Legislation Update

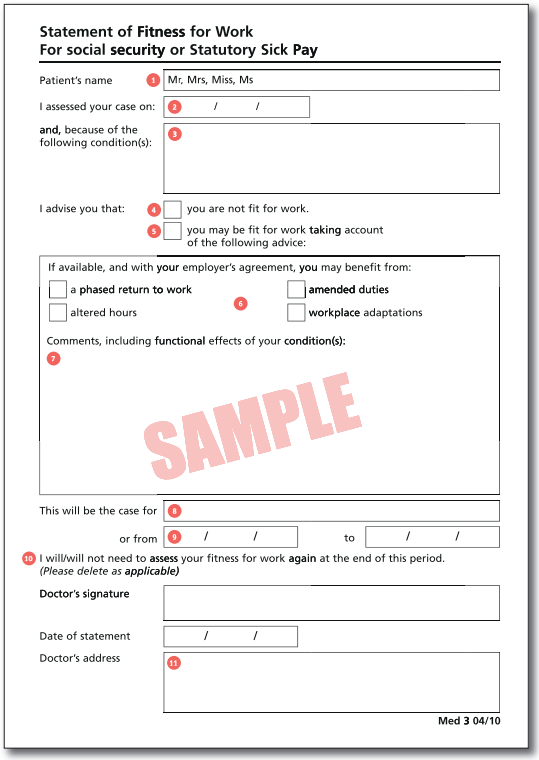
Employment

Sick notes to be replaced by 'Fit Notes' from 6 April 2010

Introduction

From 6 April 2010, the sick note an employee currently has to obtain from his GP if he is absent from work for eight days or more will be replaced by a new "Statement of Fitness for Work" medical statement (known as a "Fit Note") in the form below.

'Sickness absence at work has been high on the Government's agenda for some time.'



Statement of Fitness for Work
For social security or Statutory Sick Pay

Patient's name 1 Mr, Mrs, Miss, Ms

I assessed your case on: 2 / /

and, because of the following condition(s): 3

I advise you that:
4 ☐ you are not fit for work.
5 ☐ you may be fit for work taking account of the following advice:

If available, and with your employer's agreement, you may benefit from:
☐ a phased return to work ☐ amended duties
☐ altered hours 6 ☐ workplace adaptations

Comments, including functional effects of your condition(s):
7

SAMPLE

This will be the case for 8

or from 9 / / to / /

10 I will/will not need to assess your fitness for work again at the end of this period.
(Please delete as applicable)

Doctor's signature

Date of statement / /

Doctor's address 11

Med 3 04/10

Background

Sickness absence at work has been high on the Government's agenda for some time. The new legislation (the snappily-titled Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010) which brings the Fit Notes into use is in response to a Review commissioned by the Government and published in March 2008: "Working for a Healthier Tomorrow".

The Review estimated that sickness absence costs the UK economy appropriately £100 billion per year in lost productivity. In addition, there is the cost of Statutory Sick Pay and any contractual sick pay to which employees might be entitled. The new scheme is based on the principle that looking at what employees can do rather than what they cannot will help keep them at work in some contributing capacity to help the employer, and also on the Review's conclusions that being at work is often of beneficial and therapeutic effect upon the employee.

What do employers need to know about Fit Notes?

- The maximum period of time the Fit Note can be issued for is three months during the first six months of a health condition.
- A Fit Note will either state that an employee is “not fit for work” or “may be fit for work taking account of the following advice”. If the latter is the case, the Fit Note will set out recommended changes to the employee’s work situation to help him return to work, for example: working part-time, undertaking different duties or adapting the workplace. The Fit Note may also state that an occupational health referral might be appropriate.
- The recommendations on the Fit Note are not binding on the employer and are only likely to be temporary (i.e. for the duration of the Fit Note) although their duration might have to be reviewed if the employee’s health condition continues.
- If an employer cannot comply with the GP’s recommendations, the status of the employee is that he is “not fit for work”, i.e. as if signed off under the pre-April sick note regime.

See below for a detailed checklist for employers.

Implications for employers

There may be increased administration for employers in terms of having to review company policies and undertake careful consideration of whether adjustments recommended by a doctor are feasible. They will need to adopt a new ‘mindset’ of having to consider what are effectively reasonable adjustments without there necessarily being a potential disability situation.

However, employers should also be careful to do what they already do by way of good practice which is not altered or dispensed with by the introduction of the Fit Note, for example:

- discussing and reviewing matters with the employee;
- considering whether there are any Disability Discrimination Act implications;
- keeping careful notes and reviewing and monitoring the situation – especially as there are likely to be differences of opinion between doctors and employers as to what adjustments might be feasible; and
- considering whether there are any additional adjustments which could be made to accommodate the employee’s situation, irrespective of the disability question.

The introduction of the Fit Note system could lead to potential difficulties. For example:

- GPs may not be able to fully and accurately assess the realities of a workplace or an employee’s role, so their recommendations may serve only to raise the expectations of the sick employee even though not feasible in practice;
- the employer may dispute that adjustments are feasible, whereas an employee may be keen to return to work, especially if he otherwise only receives Statutory Sick Pay. This will place a higher burden on employers to have a good reason not to make the changes recommended; and
- the employee may dispute the recommended adjustments, in which case more information may be needed, which could take time to obtain from a GP.

FIT NOTES - CHECKLIST FOR EMPLOYERS

EVENT		ACTION	✓
1	**Employee goes on sick leave**		
1.1	For 1-3 days	SSP not triggered; employee usually paid, depending on past history; no further action	
1.2	For 4-7 days	Entitlement to SSP triggered; employee can 'self-certify'; no further action	
1.3	For 8 or more days	Sick note (fit note after 6 April 2010) needed from GP	
2	**Employee obtains fit note from GP**		
2.1	Fit note states employee not fit to attend work for a specified period (a maximum of three months during the first six months of the health condition) OR	See 3 below	
2.2	Fit note states employee may be "fit for work taking account of the following advice…"	See 7 below	
3	**Employee paid SSP and/or company sick pay**	Check employee's entitlements to company sick pay/SSP	
4	**Also check: does the health condition specified in the fit note suggest that employee might be disabled within the meaning of the Disability Discrimination Act?**		
4.1	No	No further action, but keep the situation under review. Consider adjustments regardless	
4.2	Yes	Obtain report from company doctor. Consider adjustments beyond those on fit note	
5	**Does fit note (and/or doctor's advice) indicate that employee might not be able to return to work in a reasonable space of time?**		
5.1	No	No further action to take at this stage. Consider notification to any PHI insurer	
5.2	Yes	Subject to 6.2 below, if employee is unlikely to be able to return to work for the foreseeable future, (and unless there is a PHI scheme) consider terminating on incapacity grounds but follow a very careful procedure and take medical advice, consider alternative employment etc	
6	**Employee returns to work by expiry of fit note?**		
6.1	Yes	No further action	
6.2	No	Employee must visit GP for another fit note and the process starts again – go back to step 1	
7	**Fit note states that employee may be fit for some work and gives (1) recommendations and possibly (2) either (i) comments and/or (ii) a suggestion on whether an occupational health referral would be appropriate**		

EVENT		ACTION	✓
7.1	Employer can reasonably comply with recommendations	No further action at this stage other than to put recommendations into practice, noting any limitations, e.g. trial periods etc.	
7.2	Employer cannot reasonably comply with recommendations	Employee moves to status of 'not fit to work' (see 2.1 above). Employer needs to be careful to document why compliance is not possible and whether further adjustments could be made which would make the situation feasible	
7.3	Fit note states that employee can return to work with adjustments, but still cannot carry out a major aspect of his work	Consider whether employee has a disability (see 4 above) and consider taking further medical advice from company doctor, together with any possible adjustments in addition to those suggested in the fit note	
8	**Employee comes back to work with agreed adjustment as in 7.3 above, but this is not feasible in practice**	Employee reverts to 'not fit for work' status (see 2.1 above)	

Note that at <u>all</u> stages, employers should:

- discuss all steps with the employee and keep consulting with him/her
- keep careful notes
- take further medical advice as appropriate
- keep the situation under review
- not limit their thinking to the suggestions/conditions made on the note by the doctor

ADDITIONAL PATERNITY LEAVE FROM 2011

A new right to additional paternity leave will be introduced for babies born or matched for adoption on or after **3 April 2011**.

This new right is part of a Government drive for more flexible working patterns for families. Harriet Harman, the Minister for Women and Equality, has commented that:

"Mothers will be able to choose to transfer the last six months of their maternity leave to the father with three months' pay. This gives families radically more choice and flexibility in how they balance work and care of children, and enables fathers to play a bigger part in bringing up their children".

The current entitlements to maternity and paternity leave are as follows:

- **Paternity leave** – two weeks' paid paternity leave; and
- **Maternity leave** – 52 weeks' maternity leave, of which up to 39 weeks are paid.

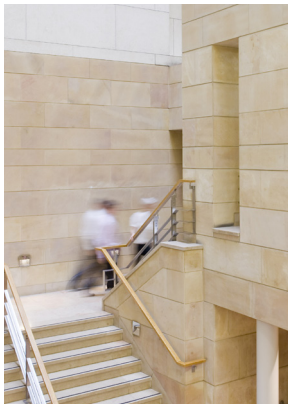
These entitlements are subject to eligibility criteria.

How will the new right work?

- The new right to additional paternity leave will operate by parents in effect "sharing" or dividing the entitlement to leave between them. It will apply where the mother ends her maternity or adoption leave early, and the father can then "take over" the remainder of the leave of up to six months, with up to a maximum of three months' leave paid at the statutory rate (£124.88 per week up from £123.06 from 4 April 2010) (ie the 'paid' period will be the usual 39 weeks) and three months' unpaid leave. Therefore an eligible employee will be able to take a maximum of 26 weeks' additional paternity leave before the baby's first birthday.

- The new right to additional paternity leave is in addition to the two weeks' paid paternity leave (see above) to which fathers are already entitled.
- The new right to additional paternity leave will also apply to the "fathers" of babies who are adopted.
- Employed parents' current rights to parental leave and to request flexible working are not affected by the introduction of additional paternity leave.
- The new right to additional paternity leave and all the associated details relating to eligibility and notification, etc will be introduced by Regulations, which are still in draft form.

The Government estimates that 6% or less of those eligible to take additional paternity leave will take it (Press Release, 15 September 2009).



'consider raising awareness of paternity rights within your company or organisation.'

Practical Steps to Take

- review your company policies to make sure that they are up-to-date and reflect the legislative changes which will take place from April 2011;
- if you do not already have a written policy for paternity rights, consider introducing such a policy; and
- consider raising awareness of paternity rights within your company or organisation. The research carried out by the Department for Business, Innovation and Skills in February 2010 showed that there is still a considerable lack of awareness about paternity rights (some 34% of those surveyed were unaware of the right) and that flexible working forms part of what they look for in an employer. Raising awareness could be, for example, by holding a meeting, or emailing round a brief explanation of current rights and the forthcoming changes in 2011.

EMPLOYMENT TRIBUNALS MAY FORWARD DETAILS OF WHISTLEBLOWING FROM APRIL 2010

Background

The Public Interest Disclosure Act 1998 amended the Employment Rights Act 1996 in order to protect employees from suffering a detriment (including disciplinary action, loss of work or pay, or victimisation) if they make a "protected disclosure" about alleged wrongdoing or dangerous practices in the workplace to their employer or another prescribed person (usually known as "whistleblowing").

An employee who considers that he has suffered such a detriment is able to bring a claim in the Employment Tribunal. Claims for whistleblowing in the Employment Tribunals are on the increase, with around 1,700 claims bought in 2008 (the most recent year for which statistics are available).

The Employment Tribunal assesses whether the employee has suffered any detriment but not generally whether there is any substance to the alleged wrongdoing on which the claim is based. The Government is therefore introducing a new right that enables Employment Tribunals to send copies of the Employment Tribunal claim form, or extracts from it, to the appropriate regulator. These will be the same as the list of prescribed persons in the whistleblowing provisions. For example, a disclosure concerning a taxation matter would be referred to HM Revenue and Customs as the appropriate regulatory body, matters relating to the sale of goods or the supply of services to the Office of Fair Trading, the operation of banks to the Financial Services Authority, etc. The Government's website states that the new right means that the regulator could take action where appropriate in accordance with its [the regulator's] aims, practices and procedures. It would then be a matter for regulators to address instances of unlawful, fraudulent or dangerous behaviour.

The new right is made under the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010 and comes into force on 6 April 2010. It applies to claims received by Employment Tribunals on or after that date.

How will it work?

The Employment Tribunal will have the statutory power to forward a claim form (or extracts from it) to a regulator provided that:

- The claimant has consented (by ticking a box on the Tribunal claim form); and
- The claimant has alleged in the Employment Tribunal claim that he has made a protected disclosure

Where a claim is forwarded to a regulator, the Respondent employer will be notified. The regulator will then assess the information in the usual way.

Action for employers

There is no specific action which employers need to (or indeed can) take except to be aware that this is a step which will be open to employees and to Employment Tribunals.

As it is the Employment Tribunal's role to assess whether the claimant has suffered a detriment, but not whether the alleged wrongdoing or dangerous workplace practice, etc actually breaches the relevant legislation, the involvement of a regulator should not in theory slow down or affect the progress of the Employment Tribunal claim itself. However, it may be that employers may be a little more circumspect about the disclosure or discussion of evidence if enforcement proceedings are threatened or in train at the same time.

It remains to be seen how the new right will operate in practice. For example, regulators are likely to need considerably more information than is contained in the claim form in order to be able to assess a matter fully. And employers may be concerned about the wider disclosure of the claimant's allegations, although the Government have stated that the process should not release unsubstantiated allegations into the public domain, at least not unless the employee chooses to do so.

Employers may also face the prospect of employees and/or their representatives using the Tribunal's ability to forward details of the alleged wrongdoing as a negotiating tactic.

'employers may be a little more circumspect about the disclosure... if enforcement proceedings are threatened or in train at the same time.'

FURTHER INFOMATION:

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