

Sick Leave Q&A

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Sick leave and medical certificates are a common concern for employers. This week *WorkplaceOHS* has put together a compilation of sick-leave-related queries answered by the ever-popular Ask an Expert service.

The term 'sick leave' is used throughout this article. The term now covering sick leave in legislation is 'personal/carer's leave'.

Can a worker refuse to state their illness?

An employer is entitled to insist on a medical certificate as a matter of company policy to substantiate a claim for sick leave.

The contents of the certificate are matters for the treating doctor. The doctor may consider that confidentiality is relevant and decline to give details in the certificate although symptoms would normally be expected in substantiating why the employee cannot do the work.

If the employer wishes to be assured that there is no ongoing or potential OHS issues, that question could be posed to the employee who would be expected to answer honestly, although the issue of a qualified opinion could arise in the event of a further injury or illness.

However, it may be prudent to provide the treating doctor with a copy of the employee's job description or job analysis that sets out the physical/psychological requirements of the position to ensure that an informed opinion is provided prior to the employee resuming normal duties.

Alternatively, if there are grounds for being concerned about the ongoing ability of the employee to do the work, the employer can offer to arrange another medical opinion with the provision of the requirements of the position — at the employer's expense — and guarantee the employee that any findings would be treated confidentially.

Can we insist on seeing an original doctor's certificate?

An employer cannot insist on an original certificate from the employee because, often, the original has been forwarded to the insurance company (if a workers compensation insurer is involved) and employers often receive a fax or photocopied version.

An employer can, however, check to see whether the employee has attended the doctor's surgery and that a certificate was issued.

If there are any concerns regarding the validity of the injury (in a workers compensation matter), these need to be referred to the insurer so they can follow up on any issues; and they will obtain the original certificate if they have not received it.

Should we accept back-dated medical certificates?

Medical certificates should not be back-dated, although the employer should consider the circumstances in each case.

For example, a medical certificate back-dated one day may be acceptable to an employer, particularly as there may be evidence from co-workers confirming the onset of the employee's illness prior to obtaining the medical certificate; whereas, a certificate back-dated a week should be challenged by the employer.

If an employee informs a doctor that he or she was unable to attend work on a given day because of a certain condition, the doctor's certificate must be dated according to the date of examination, not the date the worker conveyed their inability to attend work.

The certificate can only state that on the day(s) the absenteeism occurred, the patient stated he or she was suffering from the described condition. However, the doctor is free to state if signs or symptoms still persist at the time of examination.

Medical practitioners are also bound to observe the 'professional code of ethics' as required by their registered professional body, and there is a clear indication in these codes that back-dating is not good practice.

You could consider a workplace policy that states something like:
'Medical certificates should relate to an employee's condition at the time of the examination. Certificates that are back-dated will not necessarily be accepted by the employer.'

This position is consistent with the policy of the Australian Medical Association.

Additional evidence of illness may be sought from any employee presenting a back-dated certificate. If the employer deems the evidence unsatisfactory then personal/sick leave may be refused.'

Can we question a worker's sick leave claim?

An employer may doubt the veracity of such a sick leave claim, even if the worker has enough sick leave accumulated and a certificate is provided, and is entitled to challenge a claim.

However, where there is a doctor's certificate involved, an employer would need compelling evidence to reject a claim.

What happens if a worker is ill while on annual leave?

There are no provisions in the state annual holidays legislation or the federal workplace relations Standard on annual leave or sick leave that allow for a process to offset annual leave against sick leave, even if a person supplies a medical certificate. However, the National Employment Standards (NES), which will be operative from 1 January 2010, will allow the offsetting of annual leave against personal/carer's leave.

Where a pre-WorkChoices workplace agreement applies to an employee, the relevant agreement should be checked. If there is a provision for sick leave on annual leave, then that will determine the matter. Otherwise, there is no entitlement.

How long can an employee stay on sick leave without pay?

Continued illness per se is not grounds for dismissal unless the illness amounts to an actual inability to fulfil the contract of employment — ie with limited prospect of this situation changing.

An employee is obliged to provide reasonable service in order to fulfil his/her part of the employment contract. There are naturally times of sickness, etc.

However, when the situation is reached where the employer is receiving no work from the employee and there is little or very uneven supply of labour from the employee, the employer is entitled to challenge the continuation of the employment relationship.

The employer would normally discuss the matter with the employee and try to resolve the matter. This would be the preferred line of approach as the employee may argue disability discrimination if the employee is not consulted.

If there is no reasonable prospect of resumption of work, then the employer could act to terminate the contract. If an individual employee contests an employer's assessment of the on-going prospects of returning to work, professional advice should be sought.

Section 659(2)(a) of the Federal [Workplace Relations Act 1996](#) provides that an employee genuinely ill who in a 12-month period accumulates more than three months of absence(s) (some of which is not paid sick leave) is not protected by the unfair dismissal provisions.

Tribunals in other jurisdictions, although not definitive in this regard, would be influenced by the federal legislation.

Can an employee resign while on sick leave?

Unlike the giving of notice when absent on annual leave, industrial tribunals have usually determined that notice of termination may be given by either the employer or employee when the employee is absent on sick leave because the period of such leave is necessarily uncertain.

An employer must not terminate an employee for the reason of the employee's absence on personal/carer's leave, because this may constitute unlawful dismissal.

The employer should ensure the form of the notice provides sufficient evidence of the employee's intention to terminate or, if the employer is giving notice, that written notice is given to the employee via registered mail. When giving notice, either party must specify a date on which the termination of employment will occur.

The employer should insist an employee gives notice of termination in writing when absent on sick leave.

The period of notice is inclusive of any periods of absence by an employee during the notice period including an absence on personal/carer's leave, compassionate leave, jury service and public holidays.

Can we make a sick employee redundant?

If the employee's absence on stress leave is not the reason for the employee being selected for redundancy or the employee is not receiving workers compensation for the stress leave, termination of employment could proceed provided the criteria applied by the employer in selecting an employee for redundancy are objective and unbiased.

An objective selection criteria should relate to the skills, experience, training and performance of individuals compared with the current and future needs of the organisation.

If the stress leave is subject to workers compensation, there may be some prohibition of termination of an employee's employment under the relevant state or territory workers compensation statute.

Under the Workplace Relations Act, it is unlawful to terminate an employee on the basis of the employee's 'temporary absence (three months in any 12 months) from work due to illness or injury'. Although this provision would only apply if the employer's reason for terminating an employee is because of the employee's absence from work; it does not provide a blanket protection from dismissal in the case of redundancy.

Also, the employer should refrain from using any discriminatory criteria (eg age or race) when selecting an employee for redundancy because this approach may be in breach of a relevant federal, state or territory anti-discrimination statute.