

BORNEOS MANAGING SICKNESS ABSENCE and HOLIDAY ENTITLEMENT

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WHY MONITOR AND MANAGE ABSENCE?

- Necessary for Statutory Sick Pay (SSP) purposes
- Helps identify the nature and potential causes of absence
- Risk of claims:
 - Breach of Health and Safety at Work Act 1974
 - Failure to provide a safe system of work
 - Constructive dismissal
 - Breach of duty to provide suitable working environment
 - Breach of duty of trust and confidence

WHY MONITOR AND MANAGE ABSENCE?

- o Health Act 2006
 - Breach of smoking ban
- o Personal injury
 - Failure to prevent reasonably foreseeable risk of physical or mental injury (e.g. stress)
- o Disability Discrimination Act 1995
 - Discrimination
 - Failure to make reasonable adjustments
- o Corporate Manslaughter Act
 - Death caused by gross breach of duty of care

WHY MONITOR AND MANAGE ABSENCE?

- Cost
 - o 2 million people suffer from work-related illness
 - o 5.8 million working days lost from July 07 to June 08
 - o average worker is absent for 8.4 days per year
 - o annual cost per employee is over £700
 - o hiring and paying temporary replacement staff
 - o missing deadlines
 - o lowered customer satisfaction
 - o low morale among colleagues
 - o diminished reputation and lost business

MONITORING ABSENCE – DATA GATHERING

- Obtain, collate and analyse data on individual absence levels
- Obtain the following data:
 - o Employee's name/ID
 - o Where employee can be contacted
 - o Date of 1st day of absence
 - o Cause of absence
 - o Is injury/illness work-related?

MONITORING ABSENCE – DATA GATHERING

- o Working days absent (update regularly)
- o Date the employee was last contacted and the outcome
- o Expected length of absence
- o Return to work date

MONITORING ABSENCE – DATA GATHERING

- Categories of nature/cause of absence:
 - o Short –term or acute medical conditions (e.g. cold, flu)
 - o Musculo-skeletal injuries
 - o Stress-related
 - o Long-term or chronic illness
 - o Work-related injury
 - o Other

MONITORING ABSENCE – DATA GATHERING

- Collate and analyse the data – is there a pattern:
 - o With an individual?
 - o Within a team/department/function/location/the organisation as a whole?
 - o On certain days/times of the year?
- Compare your absence levels with those of other organisations – local Chamber of Commerce, CIPD or CBI
- NB: Sensitive personal data under Data Protection Act

MONITORING ABSENCE – INVESTIGATING CAUSES

- o Investigate the causes:
 - Interviews with managers
 - Group sessions with samples of employees
 - Employee questionnaires

MONITORING ABSENCE – HOW TO IMPROVE ATTENDANCE

- o Cause – work related injuries, heavy workload, stress
 - Review your Health & Safety Policy
 - Carry out risk assessments including of work-related stress – HSE guidance (www.hse.gov.uk)
 - Recruit additional staff
 - Provide counselling services and confidential helpline

MONITORING ABSENCE – HOW TO IMPROVE ATTENDANCE

- o Cause – domestic responsibilities
 - Introduce family friendly policies
 - Flexible working
 - Working from home
 - Childcare support, creche facilities

MONITORING ABSENCE – HOW TO IMPROVE ATTENDANCE

- o Cause – occupational sick pay
 - Review sickness absence policy
 - Lengthen the period of service before entitlement starts
 - Don't pay for uncertified absence

MONITORING ABSENCE – HOW TO IMPROVE ATTENDANCE

- o In all cases
 - Follow sickness absence policy
 - Train staff to deal with sickness absence
 - Discuss absence at appraisals
 - Publicise absence policies and procedures
 - Manage absence
 - Return to work interviews
- o If unauthorised absence – invoke disciplinary procedure

CONTENTS OF SICKNESS ABSENCE POLICY

- One contractual policy to cover:
 - Sick pay including right to withhold
 - Notification procedure employees must follow
 - Right to obtain a medical report
- One non-contractual policy to cover:
 - How you will manage short-term and long-term absences (capability procedure)

SICK PAY

- Terms and conditions re incapacity for work and sick pay must be in writing
- No statutory right to full pay
- Right to Statutory Sick Pay (SSP)
- Contractual sick pay (CSP)

SICK PAY - SSP

- Weekly payment - £75.40
- Four or more consecutive days of absence
- No SSP for the first 3 days absence/absence of less than 4 days
- Maximum 28 weeks SSP
- Employers can recover SSP

SICK PAY – SSP

- Notification
 - o Must inform employer within 7 calendar days of date employee is unfit to work
 - o Employer can withhold SSP if late notification and there is no good cause for the delay
 - o NB: employers can impose more onerous notification requirements
- Evidence of incapacity
 - o Doctor's certificate
 - o Self-certification form

SICK PAY – SSP

- o Cause and duration of absence
- o Right to ask for reasonable evidence of incapacity after first 7 days' absence, but not before
- o Cannot withhold SSP if employee provides evidence late
- o NB: need evidence to claim back SSP

SICK PAY – SSP

- Issue Form SSP1 if
 - o Employee does not qualify for SSP
 - o Employee's entitlement is about to expire
 - o Employee leaves
- HM Revenue & Customs website – www.hmrc.gov.uk
 - o SSP calculator
 - o How to recover SSP
 - o Records you must keep

SICK PAY – CONTRACTUAL SICK PAY (CSP)

- Right to CSP may be implied into contract
- In writing
- If discretionary, say so
- SSP deducted from CSP
- Set out payment period clearly
- Set out necessary evidence of incapacity
- Reserve right to recover CSP if absence due to 3rd party negligence

SICK PAY – DISCRETIONARY CSP

- Terminating discretionary CSP
 - o Be consistent
 - o Record reasons
 - o Give notice
 - o Reduce CSP gradually
 - o Weigh up benefit of continued payment to employee and cost to business

SICK PAY – DISCRETIONARY CSP

- Terminating discretionary CSP – disabled employees
 - o No automatic right to extended CSP
 - o Did the employer's actions contribute to the absence or its duration?
 - o Record disability-related sick leave separately

SICK PAY – DISCRETIONARY CSP

- Terminating discretionary CSP – pregnancy-related illness
 - o No right to sick pay during maternity leave
 - o Absence due to pregnancy-related illness before and after maternity leave can be treated in same way as other sick leave
 - o Tread with caution
 - o Record pregnancy-related sick leave separately

SICK PAY – DISCRETIONARY CSP

- Withholding CSP
 - o Must have express right in contract/contractual sick pay policy
 - o Excessive leave
 - o Failure to comply with absence procedure

SICK PAY – DISCRETIONARY CSP

- o Doubt regarding reasons for absence
 - Draft clause carefully – e.g. CSP depends on employer’s medical adviser finding employee is unfit
 - If clause says absence must be genuine and employee provides GP certificate/evidence – right to be paid unless other medical evidence to the contrary
 - Reserve right to obtain medical evidence from another doctor

SICK PAY – DISCRETIONARY CSP

- Returning to work
 - o Employee must be paid if able to work
 - o BUT employer has the right to decide if employee can perform duties safely

SICK PAY – DISCRETIONARY CSP

- o Reserve right to:
 - get medical evidence
 - keep employee away from work
 - impose gradual return
 - ask employee to undergo retraining/rehabilitation
 - ask employee to perform additional duties
- o Employee's obligation to comply with reasonable instructions
- o Capability or misconduct dismissal

MANAGING SHORT-TERM RECURRENT ABSENCE

- Return to work interviews
 - o After every absence
 - o Carried out by line manager/supervisor
 - o Ask what causes the absence
 - o Are reasons consistent with other evidence?
 - o Raise doubts, if any
 - o Allow employee to explain absence
 - o Written record

MANAGING SHORT-TERM RECURRENT ABSENCE

- Know when to start investigation
- Clear trigger points
 - o Length of leave
 - o Number of absences
 - o Pattern of absence (certain days of the week/year)

MANAGING SHORT-TERM RECURRENT ABSENCE

- Meet with the employee
 - o Identify reasons
 - o Explain that absence is cause for concern/reasons for concern
 - o Explain impact of absence on colleagues and organisation
 - o Tell employee what improvement is expected and likely consequences
 - o Timescale for improvement

MANAGING SHORT-TERM RECURRENT ABSENCE

- o Medical advice
 - Occupational health advisers
 - Employee's GP
 - Independent doctor/specialist

MANAGING SHORT-TERM RECURRENT ABSENCE

- o Medical reason
 - follow capability procedure
 - regular review meetings
 - set targets and timescale for improvement
 - issue warnings
 - provide assistance – reasonable adjustments

MANAGING SHORT-TERM RECURRENT ABSENCE

- o No good reason
 - Follow disciplinary procedure
 - Targets and warnings
- Paper trail
 - o Records of all meetings and correspondence
 - o Notes of telephone calls and messages
 - o Follow-up letters
 - Steps taken to contact employee

MANAGING SHORT-TERM RECURRENT ABSENCE

- Actions agreed (e.g. employee to provide medical certificates)
- o Keep records confidential
- o Consult Information Commissioner's Employment Practices Code: 'Part 4 Information about workers' health' – www.ico.gov.uk

MANAGING SHORT-TERM RECURRENT ABSENCE

- Dismissal
 - o Capability, conduct or some other substantial reason
 - o Disregard disability-related and pregnancy-related absences
 - o Follow fair procedure
 - o Don't forget the Statutory Dismissal Procedure

MANAGING SHORT-TERM RECURRENT ABSENCE

o Step 1 letter

- Absence is unacceptable and reasons
- Details of absences and steps taken to deal with them
- Copies of documents – sickness absence procedure, medical evidence, correspondence

MANAGING SHORT-TERM RECURRENT ABSENCE

- Date, time and location
 - Purpose of meeting – discuss absence record
 - Risk of dismissal
 - Right to be accompanied
-
- Step 2 meeting
-
- Step 3 appeal

LONG TERM ABSENCE

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LONG TERM ABSENCE 2

- Maintain contact
- Consult fully
- Seek appropriate medical advice
- Consider all adjustments that might be possible to the role or physical environment to facilitate a return to work. Review all reasonable options for alternative employment.

LONG TERM ABSENCE

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- Possible Claims
 - Unfair dismissal
Compensation is capped at £72,900
 - Disability discrimination
Uncapped

LONG TERM ABSENCE

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- Maintain contact
 - o Make contact early
 - o Keep frequent contacts – be sensitive – don't harass
 - o Make home visits if the employee cannot come to the office

LONG TERM ABSENCE 5

- Consult Fully
- Must take reasonable steps to find out the true medical situation
- Ask the employee how they are progressing
- Encourage them to contact you following any medical update
- Ask what can the company do to aid their return

LONG TERM ABSENCE 6

Get a medical report

- Refer the employee to a company doctor, occupational health or a consultant

This is to clarify

- What is the condition and its affect on the employee
- When is the employee likely to be able to return to work
- In what capacity will the employee be able to return?
- Are adjustments required for the employee to return to return to work?

LONG TERM ABSENCE

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QUESTIONS FOR THE SPECIALIST

- What is the condition?
- How does it affect the employee?
- Depending on the condition ask, does it affect e.g.
 - o walking
 - o sitting
 - o concentration
- What is the prognosis
- When will the employee be able to return to work
- Give a description of the work the employee carries out

LONG TERM ABSENCE

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- Are there any changes that could be made to the employee's role to enable them to return to work
- Is a graduated return appropriate e.g.
 - o A short day
 - o Light duties

LONG TERM ABSENCE

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Access to Medical Report Act

- You must inform the employee that they have:
- The right to withhold consent to the application being made.
- The right to state that they wish to have access to the Report
- Rights concerning access to the Report before (or after) its supplied
- The right to withhold consent to the Report being supplied to you
- The right to request amendments to the Report

LONG TERM ABSENCE 10

- Is the employee disabled within the meaning of the Disability Discrimination Act?

DISABILITY DISCRIMINATION ACT (DDA) 11

An employee is disabled as defined by the DDA where they have:

- A physical or mental impairment
- Which has a substantial and long term adverse effect
- On their ability to carry out their normal day to day activities

DISABILITY DISCRIMINATION ACT (DDA) 12

Discrimination

If an employee is disabled within the meaning of the DDA you must be careful not to discriminate against them, either by:

- disability related discrimination
- direct discrimination
- Failing to comply with a duty to make reasonable adjustments for their disability
- Victimising them
- Subjecting them to harassment

DISABILITY DISCRIMINATION ACT (DDA) 13

- o Duty to make reasonable adjustments

DISABILITY DISCRIMINATION ACT (DDA) 14

Possible Work Adjustments

- Provide new or modify existing equipment or tools including IT, modified keyboards
- Modify workstations, furniture
- Provide additional training for the employee to do their job
- Re-allocate work, provide a phased or supported return to work
- Part time work
- Provide alternative work

DISABILITY DISCRIMINATION ACT (DDA)

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Factors to be taken into account in judging whether an adjustment is reasonable

- The effectiveness of the step in ameliorating the disadvantages
- The practicality of the step
- The financial and other costs which would be incurred by you
- the extent to which the step would disrupt any activities
- The financial and other resources available to you

DISABILITY DISCRIMINATION ACT (DDA) 16

- The availability of external financial or other assistance (e.g. Assistance from the Access to Work Scheme run by Jobcentre Plus)
- The nature of the businesses activities and the size of the business

PERMANENT HEALTH INSURANCE (PHI)

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PERMANENT HEALTH INSURANCE (PHI) 18

- Any PHI Policy should:
- Ensure the benefit is always linked to the terms of the PHI policy on offer and to any specific claim being accepted by the policy provider so as to avoid giving the employee any claim directly against the employer to receive benefits
- State the company will not be obligated to provide any benefit where cover is refused by the insurer and that employees will not have a right to claim damages if they are dismissed in any circumstances that prevent them receiving benefits under the PHI policy
- Expressly reserve the right to change the level of cover offered, the particular policy provided or remove the benefit entirely

LONG TERM ABSENCE – DISMISSAL

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Contemplating dismissal

- Make sure the medical report relied upon is up to date and gives clear prognosis of the duration of the illness
- Send statutory dismissal step 1 letter
 - o outline length of absence
 - o effect absence has had on the business
 - o Summarise medical advice and results of previous consultation with employee regarding duration of absence and possibilities of adjustments to their role

LONG TERM ABSENCE – DISMISSAL

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- o State the purpose of the meeting is to consider the above and that the outcome of the meeting may be dismissal
- o Give them the right to be accompanied by a work colleague or trade union official

LONG TERM ABSENCE – DISMISSAL

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Step 2 Meeting

- Meeting should be conducted in a manner that enables both employer and employee to explain their cases
- Employee should be given the opportunity to raise and address any objections to the steps taken to date
- History of employees absence and its effect on the organisation and any other actions previously taken to address the situation should be outlined, refer to any relevant documentation
- The employee should be given the opportunity to put their case and outline any mitigating circumstances

LONG TERM ABSENCE – DISMISSAL

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Send letter confirming your decision

- Offering the right of appeal and give the timescale within which to appeal
- Appeal should be heard by a more senior manager than the person who conducted the first meeting
- Give the right to be accompanied
- Following the appeal hearing you should send a letter confirming the outcome

HOLIDAY PAY – THE ENTITLEMENT

- Currently 4.8 weeks holiday per year
- This is 24 days for a worker who works a 5 day week
- Will rise to 5.6 weeks per year from April 2009
- This is 28 days for a worker who works a 5 day week
- Includes 8 bank holidays and public holidays
- Pro-rata entitlement for part-timers – 3-day week = 14.4 days' leave per year
- You must also pro-rata contractual holiday entitlement

TAKING ANNUAL STATUTORY LEAVE

- Workers should give notice of their annual leave of twice the period of the leave that they want to take
- For example – if the worker requires 3 days leave they should put in their request 6 days prior to that
- You can require your workers to take leave at a specific time, e.g. during a Christmas shutdown
- You must also give notice of twice the length of leave that you wish the worker to take

VARIATION OF WORKING TIME REGULATION REQUIREMENTS

- Terms in the contract of employment could require:
 - o Longer notice of intention to take holiday from workers
 - o Manager's written approval required for holiday dates
 - o Limit on holidays that can be taken at one time
 - o Holiday to be taken during the notice period

HOLIDAY ENTITLEMENT WHILST ON LONG TERM SICK LEAVE

- HMRC v Stringer & Others – Court of Appeal
 - o A worker can not give notice to their employer to take WTR annual leave during a period of sick leave
 - o A worker who is absent from work during an entire leave year is not entitled to WTR leave for that year
- So, a worker who has been off sick for the whole leave year can not claim their 4.8 weeks statutory entitlement

HOLIDAY ENTITLEMENT WHILST ON LONG TERM SICK LEAVE

- No right to a payment in lieu of unused statutory leave if employment terminates during a leave year in which the worker has not attended work
- BUT awaiting decision of European Court of Justice (ECJ)

HOLIDAY ENTITLEMENT WHILST ON LONG TERM SICK LEAVE

- The ECJ are likely to follow the opinion of the Advocate General who has said that:
 - o A worker can accrue paid leave while off sick but cannot take paid annual leave during their sick leave
 - o On termination of employment workers are entitled to compensation for annual leave accrued but not taken due to sickness absence

HOLIDAY ENTITLEMENT WHILST ON LONG TERM SICK LEAVE

- Insert clause in contract:
 - o Contractual leave does not accrue during sick leave

HOLIDAY ENTITLEMENT AND FAMILY LEAVE

- Maternity leave and paternity leave
 - o Both WTR holiday and contractual holiday accrue

HOLIDAY ENTITLEMENT AND FAMILY LEAVE

- No right to carry over WTR/contractual holiday from one year to the next
- No right to take WTR/contractual holiday during family leave
- BUT if a woman is on maternity leave during a shutdown, she must be allowed to take WTR holiday outside of maternity leave

HOLIDAY ENTITLEMENT AND FAMILY LEAVE

- Ask employee to use up holiday before starting leave
- You can allow worker to take contractual holiday on return to make up for holiday not taken during leave
- Worker who returns from sick leave or family leave before the end of the holiday year can take WTR holiday during the remaining part of the leave year.

ROLLED UP HOLIDAY PAY

- Unlawful
- Renegotiate contracts ASAP to ensure workers are paid WTR holiday whilst they are on leave

CASE STUDIES

Short-Term Absence Case Study – Points to Consider:

- Back to work interview
- Should you start investigating the absence?
- If so, which procedure should you follow – disciplinary or capability?
- Should you obtain a medical report?
- Is Arthur entitled to SSP?
- Can you withhold contractual sick pay?

CASE STUDIES

Long-Term Absence Case Study – Points to Consider:

- Is Sarah disabled within the meaning of the Disability Discrimination Act?
- If so, are there any reasonable adjustments that you could make to your premises, her workstation or her role to enable her to return to work?
- There are no reasonable adjustments that can be made – but if I dismiss her, that is disability discrimination isn't it? I wouldn't be dismissing her if she wasn't disabled.

- **Feedback form**
- **Other training we provide:**
 - Managing redundancies
 - Duties under Information and Consultation Regulations
 - New ACAS Code on dismissal and grievance procedures
 - How to defend an Employment Tribunal claim
 - Contracts of employment and their variation

- **Other training we provide:**
 - TUPE
 - buying or selling a business
 - outsourcing
 - Discrimination
 - age
 - Sex/sexual orientation
 - race/religion or belief
 - disability
 - Maternity and family friendly rights