

Is the New Fit Note Fit for Purpose?

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Revised fit notes came into operation in Northern Ireland from 6 April 2010 replacing the existing “sick note” which has been in place since 1948. However, this is more than just a simple change to a document as it represents a major overhaul in the sick note system which has been modernised to help address the large number of staff on long term sickness absence. The Government’s intention is to encourage employees back to work quickly and to ultimately reduce the vast number of incapacity benefit claimants. The new fit note focuses on what can be done to assist an employee’s return to work. The original proposal to give GPs the option to certify an employee as “fit for work” was rejected in favour of the more ambiguous “may be fit for work”. If this option is considered appropriate, a GP can suggest adjustments to the work or workplace which would enable the employee to go back to work. Focusing on what the employee is able to do should help to facilitate the employee’s return to work. If however, the employer is unable to accommodate the adjustments proposed by the doctor, the employee will be considered not fit for work.

The introduction of fit notes should assist employers to manage long-term sickness absence by encouraging employees and employers to evaluate whether there are any aspects of the employment that the employee can undertake, notwithstanding the sickness reason. Clearly, fit notes will have to be utilised properly by both doctors and employers if they are to achieve their full potential. However, this new approach has already been criticised for being ineffective in relation to certain conditions such as back pain. It is important to stress that employers’ duties to pay SSP and make reasonable adjustments under the Disability Discrimination Act 1995 remain unchanged. Employers must remain wary of contravening DDA where an employee’s health problems qualify as a disability.



Please note: The content of this article is for information purposes only and further advice should be sought from a professional advisor before any action is taken.

What the Law Says...

To access a copy of the Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010 which include a pro forma of the fit note, please click here (www.opsi.gov.uk).

What the Papers Say...

The media's reaction to the advent of fit notes has varied greatly with headlines ranging from 'Fewer staff to be signed off under new fit notes' (Daily Telegraph) to the more sensationalist 'Crackdown on Skivers' (Daily Mail). Everyone seems to have quoted the Government statistics of 172 million working days lost every year due to sickness (although the Mail left out the word million) with 2.6 million people claiming incapacity benefit. The cost to the economy is estimated at £100 billion – greater than the entirety of the NHS budget.

The Sunday Times and the BBC have reported some novel attempts at reducing sickness absence with one employer in Liverpool offering staff with good attendance the chance to win a car. Generally, the fit note has been welcomed by the CBI, the CIPD and politicians with the Belfast Telegraph recently quoting Margaret Ritchie who said that there is clear evidence that work can have a positive effect on health. The BMA has also welcomed the new fit note but warned that GPs should not be expected to police incapacity benefit claimants.

What the Fit Note Says...

The key difference between the old sick note and the new fit note is that previously GPs had to say if an employee was or was not fit to work. Now, GPs must advise if the employee is either:-

- Not fit for work, or
- May be fit for working taking account of the "following advice".

The second option represents a fundamental shift in dealing with ill employees. An employee may have mental health problems but this may not necessarily prevent them from working which will provide employers greater flexibility in managing sickness absence. A GP should suggest ways of helping an employee return to work, outlining on the note which work the employee can do in spite of their illness. GPs should advise employers about the effects of the employee's health condition and suggest what types of adjustment an employer could make to help the employee return to work.

An employer can then discuss with the employee appropriate adjustments such as:-

- A phased or gradual return to work;
- Altered hours;
- Flexible hours;
- Time off for treatment;
- Amended duties; and
- Workplace adaptations.

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Employers are not legally bound to follow the GP's advice and if it is not possible to provide support to an employee an employer can use the statement for sick pay purposes as if the GP has advised not fit for work.

The Government has emphasised that it is a myth that an employee has to be fully fit for work: employees do not need to be signed back to work by a GP. If an employer requires a medical opinion stating that an employee is fit for work this is a matter for the employer to arrange with an appropriate medical expert or the GP and is not a legal obligation.

GPs should also state how long the advice contained in the fit note will apply for. An employer should agree the return to work with any appropriate adjustments in place for a specific timescale. In the first six months of any health condition, the maximum period a GP can issue a fit note for is three months, this represents a reduction from the previous six month period.

Issues for Employers

It remains to be seen how the fit notes will be welcomed by staff, employers and GPs alike and furthermore how the Tribunals might deal with any legal issues arising, however, some of the potential issues and difficulties for employers that we envisage are:-

- Will the fit notes lead to further bureaucracy for employers and HR staff who are already burdened with paperwork;
- Will HR personnel be adequately prepared and trained for the new regime;
- Will employers have the resources, systems and staff to deal with the new fit notes and act upon any "adjustments" suggested by the GP;
- By giving examples of "adjustments" to be made in order that the person may be fit for work, is this extending the employer's obligations under the Disability Discrimination Act 1995 in cases where an employee is not considered to be "disabled";
- Will there be other health and safety issues in relation to the suggestions put forward by GPs;
- What happens where an employee fails to agree to the proposed "adjustments";
- Is it reasonable for an employer not to agree to the "adjustments" suggested by a GP;
- Are GPs adequately trained in relation to the new regime;
- It may not be easy for GPs to make judgments between "unfit for work" and "may be fit for some work" as they may not know enough about the nature of the work;
- Where an employee refuses to return to work even when adjustments have been made it may be difficult for an employer to decide whether to invoke a disciplinary or capability process or to stop paying SSP;
- Other staff may feel hard done by if another employee achieves a variation to their duties on what may be viewed by them as spurious health reasons;
- There could be an increase in DDA claims as a result of employers refusing to carry out adjustments in appropriate cases;
- There could also be an increased risk of personal injury claims from employees who are injured who are back at work following a fit note saying they may be fit to return.

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Action Points for Employers

- Employers should now review their contractual documentation as well as absence and return to work policies to ensure they are compliant with the new fit note system.
- Employers should also check ancillary documentation, such as self-certification forms, to ensure sickness absence obligations are appropriately worded.
- Line Managers and HR staff should receive training on the new fit note system with a focus on encouraging employees to return to work as soon as possible taking into account appropriate adjustments.
- Avoid breaching the Disability Discrimination Act 1995 when dealing with the new fit note.
- Be aware that the SSP regime remains unaffected, however difficulties may occur where an employee may be declared fit for work but the employee remains absent because an employer cannot provide the necessary support. In these cases, employers should treat the note as a “not fit for work” note and pay SSP in the usual way. It is interesting to note that government guidance states that SSP is only a minimum provision and that if an employer is considering a return to work which involves reduced hours, it may be cost effective to consider paying voluntary sick pay for the hours not worked due to illness or injury, even where SSP does not apply.

Useful Links

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