Employment*Brief*

January 2017

Managing Sickness Absence

January, often a month of colds, flu and Norovirus, can stretch an employer's patience and put pressure on its ability to provide a continuing service to its customers. All employers should ensure that they take a breath and make sure each instance is dealt with fairly and consistently. To that end we are supplying below a check list of issues to consider, not all will be relevant to every case but it should prove a useful starting point.

Documentation

- Check (and comply with) any relevant sickness or absence procedures and employment contract provisions.
- Keep confidential records of medical certificates, correspondence, telephone calls and meetings.

Investigation

- Investigate nature, extent and likely duration of illness. Ask employee for information and obtain a medical report if appropriate. If absence is stress-related, refer employee to any stress policy or counselling services on offer.
- If absences are short-term and intermittent, investigate whether there is any underlying cause (medical or otherwise). If necessary, follow capability or disciplinary procedure, offering practical guidance and assistance, setting timescales for improvement, and giving warnings where appropriate.
- Keep in contact with employee throughout procedure, especially in relation to medical evidence received prior to making adjustments, identifying an alternative position or taking a decision to dismiss.

Disability and reasonable adjustments

- Consider whether employee is disabled for the purposes of the Equality Act 2010, relying on medical evidence as required.
- Consider whether any adjustments (for example to employee's duties, workplace or working conditions) would facilitate their return to work (or their taking less time off if absence is intermittent).
- Consider whether these adjustments are reasonable in the circumstances.

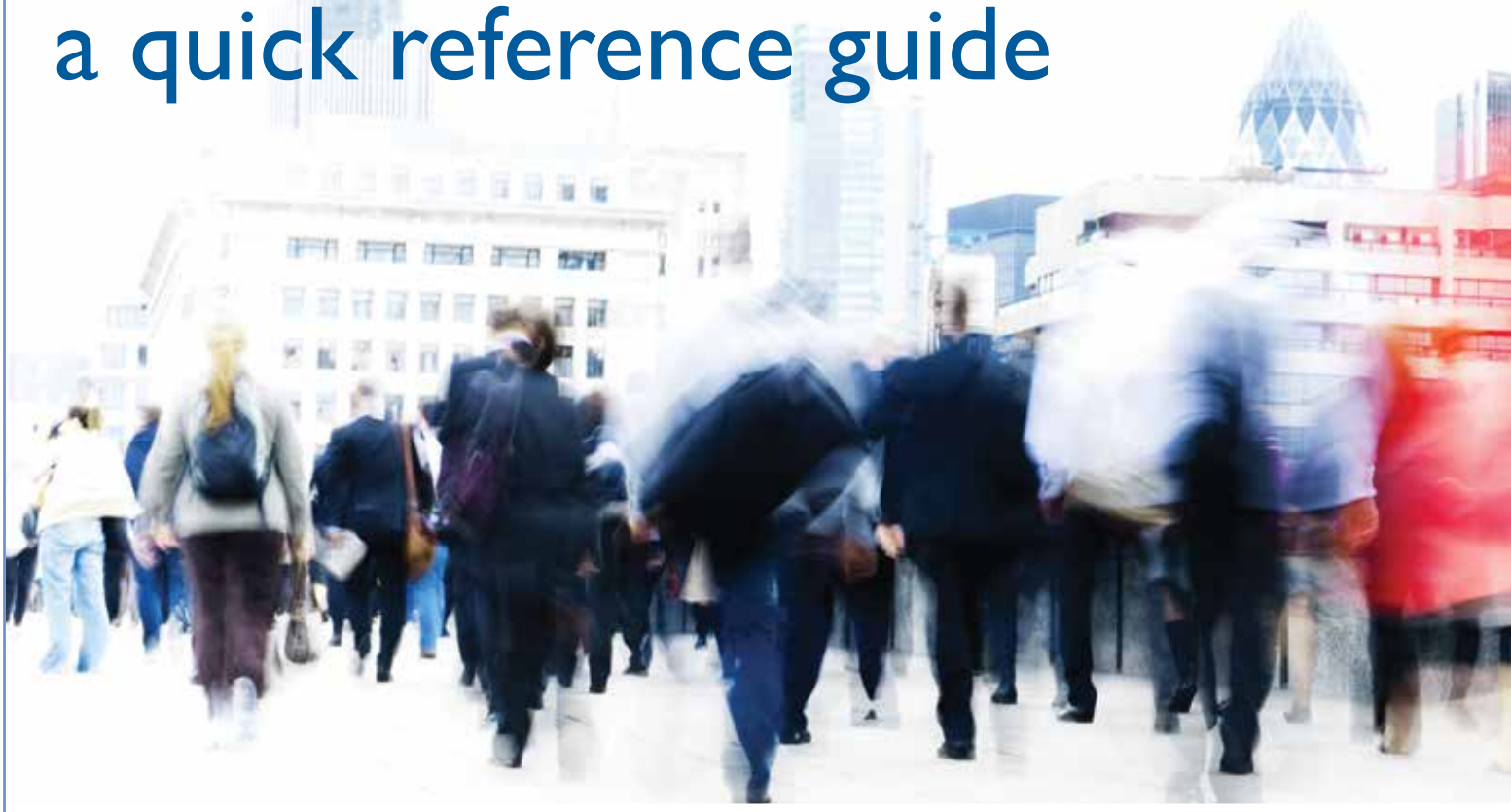
Reviewing the alternatives

- Before taking a decision to dismiss, consider surrounding circumstances, age and length of service of employee together with action taken in respect of similar circumstances in the past.
- Consider importance of employee and/or the post occupied to the business, the impact their continued absence is having on the business, and the difficulty and cost of continuing to deal with their absence, before contemplating dismissal.
- Consider whether employee could take up alternative employment or whether there are any other options that would avoid the need for dismissal.
- If employee has been absent long-term and is unlikely to return in the foreseeable future, consider claiming under terms of any PHI policy or ill health retirement (and seeking additional medical evidence for such a claim if required).
- Review medical evidence to ensure it is up-to-date. Identify correct potentially fair reason for dismissal – capability, conduct or some other substantial reason?

Contemplating dismissal

- Once dismissal is contemplated, write to employee to invite them to a meeting. Give enough information about the circumstances you are taking into account, (see above) and the possible outcomes, to enable the employee to participate meaningfully.
- Hold meeting with employee and give them the opportunity to present their case against dismissal.
- Confirm any subsequent decision to employee in writing.
- On dismissal, ensure employee's contractual and statutory entitlements are met and that they receive correct pay entitlement including holiday pay under the Working Time Regulations 1998 (SI 1988/1833).
- In the dismissal letter identify reason for dismissal, effective date of dismissal and offer employee the right of appeal from the dismissal decision.
- Hold an appeal meeting if requested by employee and confirm decision to employee in writing.

Atypical Workers
a quick reference guide



With the recent case concerning Uber and the continuing debate over zero hours contracts, much has been written about the "gig economy" where atypical working is prevalent. The queries we deal with seem to indicate that employers still are unclear about the issues that arise once the employer moves away from the full time 9-5 workforce.

Atypical work is any pattern of work which does not fit the classic or traditional concept of an employee working full-time for a single employer under a contract of service of indefinite length.

The first point to establish when considering what rights and protections an atypical worker might have is whether they are:

- An employee working under a contract of service;
- A worker; or
- Self-employed working under a contract for services.

Employees have the greatest level of protection, since the legislators initially focused on the traditional model of permanent employment of indefinite length.

However as forms of working have become more flexible, atypical workers may be found to be employees rather than workers, and so entitled to the rights and protections available to an employee. They may also be entitled to certain protection available to workers or employees for example the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 and the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002.

Below we have listed the types of atypical worker that we commonly come across and the key issues that employers need to be aware of.

Agency workers: Agency worker is a term used to describe an individual engaged by an employment business to perform work for one of the employment business clients (often referred to as an end-user or hirer). Agency workers are often used to cover staff shortages caused by illness, holidays, sabbaticals or maternity leave, in industries such as construction, in order to meet fluctuating demands.

Apprentices: An apprenticeship involves on-the-job training for the apprentice over a fixed term during which the apprentice also undertakes work for their employer. There are several methods of engaging an apprentice and further advice should be sought on the differences between a "traditional" contract of apprenticeship entered into and governed by the common law, an apprenticeship agreement entered into and governed by the Apprenticeships, Skills, Children and Learning Act 2009 or an approved English apprenticeship agreement which was introduced by the Deregulation Act 2015 in May 2015.

Casual workers: Supply their labour or services in irregular or informal working arrangements under which there is no obligation to provide or accept work. The flexibility in such arrangements may suit both employer and worker and often takes the form of one-off tasks or events or being available on an on-call basis, but there being no obligation on the worker to accept the work. The most talked of category are those working under a zero hours contract under which the employer does not guarantee to provide work and pays only for work actually done. Casual workers are often used in seasonal industries such as agriculture and tourism, or to meet fluctuating demand such as in the construction industry.

The primary issue with casual workers is whether, notwithstanding the casual basis of their work, they are actually employees. Where

working arrangements remain informal but develop a regular pattern, a casual worker may be able to show a global or umbrella contract of employment which continues to exist during the periods when they are not working. However, the question is often whether there is sufficient mutuality of obligation in existence during the periods when they are not working for a casual worker to be an employee.

Those casual workers who are not employees will be workers, as long as they provide personal services under a contract and the other party to the contract is not a client or customer of a profession or business carried on by the individual in question. If the individual is able to substitute another to carry out their work they may not be a worker.

Consultants and self-employed contractors: Many self-employed workers are engaged on a consultancy basis. However, a person who works in a consultancy or advisory capacity may be an employee. Whether an individual is self-employed or an employee will depend on the circumstances and the application of relevant case law.

Fixed-term workers: The Fixed-term Employees Regulations only apply to employees and not to workers. A fixed-term contract therefore refers to a contract of employment that, in its provisions dealing with termination in the normal course, will provide for termination on the expiry of a fixed term or the completion of a particular task.

Flexible working: The statutory right to request flexible working extends to all employees with 26 weeks' continuous service. Employers are under a duty to consider requests reasonably and to notify employees of a final decision within a three-month decision period.

Homeworkers: There is no statutory definition of a homeworker and, unlike the traditional image of someone with little job security doing tasks on piecework rates, the majority of homeworkers are now managerial, professional, technical or skilled workers. Homeworking is also more common among the self-employed. While there is no automatic right for employees to work from home, a refusal could give rise to a claim for sex or disability discrimination, in appropriate circumstances.

Part-time workers: The Regulations applicable to this area apply to all workers not just employees. They do not give full-time workers the right to switch to part-time work or vice versa. However employees of either sex may, in certain circumstances, have the right to request flexible working including a change to their working patterns, such as their working hours.

Secondees: An employee remains employed by their ongoing employer (the seconder) if they are seconded to another organisation (the host) for a specified purpose or period of time. However, questions may arise about the status of the employee particularly in relation to duties to third parties. There is little case law on how seconded employees are treated for the purposes of employment law. An employment relationship is not usually created between the seconded employee and the host. To avoid this, the host should ensure that it does not act like an employer towards the seconded employee. For example, responsibility for disciplinary processes, grievance procedures and salary reviews, (which are typically undertaken by employers) should be retained by the seconder. There is, however, always a risk that the Courts will find that in reality the host has become the secondee's employer.

Volunteers: In a genuine volunteer arrangement there will be no mutuality of obligation between the volunteer and the organisation to which they are providing services. Volunteers will generally have very limited rights unless they are workers (see atypical workers: rights and protections). For more details, see practice note, volunteering and internships: employment law issues.

in brief

Autism

The National Autistic Society (NAS) has published a report that calls on employers to curb an autism employment gap. According to the report only 16% of people with autism are currently in full-time employment. Furthermore, only 32% are in any form of paid work in contrast with 47% of disabled workers and 80% of able-bodied workers.

NAS suggests that it is barriers within the workplace that create the biggest hurdle. It suggests that relatively small adjustments could be made to assist people with autism such as allowing them to wear headphones if they are feeling overwhelmed. In addition, the charity suggests that businesses could benefit from an autistic employee's tenacity and intellectual curiosity.

A recent YouGov poll revealed that 60% of employers worry about "getting it wrong" in terms of support for an autistic employee and they don't know who to turn to for support and advice.

Marriage and Civil Partnership

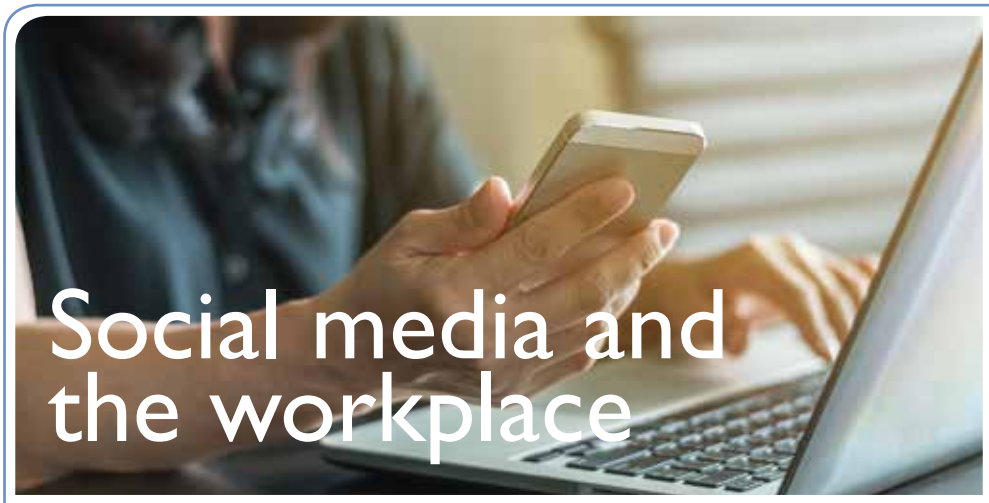
Acas has published guidance concerning marriage and civil partnership discrimination. The guide summarises the current legal protections and obligations under the Equality Act 2010. It also offers guidance to employers, employees and job applicants on how marriage and civil partnership discrimination can occur in the workplace, how it can be dealt with and how to reduce the chance of future discrimination.

Internships

The National Minimum Wage (Workplace Internships) Bill 2016-17 is scheduled to have its second reading on 4 November 2016. The Bill will propose that the Secretary of State applies the provisions of the National Minimum Wage Act 1998 to workplace internships.

The Bill follows the recent debate around unpaid internships after they were criticised for favouring young people with wealthy parents. Unpaid internships fail to offer equal opportunities to young people by excluding those who are unable to receive suitable financial support from other sources.

This is the first time a ban on unpaid internships has been considered since David Cameron blocked Nick Clegg's proposals in 2011.



Social media and the workplace

What would you do if an employee posted on her Facebook site that it would make them happy to 'hit customers on the back of the head with a pickaxe'? That question fell to one large supermarket chain when their employee made this very comment. They, thinking that they were not prepared to accept such behaviour, dismissed the lady in question for gross misconduct. The employee appealed that decision and was successful. The basis of the appeal was that the employer's internet policy set out a number of examples of behaviour which constituted gross misconduct and those which were simply misconduct. Being insulting about the company's customers was considered to fit more readily into the misconduct category based on those examples.

The law is littered with various cases on the use of social media as it develops over the years. It was commonly thought until recently that employees conducting their comments outside of work were not in a position to be challenged, but this has gradually changed as work/life boundaries are blurred through the sharing of phones and flexible working.

One employee who sent a racially offensive email outside of working hours from his home computer to a third party's home computer fell foul of the law, as that third party worked for a client of his employer. The third party then emailed it on to work colleagues at his place of employment. His argument about the right to a private life under Human Rights regulations failed due to the nature of the offensive material being circulated.

It is often the case that employers may overreact to the posting of material on social media. One case involved a You Tube posting of an employee in uniform being hit over the head with a plastic bag full of plastic bags. The video received only eight hits and was taken down by the manager after only three days with a full apology for his error of judgement. The tribunal in this case felt it was not within the range of reasonable responses for the employer to characterise this as gross misconduct to justify dismissing the employee. There was no evidence the video had caused or was likely to cause damage to the supermarket's reputation, particularly given the behaviour and the lack of viewings it received.

Much scrutiny in these cases was focused on the existence or non-existence of any social media policies and the categories of offences that constituted gross misconduct. If you intend to rely on social media matters to justify dismissals, you will need to ensure your policies are relevant to the way your employees work and are enforced consistently and fairly throughout the organisation. It is not acceptable to turn a blind eye to one employee's circulation of emails when you do not extend the same courtesy to another employee.

Finally, the employee's reaction to being questioned about this is key to how the matter can be sensibly dealt with. One employee described his workplace as Dante's Inferno on Facebook. When he was asked to stop doing this by his employer he refused and insisted in very plain English that they were not able to tell him what to do in his personal life. At the tribunal, it was agreed that those comments were likely to cause damage to the employer's reputation but, more importantly, the employer had taken steps to try to resolve this matter and the employee's response had been unreasonable. As is always with these cases, prevention is better than cure. Employers who want to ensure they have the tools available to deal with these instances quickly and decisively will need to ensure that their tool kit includes the right policies, and that these are well known to the managers who are enforcing them.

Quick reference section

Statutory minimum notice periods:
An employer must give at least:

- One week's notice to an employee who has been employed for one month or more, but less than two years.
- One week's notice for each **complete** year of service for those employed for more than two years.
- Once an employee has more than 12 year's service, the notice period does not extend beyond 12 weeks.

National Minimum Wage
(From October 2016)

16-17	£4.00
18-20	£5.55
21-24	£6.95

National Living Wage from April 2016

for 25+	£7.20
Apprentices	£3.40

Statutory Sick Pay (from April 2016)
per week £88.45

Statutory Shared Parental/Maternity/ Paternity/Adoption Pay
(basic rate) (from April 2016)
£139.58

Statutory Holiday
5.6 weeks for a full-time employee.
This can include bank and public holidays.

Redundancy Calculation

- 0.5 week's pay for each full year of service when age is less than 22.
- 1 week's pay for each full year of service where age during year is 22 or above, but less than 41.
- 1.5 week's pay for each full year of service where age during year is 41 and over.

Calculation is capped at 20 years.
Maximum week's pay is capped for dismissals after 6th April 2016 under the Statutory Scheme at £479.00

CONTACT

If you would like any additional information on any of the subjects discussed in this newsletter please do not hesitate to contact us.

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