

Employment Bulletin

31 March 2010

The new 'fit note'

The WS Society's Employment Network of experienced legal and HR professionals meets regularly to discuss practical application of legal provisions. The group met recently to discuss the new fit note system.

Introduction

On 6 April 2010 sick notes ceased to exist and were replaced by "Statements of fitness for work" or fit notes. Fit notes are intended as a more helpful device to assist employees to return to work.

What is a "fit note"?

The fit note differs from a sick note by requiring the attending GP to state that the employee is either:

- a. not fit for work,
- b. may be fit for work, or
- c. fit for work.

If a GP assesses an employee as "may be fit for work", they can suggest the following changes:

- a. returning to work gradually;
- b. temporary change in hours;
- c. different duties or tasks;
- d. other support, e.g., no heavy lifting.

The GP can also give advice about the impact of the illness or injury and suggest common ways in which the employer could support the employees return to work.

Content of fit note

There has been little guidance for GPs as issuers of fit notes, and therefore there may be little practical difference from a sick note, particularly as it is unclear how a GP will fill in a fit note when they know little about the employee's workplace.

There is a risk that smaller employers may suffer as they are less likely to have

a robust return to work policy, and may not be aware that the directions on a fit note are not necessarily compulsory.

Financial impact

There are significant potential difficulties to a phased (e.g., part time) return to work:

- a. If an employee returns to less hours and is unable to utilise any leave to "top up" their earnings, they will receive less money for returning to work than if they had remained off sick.
- b. If an employee returns to "alternative duties" that are at a lower pay grade, this may not be financially sustainable long term and may cause tensions in the workplace between employees.
- c. If an employee returns to a "make-shift" position that was created solely to enable them to return to work, it is unclear what happens when that position no longer exists e.g., technically a redundancy?

Workplace adjustments

A GP may not be the most appropriate person to recommend workplace adjustments – occupational therapists and rehabilitation providers may be better suited to the task.

There is a risk of grievances arising where a GP assesses an employee as "may be fit for work" and the employer will not, or cannot, make the necessary workplace adjustments. This is of particular concern for an employee who has exhausted their entitlement to sick pay.

Some unions have indicated that they consider that an employee should not be held liable for any delays or difficulty in implementing workplace adjustments and should continue to receive sick pay, despite this being opposed to the default position in the Act.

Risks

An employee may be more likely to request a “fit for work” or “may be fit for work” fit note when their sick pay has been exhausted, rather than as part of the ongoing rehabilitation process.

An employee who returns to work early may be more likely to re-injure themselves, potentially resulting in a rise in insurance premiums and increased risk assessments to be undertaken by employers.

Practical points

- Education needs to be provided to employers about their rights and responsibilities under the fit note system.
- More guidance and training is required for GPs about their responsibilities when issuing fit notes.
- Employers must carefully consider each situation on a case by case basis and ensure they have structured back to work programmes.
- Employers should consider alternative dispute resolution procedures, such as mediation at an early stage of any grievance associated with sick leave.
- If an employer refuses a request to return to work based on a fit note with work adjustments, the refusal

will need to be robust and well articulated.

- Employers should consider rewording certain provisions of their employment contracts.
- For highly unionised workplaces, contact the unions before any potential grievances arise around sick employees returning to work to attempt to agree a position to avoid any future conflict.

Other issues

Employees continue to accrue annual leave while on long-term sick leave, and will be entitled to carry this leave over until they are fit to take it – may lead to employees being disciplined and dismissed more readily and quickly.

An employee’s employment does not necessarily end when they enter onto a long-term health scheme. It is appropriate to consider changing the terms and conditions of the scheme, employment contracts or both, to mutually terminate employment when an employee goes onto a such a scheme.

Conclusion

It is too early to say whether the introduction of fit notes will have a marked effect on long term sick leave, and there are a number of potential pitfalls which will require careful negotiation. However, fit notes also have the potential to result in better long term sick leave management and encourage a more collaborative process that benefits both employers and employees. Time will tell.

With thanks to David Patterson and Lynsey McAfee, Interns, WS Society, for their assistance in preparing this bulletin.

Next Employment Bulletin:

The group meet next on 26 May 2010 to discuss the potential abolition of the compulsory retirement age. To participate, contact Michael Flynn on 0131 220 3249 or mflynn@wssociety.co.uk