The advice on the statement is not binding on the employer. If a return to work is not possible because the employer cannot make the advised changes they should explain the reasons for this to the employee and treat the statement as if it were a 'not fit for work' statement. The employee does not need to return to their doctor for a new statement. The employer should agree a return to work or next review date with the employee.

- If an employer thinks that they can support an employee to return to work and the employee disagrees the employer should discuss this with them. If the employer and employee cannot agree on the employee's fitness for work the employer may wish to consult an occupational health specialist and if necessary, consider their policy for absence disputes.

- Employer's responsibilities in relation to SSP, health and safety and the Disability Discrimination Act (DDA) are unaffected.

Some potential issues

- A doctor's knowledge of the employee's work and workplace is likely to be limited. Employers should carry out risk assessments to minimise risks to the employee, colleagues and others, and take care to consider health and safety guidelines and any particular issues such as industry specific regulations.

- Employers with generous occupational sick pay provisions may find that employees are reluctant to engage in an early return to work. Conversely, employers with minimal or no occupational sick pay provisions may find that employees are very keen to return to work. In situations where redundancies are on the horizon employees may prefer to return to work even if they would otherwise be entitled to occupational sick pay in order to improve their sick leave record, as this is often part of redundancy selection criteria. Employers are likely to see an increase in grievances relating to sick leave and sick pay.

- Whilst the advice given in a statement is not binding on the employer per se, if the employee is disabled it could amount to reasonable adjustment(s) which the employer is obliged to make under the DDA. Employers who fail to comply with their obligations under the DDA risk costly claims of disability discrimination. Furthermore, if an employer unreasonably refuses to make the advised changes, for example where they are able to do so but simply choose not to, employers may be at risk of claims of constructive dismissal, regardless of whether or not the employee is disabled.

- It is important that at each stage of dealing with a 'may be fit for work' statement employers apply their mind to the situation and discuss matters with the employee. In particular, you should document all decisions and discussions especially where you cannot make the advised changes and your reasoning.

- If the employer offers the advised support to the employee and the employee disagrees with the employer's proposal the first step should always be for the employer to discuss this with the employee in case there is something which the employer has not considered. If agreement on the employee's fitness for work cannot be reached the employer may wish to use an occupational health specialist, and if necessary, should consider its organisational policy for absence disputes. If the issue cannot be resolved the employer may need to consider whether, as a last resort, its disciplinary procedure should be applied. The appropriateness of such a step will depend upon all the circumstances and legal advice should be taken. (There is a prescribed procedure for disagreements about payment of SSP, details of which can be found on the HMRC website).

- Subject to the employee's contractual terms and any absence polices, in cases where altered hours or a phased return to work are agreed, any days/hours which the employee is contracted to work but which they are not working due to illness or injury should normally be treated as sick leave. It should be noted that days on which any work at all was done do not qualify for SSP. In cases where an employer and employee agree a variation to the employee's contractual terms, for example by reducing their contracted hours, the issue of pay (and holiday accrual) will need to be addressed in the variation.

- Employers who have concerns about coverage of their employer's liability insurance should contact their insurer.

- Employers should review their contracts of employment and absence policies in order to ensure that they reflect the changes.

- Whilst they are undoubtedly a good idea in theory, there is a great deal of uncertainty about how 'fit notes' will operate in practice, and we will need to wait and see how the tribunals deal with them.

If you are an employer we can –

- Review and amend your contracts of employment and sickness absence policies, and guide you through the process of consulting with your employees about any changes.

- Train your HR department and line managers in how to effectively manage sickness absence and deal with difficult cases.

- Advise and represent you in relation to any disputes arising from the new 'fit note'.

- Advise you on complying with your obligations under the DDA.

If you are an employee we can –

- Advise and represent you in relation to any disputes arising from the new 'fit note'.

- Advise and represent you in relation to any claims of disability discrimination.

For further information

Please call us on 020 7148 7850 or email info@levenesemployment.co.uk.

Alternatively please contact Victoria Willson directly on 020 7148 7852 or vwillson@levenesemployment.co.uk.

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