

ATTACHMENT B

Guidance on Disability Related Absence

This guidance has been developed with reference to the Employers Forum on Disability Briefing Paper - *A practical guide to managing sickness absence* and the Disability Rights Commission's (DRC) Code of Practice on the disability equality duty for the public sector. This new duty was introduced in the Disability Discrimination Act (2005) (DDA) and came into force on the 5th December 2006.

This guidance must be used as guidance only.

It is essential that disability related absence is managed separately to sickness management.

All disability related absence must be treated as unique to the individual and it is essential that organisations are able to provide flexible solutions when working with disability related absence. It is also important to remember that the disabled individual is the expert on their disability and must be involved in determining reasonable adjustments and any agreements reached.

It is essential that disability related absence is managed on a case by case basis and reasonable adjustments are applied from the point of disclosure for each situation. It is important that the individual is involved and 'reasonable' is determined for each situation.

This guidance should be read in partnership with the NNC Model Sickness Absence Management Policy (NNC Circular No. 03/2007).

TABLE OF CONTENTS

1. The Social Model of Disability	3
2. Overview and summary of the DDA	3
3. Disabled people	4
4. Managing Disability Related Absences	5
5. Reasonable Adjustments.....	6
6. Discounting disability-related sickness absences as a reasonable adjustment	7
7. Implications for absence due to implementation of reasonable adjustments	7
8. Sick pay and reasonable adjustments.....	8
9. Redeployment as an adjustment	8
10. Health assessment.....	9
11. Management and medical responsibilities.....	11
12. Recording sickness absence	12
13. Termination of contract.....	13

1. The Social Model of Disability

1.1. The social model forms the foundation of the DDA as opposed to the medical model which sees the disability as the barrier. The definition of the social model of disability as defined within the Act as follows:

'The poverty, disadvantage and social exclusion experienced by many disabled people is not the inevitable result of their impairments or medical conditions, but rather stems from attitudinal and environmental barriers.'

2. Overview and summary of the DDA

2.1. The duty requires that every public authority shall in carrying out its functions have due regard to the need to:

- promote equality of opportunity between disabled persons and other persons
- eliminate discrimination that is unlawful under the Act
- eliminate harassment of disabled persons that is related to their disabilities
- promote positive attitudes towards disabled persons
- encourage participation by disabled persons in public life; and
- take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons

2.2. The duty does not create new individual rights for disabled people. (Although there are important changes, for example HIV and cancer being recognised from point of diagnosis and the removal of 'clinically well recognised' in mental illness) Rather than providing restitution when a disabled person has been the subject of discriminatory treatment, the duty provides a framework for public authorities to carry out their functions more effectively and to tackle discrimination and its causes in a proactive way. The duty thus reinforces the pre-existing duties under the Act.

- 2.3. The general duty requires public authorities to adopt a proactive approach, mainstreaming disability equality into all decisions and activities.
- 2.4. "Due regard" means that authorities should give due weight to the need to promote disability equality in proportion to its relevance. It requires more than simply giving consideration to disability equality.
- 2.5. The general duty requires authorities not only to have due regard to disability equality when making decisions about the future. They will also need to take action to tackle the consequences of decisions in the past which failed to give due regard to disability equality.
- 2.6. An underlying principle of the Act is ***the need to take steps to take account of disabled persons' disabilities, even where that involves treating disabled persons more favourably than other persons***. This underlines the fact that equality of opportunity cannot be achieved simply by treating disabled and non-disabled people alike.

3. Disabled people

- 3.1. Disabled people aren't just those who use wheelchairs or guide dogs. There are many types of disability and health conditions that mean someone could be covered by the DDA. And you often can't tell just by looking at someone whether they meet this definition. In fact, around half of those with rights under the DDA don't describe themselves as a 'disabled person'. Most employers will already be employing someone who might be protected by the law.
- 3.2. A 'disabled person' is legally defined as someone with 'a physical or mental impairment that has a substantial and long-term adverse effect on his/her ability to carry out normal day-to-day activities'. What matters is that their impairment or health condition has an impact – not what their diagnosis is.
- 3.3. In terms of 'who defines if a person is disabled or not', this is only tested in a court of law, - for example by a chair on an employment tribunal and/or a commissioner of the disability rights commission.

Hence, it is best practise to assume that if someone discloses a disability to move straight to the adjustment process.

3.4. Normal-day-to-day activities include:

- mobility
- manual dexterity
- physical co-ordination
- continence
- ability to lift, carry or otherwise move everyday objects
- speaking, hearing or seeing
- memory or ability to concentrate, learn or understand
- perception of the risk of physical danger.

3.5. People who have had a disability in the past are also covered, even if they have recovered – for example, those who have had episodes of mental ill health. People who have severe back pain or arthritis can be covered by the law if that condition means that their ability to do normal activities is adversely affected.

3.6. The law covers people with facial disfigurements and ‘hidden’ disabilities like dyslexia, epilepsy, schizophrenia and depression. It can also cover people with progressive conditions, such as HIV, cancer or multiple sclerosis (from the point of diagnosis rather than onset of symptoms).

3.7. It's really important to think about the effect of a disability without treatment. The Act says that any treatment or correction should not be taken into account, including medical treatment or the use of a prosthesis or other aid (for example, a hearing aid). The only things which are taken into account are glasses or contact lenses.

4. Managing Disability Related Absences

4.1. An employer who is concerned about an employee's sickness absence levels should always first discuss with the employee difficulties that they may be having doing their job. An employer has a duty to recognise that an employee's sickness absence may be because they are disabled (as per the definition of disability) even if they are unaware

or have not disclosed. Then together the employer and employee should agree a plan of action that could include obtaining medical reports and identifying reasonable adjustments that might:

- enable the employee to return to work; or
- reduce the number or length of absences; or
- help the employer to accommodate absences.

4.2. Employers should be aware of Access to Work as a source for assistance with reasonable adjustments. The employee must instigate the relationship and it is wise to do this as soon as a disability is either identified or disclosed in regards to the time frames for implementing reasonable adjustments.

4.3. Information about Access to Work can be found at <http://www.jobcentreplus.gov.uk/JCP/Customers/HelpForDisabledPeople/AccessToWork/>

5. Reasonable Adjustments

5.1. The DDA states that the duty to make reasonable adjustments arises *'where a provision, criterion or practice applied by, or on behalf of an employer, or public body, or any physical feature of the premises, places the disabled person at a substantial disadvantage compared with a person who is not disabled'*.

5.2. If a disabled person is at a 'substantial disadvantage' the employer or public body has to take the appropriate steps to make the relevant adjustment. **Failure to do so is unlawful and cannot be justified.**

5.3. The provision of reasonable adjustments always requires the involvement and agreement of the person involved. Many impairments fluctuate in their severity or are made worse by environmental factors, for example, temperature, light levels or noise.

5.4. Patronising language must not be used when communicating and respect must be given to people in allowing time to answer. Always address the person directly and not through an interpreter or support worker. Remember that the majority of impairments are hidden.

- 5.5. Research shows that disabled people have good reason not to disclose impairments due to certain conditions carrying an extra societal burden of stigma and prejudice, some examples being HIV, mental illness and epilepsy.
- 5.6. Be sensitive both to age and gender issues. Some women and men may prefer to discuss an impairment they regard as an intimate matter, for example, incontinence, with a person of the same gender or of an age similar to their own.
- 5.7. **It is important to remember that treating everyone the same does not mean that everyone is treated fairly. The DDA requires people to be treated differently according to their needs by making reasonable adjustments.**

6. Discounting disability-related sickness absences as a reasonable adjustment

- 6.1. A reasonable adjustment may be to accommodate a higher level of sickness absence from a particular disabled employee. Failure to make such adjustments could lead to less favourable treatment of the person for a reason relating to their disability if, for example, they are disciplined or have their contract of employment terminated because of their attendance record.
- 6.2. It might be reasonable in some situations depending on the individual circumstance to discount disability-related absences when considering:
 - promotion
 - training opportunities
 - redundancy
 - disciplinary procedures for poor attendance
 - whether to reduce or end sick pay.

7. Implications for absence due to implementation of reasonable adjustments

- 7.1. Reasonable adjustments can take time to implement. It is critical that employers develop short term solutions whilst implementation is

occurring so the employee is either able to perform the duties of the role or other duties are determined and agreed.

7.2. Often the implementation of reasonable adjustments is out of the disabled employees control and it can be very stressful waiting for implementation of reasonable adjustments, particularly if not informed or kept up to date of progress. To avoid stress related absence best practise would suggest;

- Keeping the employee informed
- Ensuring short term solutions are implemented
- Regular discussions with the employer about the effectiveness of the short term solution
- Flexible solutions to what can often be frustrating experiences for both the employer and employee

8. Sick pay and reasonable adjustments

8.1. If an employee is paid sick pay while waiting for reasonable adjustments to enable them to return to work, and sick pay entitlement is reduced or runs out after a certain period, this may constitute less favourable treatment for a reason relating to the individual's disability.

8.2. A reasonable adjustment in this case would be to continue to pay full rate sick pay. The safer and best practice option is not to count this as sickness absence at all.

9. Redeployment as an adjustment

9.1. If the employee cannot return to their current position the employer needs to consider whether or not they can be transferred to a suitable alternative vacancy. This is a reasonable adjustment under the DDA.

9.2. The employer needs to consider both the following questions: (remembering that in the DDA an organisation can treat a disabled person more favourably – an example of this is to redeploy someone to a more senior post)

- is there another position in the organisation to which the employee could be transferred without any reasonable adjustments being made to that post?
 - is there another position to which the employee could be transferred with reasonable adjustments to that post?
- 9.3. Reasonable adjustments, which the employer needs to consider to the new position, include:
- equipment
 - retraining, to help the person:
 - acquire new or different skills
 - learn new systems
 - training to use equipment being used as an adjustment, e.g. voice recognition software
 - allocating, to someone else, the non-essential parts of the new job which the employee cannot do because of their disability
 - working part-time, perhaps as part of a job share
 - working flexible hours or from home
 - time off work to attend a medical appointment.

10. Health assessment

- 10.1. In order for an employer to obtain a medical report or records from an employee's doctor the employee must first give his/her consent under the Access to Medical Reports Act 1988.
- 10.2. Once consent has been given, the letter to the doctor (preferably a specialist if the employee has one) should specifically ask:
- why they are unable to work at present
 - how long they are likely to be absent, if it can be reasonably ascertained
 - whether their return to work could be facilitated by reasonable adjustments such as part-time working, a phased return to work or any particular equipment
 - whether they are receiving any treatment or medication that might impact on their ability to return to work.

- 10.3. Under the Access to Medical Reports Act 1988 the employee must be told that they have the right to see any report on them. The report cannot be sent to the employer until the employee has given their consent. They also have the right to ask the doctor to amend their report.
- 10.4. Remember, you do not need to see an entire medical history about the person. A person's medical history is extremely personal and could contain information that the person is reluctant to share and has no relation to the current situation.
- 10.5. You should also ask the employee to see an occupational health adviser to whom the Access to Medical Reports Act 1998 also applies. If it is your normal practice or appropriate for your occupational health adviser to request a report from the individual's doctor then the quality of advice you receive from your occupational health adviser (or indeed from any doctor) will depend on the adviser's understanding of the individual's job. You should therefore provide them with a full job description and in particular:
- specify the hours to be worked, the flexible hours possible and whether working from home is possible
 - state whether the employee is required to travel
 - indicate physical requirements of the job, including strength and stamina
 - describe the working environment including temperature, lighting and any other unusual or significant features of the environment
 - note intellectual and emotional demands, including stress factors
 - outline your expectations – the key outputs required for the job
 - provide a record of sickness absences to date.
- 10.6. It might be helpful to issue medical advisers with a pro forma to make sure that the report covers the necessary ground. Questions could include:
- Is this person capable of carrying out the duties of this particular job?
 - Is there any reason why this capability might change over time?

- Would any reasonable adjustments such as altering working hours or providing equipment enable the person to continue in this role?
 - If the person cannot continue in their existing role would they be able to return to an alternative post and, if so, what type of job?
 - Could medical intervention, change of medication or specialist rehabilitation help the individual work to their full potential?
 - If they are unable to return to work now, is it likely they will be able to do so in the foreseeable future?
- 10.7. You cannot, however, insist that an employee visit a medical adviser unless there is an express term in their contract of employment requiring them to do so at your request. Where there is such a term in the contract, you must still first explain the nature, purpose and extent of the examination.
- 10.8. If there is no such term in your contracts of employment your employee might still agree to see your occupational health adviser if you explain that the purpose is to determine if reasonable adjustments could help them to do their job or return to work.

11. Management and medical responsibilities

- 11.1. Human resources managers often ask a doctor to assess fitness for work when the employment of a person with a medical condition may give rise to risks. This does not mean that the decision on employability is a medical responsibility. The doctor's role is to assess the risks and present them as clearly as possible.
- 11.2. It is then the employer's responsibility to decide on the acceptability of risks after reasonable adjustments have been made under the DDA and health and safety legislation. Specialist occupational physicians, however, may be able to assist employers in deciding the level of risk that is acceptable.
- 11.3. An employer may have health and safety concerns, particularly if an employee returns to work with a recently acquired disability. In these circumstances the employer will need to conduct an individual risk assessment to determine whether the individual's particular disability

presents any increased risks either to themselves or others when working in a specific role or environment.

- 11.4. An individual and competent risk assessment will provide the means of ensuring that any genuine concerns about a disabled employee or prospective employee can be addressed in ways which are rational, proportionate to the level of risk, and which do not unduly disadvantage the disabled person.
- 11.5. Such risk assessments must always be specific to the particular individual, job-role and working environment concerned. It is therefore unlikely that an organisation that has a general policy of excluding or restricting the career opportunities open to people with particular impairments will be able to justify doing so, even if this policy is in accordance with the advice of an occupational health adviser.
- 11.6. Experts consulted in order to carry out a risk assessment could include occupational health practitioners, health and safety consultants and ergonomists. Whether or not an employee can continue to work safely in a particular role is, however, always a management and not a medical decision.
- 11.7. The employer should take advice and then assess whether, with reasonable adjustments, any risk can be reduced to acceptable levels. Employers cannot abdicate responsibility for making such decisions to medical or other experts.
- 11.8. If health and safety is put forward as the reason for refusing to allow an employee to return from a period of absence, it must be shown to be material to the circumstances of the case and substantial, and it must not be possible to overcome the health and safety risk by making reasonable adjustments. Only then will the less favourable treatment of that employee be justifiable, otherwise the employer may be in breach of the DDA.

12. Recording sickness absence

- 12.1. Disability-related sickness absence should be recorded separately from other types of absences.

- 12.2. Disability related sickness (DDA related sickness) will be included in the performance reports and has to be counted in the overall sickness management that is submitted to the cabinet office. However in regards to calculations that underpin the weighted score card and performance related pay, disability related sickness will not be taken into account, hence areas need to record separately and submit with quarterly returns.
- 12.3. On sickness absence self-certification forms every employee should be asked if the absence was related to a disability. The form should clearly state who will have access to this information, e.g. human resources, the line manager, occupational health.
- 12.4. An employee may disclose a disability for the first time on such a form and so it is vital that this is followed up with a discussion with that employee. This may result in medical reports being sought and reasonable adjustments being identified.
- 12.5. Disclosure of a disability is sensitive personal data for the purposes of the Data Protection Act. The self-certification form should, therefore, ask the employee to consent to the information being passed to the people listed by signing the form. You should make it clear on the form that the information will not be given to anyone else without the consent of the employee.
- 12.6. Disability-related sickness absences should then be recorded separately from other absences, for example:
- non-disability related sickness absence
 - disability leave
 - study leave
 - compassionate leave
 - carer's leave
 - special leave

13. Termination of contract

- 13.1. An employer may decide in some instances that it has no option but to terminate the employee's contract either because there is no prospect

of the employee returning to work in the foreseeable future, or because the number of periodic absences is unsustainable.

- 13.2. Before doing so, the employer should ensure that good practice procedures and all possible reasonable adjustments under the DDA have been considered which could have possibly enabled the person to continue to work for the employer.
- 13.3. The Code of Practice states: “Where a disabled person is dismissed or is selected for redundancy or for compulsory early retirement (including compulsory ill-health retirement), the employer must ensure that the disabled person is not being discriminated against. It is likely to be direct discrimination if the dismissal or selection is made on the ground of disability. If the dismissal or selection is not directly discriminatory, but is made for a reason related to the disability, it will amount to disability-related discrimination unless the employer can show that it is justified. The reason would also have to be one which could not be removed by any reasonable adjustment.” (para 8.24 Code of Practice – Employment and Occupation)