

# The LA employment alert!

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## Sickness Absence –

### Common problems and how to deal with them

Plus:

- Your questions answered by our team of experts


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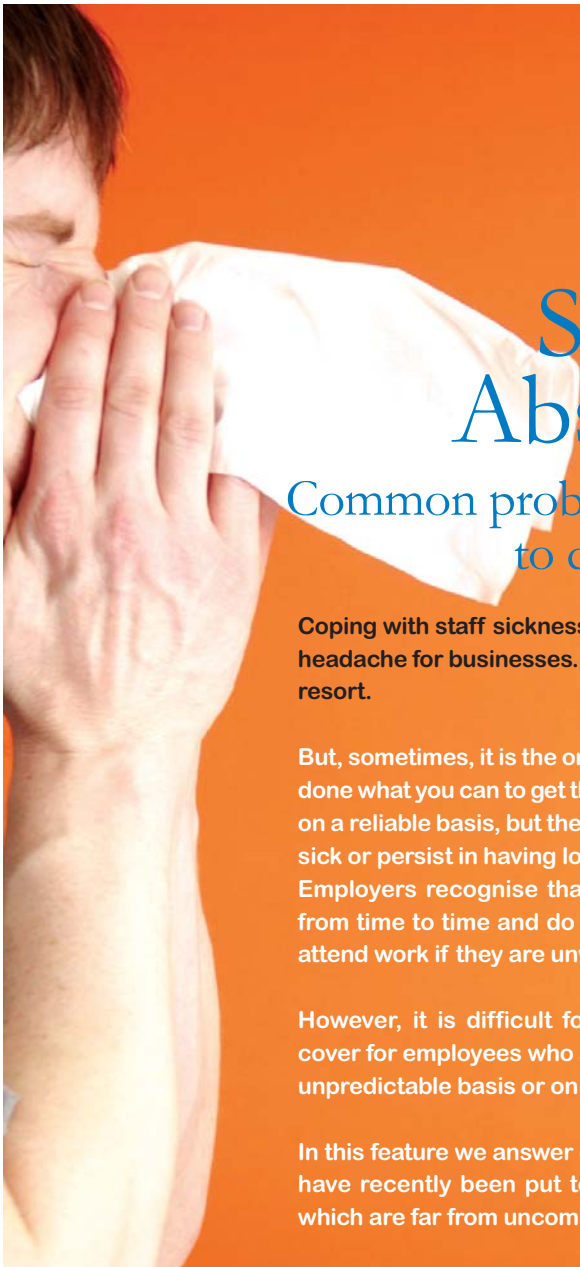
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# Sickness Absence — Common problems and how to deal with them

**Coping with staff sickness absence can be a major headache for businesses. Dismissal is always a last resort.**

But, sometimes, it is the only option where you have done what you can to get the employee back to work on a reliable basis, but they are still off on long term sick or persist in having lots of short term absence. Employers recognise that employees will be sick from time to time and do not expect employees to attend work if they are unwell.

However, it is difficult for businesses to provide cover for employees who are sick on a frequent but unpredictable basis or on a longer term basis.

In this feature we answer one or two questions that have recently been put to us by employers – and which are far from uncommon.

## Frequent short term absences

### Question

I have a Practice Nurse who, over the last year or so, has had lots of time off – odd days here and there. She has just been given a written warning for shouting at a patient. Can I now give her a final written warning for her ongoing absence problems?

### Answer

The first point to remember is that sickness absence is not a disciplinary issue.

The procedure you should follow is almost the same as the disciplinary procedure.

But – it is not disciplinary. The employee is not to blame.

Be careful not to combine disciplinary and health issues. You have to deal with these separately.

You cannot issue a written warning for misconduct and then move on to a final written warning if the employee has lots of odd days off sick.

If you combine disciplinary and sickness issues in the same process, and go on to dismiss, the dismissal is likely to be unfair.

### Question

When should I start the sickness absence procedure?

### Answer

Where the level of absence becomes a problem.

What level is a problem?  
It's up to you.

Look for patterns and trends. Certain days of the week or certain shifts being missed. Days off before or after holidays.

### Question

What does the procedure actually involve?

### Answer

It's quite straightforward really. See Checklist – but be aware that this is just a brief summary and is not comprehensive. You should take legal advice before taking action.

## Checklist

### 1st Step

- Informal meeting.
- Go through absence records and the reasons given for absences.
- Explain why you are concerned. Ask for an explanation.
- Ask if there might be any underlying medical reasons. If there might be, obtain a medical report from their GP and/or consultant.
- Write to the employee referring to the absence history, the problems this is causing the business and explaining that an immediate and sustained improvement is expected.

### 2nd Step

- If there is further sickness absence, move on to a formal meeting.
- Go through the same discussions as with step 1.
- Following the meeting, issue a formal written warning.

### 3rd step

- If there is further sickness absence, hold a further formal meeting.
- Follow up with a final written warning.

### Final step

- Final meeting.
- Dismissal and the right to appeal.

## Long term absences

### Question

We have a receptionist who has been off sick with mental health problems for approximately 3 months. We could really do with organising a permanent replacement. What can we do? Can we do something now or do we have to wait?

### Answer

How you deal with this absence may differ depending on whether or not you operate a Permanent Health Insurance (income replacement during incapacity) scheme.

If you operate such a scheme the employee might lose benefits under the scheme if they are dismissed.

So, it might make sense to keep the employee on and leave it to the insurers to take the necessary steps to facilitate a return to work – and possibly stop paying them if they are able to return but do not do so.

You do not have to wait too long before starting the procedure.

### How long should you wait?

It's up to you. It depends on how urgent your need is to have someone doing the job on a reliable basis.

In this case, I see no reason to wait any longer.

As regards resolving the situation, the procedure is summarised in the box opposite.

### Conclusion

These situations aren't nice but you have to deal with them.

Don't ignore them.

Act promptly and consistently – and persevere.

If you follow a proper procedure and take account of any disability issues, it will be hard for an employee to bring/succeed in a claim against you.

## Procedure

### 1st step

Write to the employee. Explain why you want to obtain a medical report and that you need their consent to do so.

Once you have their written consent, write to their GP and/or Consultant.

### 2nd step

Once you have the medical report, write to the employee with a copy and invite them to attend a meeting. At the meeting, discuss the medical report, prognosis, likely return to work, any adjustments that you might be able to make to facilitate a return to work etc.

### 3rd step

If the employee is unable to return to work in a reasonable time frame either to their old job or any new job that might be available – taking into account any adjustments that you can reasonably make – you can dismiss (on notice). You must give them the right to an appeal.

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# Can employees bring a lawyer to a disciplinary hearing?

## Employees have the statutory right to be accompanied at disciplinary hearings by a work colleague or trade union official.

This really amounts to representation since the companion can do pretty much everything apart from answering questions put to the employee.

### What about legal representation?

Are employees entitled to be represented at disciplinary hearings by a lawyer?

The answer is yes – in certain circumstances.

### What circumstances?

Where the outcome of the hearing might have grave consequences for the employee – e.g. where the employee works in financial services and the hearing relates to their honesty, or the employee works with children and the hearing relates to allegations of inappropriate contact, and the hearing could result in them being prevented from working in their chosen career.

Note: The recent case in which this

issue was raised involved a teacher accused of making sexual advances to a 15 year old pupil.

### Action Points

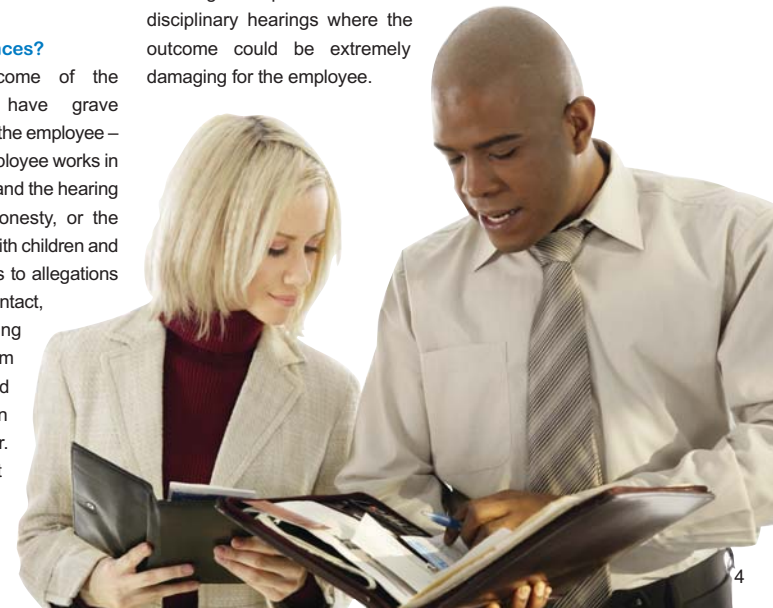
For most employers and in most cases, this won't be an issue.

But, if you operate in, for example, financial services, the care sector, accountancy, you will need to consider carefully any requests for legal representation at disciplinary hearings where the outcome could be extremely damaging for the employee.

**If the employee has a lawyer at the hearing, do you need one?**  
Not necessarily.

Look at each case separately.

In some cases, it will be helpful to have your lawyer there. In other cases, it will be better to deal with it yourself, with some help from your lawyer in preparing for the hearing.





# Your Questions answered by our team of experts



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## Question

My workers are contracted to work 40 hours per week - these are their normal hours of work. They are not guaranteed to be offered overtime, but if they are offered any overtime they are obliged to work it. They habitually work around 70 hours per week. However, when they are on holiday, I only pay them for 40 hours and not 70 hours. Am I paying them correctly? Is it a big deal if I am not?

## Answer

### Are you paying them correctly?

The starting point is that as long as you are not obliged to offer overtime, the employee is only entitled to receive holiday entitlement and pay based on the fixed 40 hours. Overtime will need to be taken into account when calculating holiday entitlement and pay if there is an obligation on both sides.

On this basis it appears that your workers should receive holiday pay based only on their basic hours.

However, there is some risk in your situation as a result of the overtime being habitually offered. It is possible that an employee might argue that the offer of overtime has become guaranteed or that the normal hours of work are no longer 40 as stated in the contract but the 70 or so that they habitually work each week. It is difficult for an employee to successfully argue that a term has been implied into an employment contract, if there is an express provision to the contrary - but there is a risk.

Practically speaking, I would recommend that, if you are proposing to revise employment contracts at some point, you take a close look at the wording regarding hours of work and holidays to confirm very clearly what the basic/normal hours of work are, that they will be paid holiday pay based on those hours and that the company is not obliged to offer overtime.

**The cost of getting it wrong**  
Unfortunately at the moment we don't know how costly it might be



if you do not calculate holiday pay in the correct way.

This is because we are waiting for a House of Lords decision on this point.

The issue is - should workers be able to bring a claim solely under the Working Time Regulations (WTR) or, alternatively, for unlawful deductions from wages?

## What does it matter?

If workers can only bring holiday pay claims under the WTR, they have to bring those claims within 3 months of each occasion on which their employer does not pay their holiday entitlement correctly - which might be the date of termination if they are to be paid in lieu of accrued but untaken holiday on termination. Occasions of non-payment would not be linked together. So, if they do not claim within the 3 months, they lose the right to do so. If, therefore, workers can only bring claims under the WTR the employer's liability will always be limited - claims cannot be brought for under payments going back

years and years.

If, however, workers can bring a claim for unlawful deductions from wages in respect of under payments of holiday pay, any under payments can be linked together. The effect would be that if they bring a claim in relation to the most recent under payment, within 3 months of that underpayment, they can also bring claims in respect of previous underpayments. So, they can bring claims in respect of under payments going back years and years.

You will see, therefore, why the House of Lords decision is so important. We expect to have a decision within the next few months.

We will not be able to quantify your potential liability for underpayments until we have the House of Lords decision, I am afraid - although you will be able to do a best case/worst case calculation.

I should just mention that another

possible avenue for an employee to bring a claim would be for breach of contract. But, whether this claim could be brought would depend on what was provided for in the contract as to holiday pay. Employees can bring a claim for breach of contract in the Employment Tribunal if their employment has terminated (the usual three month time limit applies) or in the courts during or after termination of employment (the time limit is 6 years from the breach). These claims are rare since the wording in the employment contract normally does not assist the employee - you will need to check the wording of your contracts to establish whether such claims might be possible.

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