

## Managing excessive sick leave

**AAAA Employer Assist** is regularly asked how to manage an employee who is taking excessive sick leave. The critical question is how do you distinguish between a genuine case of personal injury/illness or whether it is a performance issue?

### **What are employees entitled to?**

First, it is necessary to establish your employees' leave entitlements. Employees have minimum leave entitlements under the National Employment Standards (NES).

The NES provides the following minimum entitlements in relation to paid personal/carer's leave (commonly referred to as sick leave) and unpaid carer's leave:

#### ***Personal/carer's leave***

Full-time employees are entitled to 10 days paid personal/carer's leave per year. Part-time employee's entitlements are pro-rata and casual employees do not have access to paid personal leave.

An employee can take personal/carer's leave:

- If they are not fit for work because of a personal illness, personal injury or an unexpected emergency; or
- to provide care or support to a member of their immediate family, or household because of a personal illness, personal injury or an unexpected emergency.

Personal/carer's leave does not include an absence from work to attend a dental, doctor or specialist appointment that is not related to an immediate personal illness or injury (i.e. a routine check-up, consultation or similar).

#### ***Unpaid carer's leave***

Full-time and part-time employees may access up to 2 days unpaid carer's leave per occasion when they have used up all of their paid personal/carer's leave, and met all of the usual requirements of paid personal leave.

### **What if an employee runs out of paid personal leave entitlements?**

If an employee has run out of their paid personal leave entitlements and they are not fit for work because of an illness or injury, they can take unpaid leave.

### **What can an employer do if an employee is taking excessive leave?**

If an employer has identified a pattern of absenteeism over a period of time, they should meet with the employee to identify if there are any circumstances that they need to be aware of i.e. an underlying serious medical condition, family issues etc.

If the employer does not meet with the employee to discuss the absenteeism, they may be seen to be condoning the actions of the employee taking excessive leave and the ongoing leave will undoubtedly continue.

### **Can an employer discipline an employee for taking excessive personal/carer's leave?**

As mentioned above, employees have minimum personal/carer's leave entitlements and must not be disciplined for legitimately taking such leave when they are eligible to do so (ie. if their absence is covered by a medical certificate).

If the employee is in breach of a workplace policy regarding the taking of personal/carers leave (i.e. failing to provide a medical certificate or failing to contact the employer when absent), the employer may be able to take disciplinary action – however, such disciplinary action should be set out in a policy to be relied upon if you wish to issue a formal warning.

However, please note that an employer must not take any adverse action against an employee because they are exercising a workplace right (ie taking sick leave covered by a medical certificate).

Employers must also ensure that they do not breach any anti-discrimination laws. If an employer discriminates against an employee (ie for taking leave), the employee can lodge a discrimination claim under State and/or Federal anti-discrimination laws. Discrimination claims are decided depending on the individual circumstances. The consequences of a discrimination claim can have significant financial implications for the business.

### **Can an employer dismiss an employee who has exhausted their paid leave entitlements and is currently on unpaid leave?**

Pursuant to section 352 of the *Fair Work Act 2009 (Act)*, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

Regulation 3.01 of the *Fair Work Regulations 2009 (Regulations)* states that a prescribed illness or injury exists if any of the following are satisfied:

- The employee provides a medical certificate or statutory declaration about the illness or injury within 24 hours after the commencement of the absence or such longer period as is reasonable in the circumstances.
- If the employee is required by the terms of a workplace instrument to notify the employer of an absence from work and to substantiate the reason for the absence, the employee complies with those terms.
- If required by the employer, the employee gives the employer evidence that would satisfy a reasonable person that the leave is taken because the employee is not fit for work because of a personal illness or personal injury affecting the employee.

However, an illness or injury is not a prescribed illness or injury if:

- the employee's absence extends for more than 3 months or the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and
- the employee is not on paid personal/carer's leave for the duration of the absence.

*Note – a period of paid personal/carer's leave does not include a period when the employee is absent from work while receiving workers' compensation.*

In summary, the employer will not breach section 352 of the Act if the employer dismisses an employee who has been absent for more than 3 months in total within a 12 month period other than on paid personal/carer's leave. However, there are many other issues to consider before proceeding with termination of an employee on long term sick leave – please contact us before proceeding.

### **How can an employer best manage the taking of leave?**

The best solution for an employer to manage the taking of excessive personal leave is to be proactive, educate the staff and monitor employees' taking of leave on a regular basis.

**Employer Assist** recommends all employers must adopt a clear workplace policy for the taking of all forms of leave. A policy educates the employees on their entitlements, but more importantly provides a guideline to an employee on what they must do when accessing leave. This could include the requirements for:

- a. giving immediate notice to their supervisor/manager;
- b. providing evidence (ie medical certificate) ; and
- c. disciplinary guidelines that will apply when the policy is breached.

Any policy must not contravene the NES requirements or any anti-discrimination legislation.

**Employer Assist** provides AAAA members with information and advice on all employment matters. **Employer Assist** can also prepare policies for your business (including in relation to employees taking of leave) and can provide guidance on how to implement those policies. Contact us on **1300 735 306** to discuss any employment issues that arise in your business.

**Gwen and the AAAA Employer Assist team**