



Employment Law Newsletter - February 2019

In this issue ...

How to stop people pulling sickies

Check driving licences

Can you safely dismiss an employee who has permanent health insurance?

Lawyer filmed watching porn at work

Check your passports

Our latest short seminar

How to stop people pulling sickies

A recent study by Automatic Data Processing (ADP) revealed that 27% of UK employees thought it was acceptable to 'pull a sickie'; the European average is 21%. Fraudulent sickness absence is unacceptable. It costs you money by reducing your productivity and your profit. It also damages the morale of those left to pick up the slack. So, what should you do?

Set clear rules

Ensure that all your employees know when, how and to whom they should report their absence, what evidence they must provide and what you will do if they don't. Accurately record the amount, time and reasons for absence so that you can identify patterns. Make it clear that you will discipline those who take time off work without good cause or without providing appropriate notification.

Enforce the rules

Non-attendance feeds on neglect. Line managers should hold a return-to-work interview after every period of absence. This practice has been shown to be one of the most effective ways of encouraging reliable attendance. Managers should ask, and record, why the employee was absent, the reason they were absent and whether the employee visited their doctor. They should use the opportunity to check whether your employee followed your reporting rules. If your employee knows that they will have to justify their absence to their line manager, they will be discouraged from casual unnecessary absence.

Sick pay

Maintaining discretion over paying company sick pay can be a useful tool for managing absence

because you can decline or withdraw payment when it is appropriate. As with exercising any discretion, managers must be consistent and fair to defeat allegations of bias or discrimination. Provide written guidelines on the factors to consider when deciding whether to award company sick pay so that decisions are transparent and the risk of a dispute is reduced.

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Discipline

When your employee takes time off without good reason, fails to report their absence correctly or fails to provide the required certification you should treat it as a disciplinary matter. Investigate the reasons for suspicion to assess whether they have merit, distinguish between fact and rumour, and ensure that you comply with your internal disciplinary procedures.

Pulling a sickie is an issue of misconduct rather than capability so disciplinary action must be founded on reasonable grounds after a reasonable investigation. If it is not, it would break the bond of trust and confidence that must exist in order for you to continue an effective working relationship. This is confirmed by case law in [Metroline West Ltd v Ajaj; Ajaj v Metroline West Ltd](#).

Can you safely dismiss an employee who has permanent health insurance?

Many of you will operate schemes that provide long-term sickness or incapacity benefits, but what are the risks if you dismiss an employee for long-term incapacity where continued employment is required to remain in the scheme and use its benefits?

In [Awan v ICTS UK Ltd](#) the EAT implied a term into a contract of employment that 'once an employee has become entitled to payment of disability income due under the long-term disability plan, the employer will not dismiss him on the grounds of his continuing incapacity to work.' The employer had therefore acted in breach of contract when it dismissed him. The questions of whether it had unfairly dismissed and or discriminated against Mr Awan for a reason related to his disability were referred back to the tribunal.

This decision, while turning on its own particular facts, suggests that it would be risky for you to rely on an express contractual right to terminate for incapacity where the contract also provides the employee with the contractual right to disability benefits or permanent health insurance (PHI). So how can you protect yourself?

Draft carefully

Ensure that:

- the contract of employment refers to, and incorporates, the actual insurance policy so that you are not exposed if the insurer pays out less than expected, or nothing at all, under the policy
- any significant limitations under the PHI policy are specifically drawn to the employee's attention to ensure they are incorporated into the contract
- make it clear that you will pay such benefits only where the insurer agrees to fund such payments
- the termination clause specifically includes the right to terminate for incapacity.

Proceed with caution

Exercise caution before you dismiss an employee for ill health if that means the employee is no

longer entitled to permanent health insurance or other long-term disability benefits. Take specialist advice because if you get it wrong you may face claims for breach of contract or, as in *Awan*, for unfair dismissal and disability discrimination.

Check your passports

In the event of a 'no deal' Brexit on 29th March 2019, those with UK passports that expire in less than six months may run into difficulty when travelling between countries. The new rules state that after 29th March, you should have at least 6 months left on your passport from your date of arrival. If you have UK employees that travel to the EU for work, this could be problematic because they could be treated as 'third country nationals' after Brexit.

If you leave it until the last minute, there could be long delays in processing applications as large numbers of people try to renew their passports in the event of a no deal Brexit. If you have overseas workers in the EU, then act now or risk them being unable to enter a country and continue working.

The new rules will apply to passports issued by the UK, Gibraltar, Guernsey, the Isle of Man and Jersey.

Check driving licences

A survey by RAC Insurance found that only 13% of respondents would inform their employer of any points they incurred and 25% already had points that they had failed to disclose. If you require any employees to drive on business, you should routinely check their driving licence. But how should you do it and when?

Look at the photocard

Ask for a copy of the employee's physical driving licence. Most employees will produce a photocard-style driving licence, but they may show you an old-style paper licence if they have not changed any of their details since it was issued. Paper licences are still legally valid so you can't demand that an employee apply for a photocard. Always insist on seeing the original driving licence and take a copy for your records. Don't accept a photocopy.

Online

A driving licence provides certain information, but it won't show you penalty points. The DVLA moved this information online in 2015. You can sit with your employee whilst they check their own online account in front of you and print a copy of that page or get their permission to check via the DVLA's online portal.

Review

After your initial check you should review the driving licences of all employees who drive on business regularly. This should be at least annually but, as points can rack up quickly, every six months would be better.

Lawyer filmed watching porn at work

A partner at a law firm, Hogan Lovells, has agreed to leave the firm and his £900,000 a year job, after he was caught viewing pornographic images on a work computer. A lawyer watching from a window in Irwin Mitchell's offices, which are next to Hogan Lovells's, used a mobile phone to film the partner and sent the footage to the senior employee's HR department.

How could Hogan Lovells have prevented this embarrassing incident?

End free browsing

The employer was vulnerable because it allowed its employees unrestricted access online. If you don't do so already, ask your IT department to block access to all pornographic and inappropriate websites immediately. Also ask them to apply an image filter. This will prevent staff viewing and/or uploading unacceptable images and material from other sources such as a personal e-mail address or a USB stick.

Spell it out

Make it clear that you will deem it as gross misconduct if an employee logs on to any sexually explicit websites and this could render them liable to summary dismissal. Make no distinction between logging on to unacceptable websites via your own IT network and a personal device. If you do, this will make it difficult to act if an employee is seen viewing pornographic material on their own mobile phone during working hours.

Website monitoring

The GDPR does not make it unlawful for you to monitor your employees' online activities. It is allowed if your monitoring is to detect the unauthorised use of your IT system and your employees know in advance that you will monitor their activity and how you will do it. Provide this information in an e-mail and Internet policy

Our latest short seminar

In case you missed it, this is your personal invitation to the latest in our series of short seminars on key HR and employment law topics for 2019. Each seminar complements our annual employment law updates, which are held in June. This seminar is Employment status and the Gig Economy and will take place in London on 5th March and Manchester on 7th March. I do hope you can join us

Recently the gig economy has been in the spotlight of a lot of media attention and case law. Companies are offering arrangements that are changing the working landscape and the trend towards flexible working practices is growing. In the UK, the debate is firmly fixed on the difficulty faced by many companies in balancing the need for consistency and quality with flexibility. But the core message emerging from recent tribunal judgments is often that what you say in your documents will not necessarily decide the status of the individuals you engage.

As an HR professional, it is your responsibility to support your organisation as it deals with these complex challenges. Understanding the status of your staff and whether an individual is self-employed, a worker or an employee is crucial because it determines the extent of your legal obligations

We have seen a significant increase in requests for help in understanding the status of a company's workforce. In this seminar our team of experienced employment lawyers will take you through some of the most complex and emotive issues. There will also be plenty of opportunity to ask for specific advice on any matters you are currently dealing with. Amongst the many questions our employment lawyers will be answering are:

- Why does employment status matter?
- How do I identify an employee, worker and self-employed person?
- What is the potential liability if an employer incorrectly classifies someone as a worker or as self-employed?
- What can be learnt from the Uber judgement and other recent cases?
- Can a right to send a substitute in a contract defeat any claim that an individual is a worker or employee?
- Are agency workers employees? If so, who is their employer? How do employers manage the risk of agency workers making claims?
- The gig economy – what are the issues and what are the proposals for reform?

- IR35 – What is it, what are the tax implications of employment status and what are the latest developments?

The seminar is free to attend, starts at 9.15am and will finish by 11.15am. Refreshments will be available at 8.45am (with registration) and during a mid-morning break.

**Mar
5th**

London - Tuesday 5th March

Novotel London City South, Southwark Bridge Road,
London SE1 9HH

[Click here to register](#)

**Mar
7th**

Manchester - Thursday 7th March

Holiday Inn Manchester City Centre, 25 Aytoun Street,
Manchester M1 3AE

[Click here to register](#)

To register click on your preferred date and location and fill in the registration form. We shall acknowledge your booking promptly and will send you more details on the event. If you have any questions, please contact us on:

+44 161 703 5611.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

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