



Managing ill and injured employees

For employers, effectively managing ill (whether physically or mentally) or injured employees is one of the most problematic areas of human resource management. It is fraught with numerous regulatory and litigation risks, including for managers and HR professionals personally implementing an employer's decision.

This factsheet contains some basic hints and tips to guide employers through this difficult area.

Is the personal/sick leave authorised?

In any situation involving an ill and injured employee, one of the first things to determine is if the employee is entitled to either paid or unpaid leave.

These entitlements can be derived through either the National Employment Standards (NES), or other instruments (such as an applicable collective agreement or modern award).

For example, a full time national system employee as a minimum is entitled to ten days of accrued paid personal/carer's leave (includes sick leave) for each year of service. This leave accumulates from year to year.

The NES conditions for the entitlement are:

- the employee is not fit for work because of the illness or injury;
- the employee must give notice as soon as practicable, and must advise of expected period of absence; and
- if required, "reasonable" evidence to be provided.

Have you spoken to the employee?

If an illness/injury continues for a period of time, or there are indications that an employee may be suffering from an undisclosed health condition that is affecting their work performance, it is important to communicate with them very early on.

In the first instance, this should take the form of an informal discussion. This will show support to the employee and enable the employer to get a better understanding of how the illness/injury may be impacting the employee in the workplace.

Some employees will be reluctant to discuss their health with the employer, particularly if they are suffering from a mental health condition. This may require you to be particularly sensitive in your approach – for example speak with the employee in a private room, and reassure the employee that any information provided will be treated (as far as possible) sensitively and confidentially.

Keep records (including file notes of conversations and related correspondence) and follow up the employee if necessary. These records will not only assist in keeping a record of what has occurred, they may also be used (if necessary) in defending your actions and decisions.

Do you need further medical information?

If an employee does disclose that they are suffering from an illness/injury, and that this may be affecting their employment, you should obtain further medical evidence to determine:

- the type and severity of injury or illness (diagnosis);
- the prescribed medical treatment and possible adverse side effects;



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- the likely recovery time (prognosis);
- the ability of the employee to safely perform the role and the inherent requirements of the position (genuine occupational requirements); and
- what (if any) reasonable adjustments could be made to accommodate the injury or illness.

Employers should first ask the employee for a report from their treating medical practitioner, or alternatively their consent for you to contact them. Speaking directly to the employee's treating practitioner, with their consent, can be invaluable in understanding your employee's condition.

If this consent is not forthcoming, or, if the treating medical evidence is inadequate, it may be appropriate to direct the employee to attend an independent medical assessment.

If an employee refuses to cooperate it is reasonable and lawful for you to direct the employee to attend an employer appointed medical assessment. The employee should be informed that non-compliance with this direction may be treated as a disciplinary matter.

Has the employee's health impacted their behaviour?

Gathering information will be especially important if an employee's physical or mental health condition could potentially be influencing their unsatisfactory performance or conduct.

Employers need to be vigilant and keep their eyes open for hints of mental or physical health conditions that maybe impacting on an employee's performance. A medical condition (for example mental illness) may provide a strong reason for excusing instances of misconduct, which would ordinarily lead to dismissal.

Employers should confer with the employee about any concerns regarding performance, conduct or absence from work and discuss with them the medical evidence.

Employers should also consider whether or not they need to temporarily suspend investigations while an employee is unwell. However, a prolonged suspension may warrant medical investigation and independent assessment.

What are the legal risks?

Managing ill and injured employees can be fraught with many legal and regulatory risks. For example, employees can claim:

- unlawful discrimination under Federal or State laws based on their disability or impairment;
- adverse action (i.e., dismissal or unfair treatment) under section 351 of the Fair Work Act because of a physical or mental disability - unless, for example, this would not amount to unlawful discrimination under the anti-discrimination laws or because of the inherent requirements of the position;
- that they are protected under section 352 of the Fair Work Act from being dismissed because they are only temporarily absent from work (due to a illness or injury); and
- unfair dismissal under Part 3-2 of the Fair Work Act (for example if their dismissal was harsh, unjust or unreasonable because of their illness or injury).

If the employee is successful with their claims employers can be exposed to various orders, including for:

- reinstatement of the employee (including on a temporary basis);
- compensation; and



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- civil penalties of up \$10,800 (for an individual) and \$54,000 (for a corporation) including against persons “involved in” the contraventions.

Have you provided the employee with procedural fairness?

Before making any important decisions in relation to the employee you should ensure that procedural fairness is provided to them. This includes:

- ensuring that you have gathered reliable and appropriate evidence;
- considering obtaining independent external industrial or medical advice;
- acting in accordance with medical evidence (do not play doctor). If the medical evidence is unclear ask further questions;
- considering talking to the employee (and their support person/representative) in person;
- providing the employee with relevant material and information to allow them respond; and
- following your own agreements, policies and procedures.

Ultimately dealing with employees who are ill or injured can be complicated and should be managed and dealt with on a case by case basis.

For further information, please contact HopgoodGanim Lawyers’ Industrial and Employment Law team for advice specific to your business needs.

<http://www.hopgoodganim.com.au>

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