

# Sickness Absence

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# An Insight into Sickness Absence

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This may come as a surprise to most, but there is no statutory right for an employee to take time off work due to sickness. Most employment contracts do however contain express provisions concerning sickness and sensible employers will appreciate that people get ill, and suffer injuries, and are unfit to work at times.

If an employee is unable to work due to sickness then an employer can ask them to self-certify for the first seven days, and only require them to obtain a doctor's note for any period lasting longer than this. What happens where an employee takes regular, excessive sick days, or is absent for a long period of time due to sickness? When is it ok to dismiss because of sickness absence?

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## EXAMPLE

Let's take a fictional employee, Natalie, as an example. She has a cold and feels unable to work fully. She turns up for work, but wasn't performing at her best and was given permission to go home early. The next day she decides not to go to work because of her cold. For up to seven days she can self-certify, i.e. follow the employer's sickness reporting procedure without visiting her GP. If she remains unwell beyond this, her employer would be entitled to ask her to obtain a "fit note" from her GP certifying that she is not fit for work.



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If Natalie's absence continued and became longer term, it would be prudent of her employer to obtain some detailed medical evidence to find out her diagnosis, prognosis, likely timescale for return to work and whether there is anything the employer can do to assist her return.

Many employers draft into the employment contract the right to require the employee to see a doctor of the employer's choice (usually at the employer's cost) for an assessment. There's nothing wrong with this, and in fact it's a helpful tool for an employer. Even with a medical assessment arranged by the employer, there is no automatic right to see the resulting medical report, as the individual's rights will be preserved under various medical privacy laws. It also pays therefore to draft in the contractual obligation on the employee to provide their written consent, upon request, for the employer to access medical records and reports.

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So Natalie's sickness continues and becomes long term, her employer is struggling in her absence to cover her work and there doesn't appear to be any prospect of her returning soon. What happens next? Can she be dismissed? Can she be replaced? How does her employer go about managing her absence?

Managing sickness absence is a delicate, time-consuming and often complex matter. Each employee needs to be dealt with on a case by case basis but the bottom line is that it is possible to dismiss someone who is unable to work because of sickness, even if they have a disability.

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The process used to consider dismissing someone due to sickness absence will be similar to that of performance management, but there are several considerations which should be taken into account, including (based on our example above):

- Does Natalie have a disability?
- If she does and this is causing her absence, are there reasonable adjustments which can be made to assist her back to work?
- Have you obtained all of the medical evidence possible to assist you in understanding the reason for her absence, and what you can do to help her back to work?
- Have you sent her for an occupational health assessment?
- Have you considered referring Natalie to the Fit for Work service? This is a free, Government run scheme which provides access to an occupational health assessment and general health and work advice. The service can provide a Return to Work plan (which can be used as evidence of sickness, just like a GP's fit note). An employee can be referred by their employer or GP.
- Have you considered whether there are benefits such as income protection which will replace Natalie's salary in her absence (and dismissing her may therefore remove her entitlement to this)?
- Is there another reason behind Natalie's absence, perhaps related to work? For example, bullying, harassment, stress at work.

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The length of Natalie's service may play a big part of how her absence is managed. If she is in the first two years of employment, then she can be dismissed without reprisal of an unfair dismissal claim. However, there is no qualifying service for discrimination claims, so it is still important for her employer to explore the reasons behind her absence and ensure that they don't indirectly discriminate, and/or fail to make reasonable adjustments.



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## The Consequences

An employee dismissed due to sickness absence who brings an Employment Tribunal claim is most likely to bring an unfair dismissal and (if relevant) a disability discrimination claim.

If you're unlucky enough to be found against in both respects the costs could be high: up to £86,444 for unfair dismissal (see Outset.insight of Constructive Dismissal) and, in theory, an unlimited amount in respect of a discrimination claim (see Outset.insight of Sex Discrimination).



If you would like more advice regarding sickness absence, get in touch for a friendly and informal chat today.

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