

From sickness to fitness: the new 'fit notes' come into effect on 6th April 2010

A new regime for dealing with ill-health in the workplace will come into force next month. As usual its aims are laudable: reducing the cost of sick leave for employers and the state by helping employees back to work, who would otherwise be absent for sickness. It is also aimed at lowering the psychological pain that an employee may suffer when absent on long term sick leave. Employment lawyers are already refining their arguments to test this new regime.

The new regime

On 6th April 2010, the new regime will come into force for doctor's certificates issued when employees are ill or injured and have been off work for seven days or more. The new regime has been introduced via social security regulations. The Department for Work and Pensions (DWP) has issued guidance for employers on the new regime ("the Guidance"). The Guidance is available at: <http://www.dwp.gov.uk/docs/fitnote-employer-guide.pdf>.

In 2008, when the government decided to overhaul the scheme, it was calculated that ill health was costing the UK economy approximately £100bn a year. Traditional sick notes only allow GPs to certify whether an employee is fit or not fit to work. There is no flexibility to allow a GP to make suggestions as to what might help an employee return to work earlier. The new fit note scheme is meant to help bridge that gap.

There are no changes to the statutory sick pay scheme or your duties under the Disability Discrimination Act. Sick notes will now be called fit notes.

The fit note

The most important new element of the fit note is that the GP can advise you that either:

- the employee is not fit to return to work; or
- that he or she may be fit for work.

A GP will select the 'may be fit for work' option if he or she believes that the employee could return to work with suitable support. The form goes on to give options for the GP to select regarding what might amount to suitable support. These include:

- a phased return to work;
- altered hours;
- amended duties; and/or
- workplace adaptations.

The GP will also be able to provide written comments in a comments box if he or she thinks that more explanation is needed or whether another option could be more helpful. According to the Guidance, Employers are not obliged to implement the suggestions made by the GP on the form. Instead, any changes are at the discretion of the employer and will require agreement with the employee. If the employer decides that it cannot put in place the advice from the GP, the employee will remain off sick for the period of the note.

According to the Guidance, the changes to the regime are not about trying to get people back to work before they are fit to return, but are about removing the challenges to them returning, which is, theoretically, a good idea. However, there are a number of problems that we can see with the new regime.

The concept of suitable support is similar to the concept of reasonable adjustments under the Disability Discrimination Act (DDA). They are not to be confused. Under the DDA, you have a duty to make reasonable adjustments to the position of a disabled employee (ie: someone who has a physical or mental impairment that has a substantial and long-term adverse effect on his or her ability to carry out normal day-to-day activities). Under the new fit note regime, you are able to refuse to implement the GP's recommendations.

Has a GP got sufficient knowledge of the workplace and the time to make these assessments?

According to the form, the GP will be assessing just what he or she thinks will help the employee return to work, even though most GPs are not trained occupational therapists. This means that the GP will be relying on the employee to properly describe his or her main job functions and presumably to be able to give the GP an idea of your organisation's resources. Consequently, it is inevitable that the advice on the fit note is going to be heavily influenced by the employee, who will have expectations regarding your response.

The Royal College of GP's, recommends that a GP should spend 10 minutes with a patient. In that 10 minutes, the GP has to assess the patient's condition, recommend treatment and now, consider what, if any, suitable support might get the employee back to work.

There is a concern that a lack of understanding and time could lead to misleading or incorrect recommendations and encourage the employee to have an unrealistic expectation of the process.

Nowadays, many employees who are being disciplined or are raising internal grievances with their employer will, at some stage or another, be signed off sick for work related stress by their GP. Are the GPs supposed to get involved in finding solution to this?

The DWP has produced guidance specifically for GPs. In this guidance, it states "Where the 'may be fit for work' box has been ticked, you must complete this section with information on the functional effects of your patient's condition. The information you provide here will be key for your patient and for their employer when they are considering if and how they can facilitate a return to work. In circumstances where you feel the issues are complex or where you feel work itself may be a contributor to your patient's condition, you may wish to include in your comments a recommendation that an occupational health assessment be considered."

We are concerned that GPs may be over enthusiastic in the recommendation regarding occupational health assessment and workplace assessments resulting in an increase in cost and administrative burden on the employer.

Only larger employers have dedicated occupational health advisers. Many small to medium size businesses will not even know where to start.

Can you really refuse to implement the advice?

According to the Guidance, employers are not obliged to follow the advice on the form. However, we are concerned that the failure to do so could expose you to a grievance from the employee and a possible claim of constructive dismissal, on the basis that your refusal to implement the advice amounted to a breach of your duty of trust and confidence.

If you disagree with the advice or cannot afford to implement it, it is highly likely that this will be an immediate cause for conflict between you and your employee. The Guidance states that if an employer does not wish to implement the advice on the fit note, the employee will simply be treated as off sick for the period stated on the note. If you pay full salary for sick periods, this may not be such a problem. However, if you only pay statutory sick pay, the employee is likely to consider your refusal as having a direct impact on their finances.

Further, will you be able to refuse company sick pay and/or discipline an employee, if the employee disagrees with the GP's assessment that he or she may be fit to return with support?

As you can see, the intention of the fit note is to save the economy money by getting employees back to work more quickly. Unfortunately, dealing with fit note advice is likely to put new burdens on you in terms of time and money. It may also result in a rise in constructive dismissal claims.

As you start to receive fit notes, it is important that you think very carefully about the advice you have received and to talk to your employee about whether or not it is appropriate. If you agree with the advice, don't forget to monitor how your employee is doing once he or she returns to work. If you want to refuse the advice, keep notes of discussions with your employees. With a bit of imaginative thinking, you and your employee may be able to come to an agreement about alternative suggestions that would suit both you and the employee. If you do refuse, please also make sure that you are not doing so just out of frustration at receiving some unhelpful advice from your employee's GP.

For more specific information or to discuss your requirements please call either Amanda Galashan or Julie Calleux at EmployEase on 0845 123 3741, or email us at info@employease.co.uk.

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