



May 2022 Update

Welcome to this month's update - where we discuss the latest legislation and guidance.

In this month's edition, we report on:

- Providing a reference - dos and don'ts for employers
 - Are you guilty of unconscious bias?
 - Challenges in managing persistent short-term absences
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Providing a reference - dos and don'ts for employers

An employer is under no legal obligation to provide a reference.

There are some exceptions such as in the financial services sector and for candidates applying for a position at an academy or maintained school in England.

Some employers' contracts of employment may also include an express obligation to provide a reference, although there is no need to put this in contracts.

What should a reference include?

The employer owes a duty to take reasonable care to ensure that the information contained in the reference is true, accurate and fair and does not give a misleading impression.

Employers also have a duty of care towards any prospective employers to ensure a reference does not include any negligent misstatement or misrepresentation.

More and more companies are providing basic references which just include the dates of employment and the role undertaken. Previously this was seen in a negative light, but with more companies adopting this reference format this may no longer be the case.

Prospective employers are sometimes asking for other information, such as information on time keeping, the reason for leaving, disciplinary record, performance and absence records. Employers must take care when disclosing this information to make sure it is accurate and truthful.

Generally, if a disciplinary procedure or performance management process is finished then the employer may feel it necessary to let the prospective employer know about this, although be careful when the disciplinary or performance management is still underway. An employer can put in a reference the number of days off absent but should not disclose the reasons without the consent of the employee, as this may be a breach of data protection.

If you are asked about job capabilities make sure that you limit this to the referee's specific knowledge of the subject rather than include speculation as to the person's suitability for a new role. It is quite usual to briefly set out the duties and responsibilities which the employee undertook satisfactorily in the role they were employed to do.

A refusal to provide a reference if it is related to a protected characteristic under the Equality Act 2010 would be potentially discriminatory. It can also result in a claim for victimisation if they have asserted discrimination.

Make sure you include a disclaimer, along the lines of, *"Agree to provide this reference in the following terms subject to any new information coming to light that may change this. The company does not accept any loss or damage as a result of reliance on this reference"*. Also don't forget to mark it private and confidential.

Employers: Have a reference policy or format in place to ensure consistency about what information to include.

Contact us: We can assist with drafting or responding to reference requests.

Are you guilty of unconscious bias?

Unconscious bias is when we make judgments or decisions based on our prior experience, beliefs, views, associations, thought patterns, judgements or interpretations, and we are not aware that we are doing it.

In the workplace, this can result in managers:

- Making misplaced assumptions about an employee's competencies, suitability, or likely enthusiasm for specific project.
- Treating employees differently and perhaps causing them to miss out on opportunities that might have furthered their personal and/or professional development.
- Slowing down diversity and driving up attrition.

Everyone displays bias. Before you say you would never do that, think. Prejudice and discrimination based on gender, skin colour, age etc. are not intentional. They are deep-rooted and often centuries old. After all the ability to distinguish friend from foe helped early humans survive.

Essentially, our mind's ability to quickly and automatically categorise people helps give order to life's complexity. Although we all like to think we are open minded and objective, research shows that this is not the case.

The shift to remote working has in some cases made it harder for some less vocal employees to be noticed and their effort recognised.

Whilst many organisations have put operational policies and processes in place around recruitment and promotion to help mitigate unconscious bias, there needs to be more done when it comes to ongoing manager/employee relationships. After all important decisions must not be taken on a one-to-one basis based on gut instinct, limited data, or worse still sweeping generalisations.

Fortunately, the world of work is slowly changing. Increasing numbers of companies are recognising that teams are made up of individuals and that those individuals need to be understood (attitudes, motivations etc.), supported and developed correctly.

The companies that encourage managers to concentrate on their own professional development and in turn brings unconscious bias issues out into the open will allow all employees to thrive better.

Consider:

- Self-evaluation – reflecting on their performance and acknowledging any biases without fear of retribution
- Committing to overcoming biases over time
- Training and tools to help them to honing their people and other soft skills

Employers: Everyone can think in a way that involves unconscious bias at some point, but it's important to be aware of it and not let it affect your behaviour or decisions.

Contact us: We can assist with these important issues.

Challenges in managing persistent short-term absences

Persistent short-term absences can result in a significant cost to employers. Employers need to manage this situation carefully in case any persistent illnesses could be classified as a disability. There are steps that can be taken to help manage these absences sensitively and effectively for your business.

Where continued short-term absences are affecting an employee's ability to carry out their role, it may be more appropriate to deal with this as a capability issue, rather than under a disciplinary procedure. Ensure that you consider any reasonable adjustments to allow an employee to return to work or to avoid further absences.

It is only where the frequency of absences means that an employee is unable to perform their role, and you have explored all possible reasonable adjustments, is dismissal seen as a justified action, but usually as a last resort.

Where employees have a string of frequent short-term absences, be aware these could be related. Guidance is clear that any disability-related absence should be managed separately to regular sickness management. Employers are expected to provide flexible solutions when working with disability-related absence and treat each case on its own merits.

Some methods of monitoring absence can be particularly harsh on employees who take frequent, short absences which may be related to their underlying medical condition or disability. The sickness policy would need to be looked at carefully to take this into account. Be carefully deviating too much from the sickness policy, for example, if the policy requires

medical advice to be obtained before a warning or dismissal, and this does not happen, employers may struggle to justify their actions.

It may also be important to consider sick pay, as an employer may need to consider making the sick pay slightly more generous for a disabled employee as part of the reasonable adjustment to assist them back to work.

What steps can be taken?

It is important to remember that the key aim is to support employees to return to work after a period of absence or to stay in work where an illness is recurrent or ongoing.

You should consider implementing:

1. Effective absence monitoring

Make sure you properly record all absences and the reasons given for each individual and not only overall absence rates.

2. Use early intervention

In particular the use of return-to-work meetings, can assist employers in spotting underlying issues that may point to a longer-term illness or disability, and can start a dialogue with the employee.

3. Flexible absence policies

Absence policies should also be put in place. These are not compulsory but are useful in order to provide employees with information on their entitlements, as well as of the expectations of the employer. However, it is important to retain flexibility when applying absence policies, in particular for an employee with a disability, to put in place reasonable adjustments.

4. A well-rounded approach

Absence management policies and disciplinary procedures should be complemented by return-to-work programmes, employee assistance schemes and flexible working arrangements.

Other considerations:

Don't forget that absence records are personal data under the Data Protection Act. Health is sensitive personal data and must be treated with extra caution. All records, correspondence and medical evidence must be stored confidentially and specific information on health must be kept separately from simple absence records.

Employers: Short-term absences should be proactively managed with care and sensitivity, in order to support employees and to avoid potential discrimination.

Contact us: We can assist with sickness management

For more information or assistance Email: enquiries@employmentlawsupport.co.uk



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