

> **EMPLOYMENT & INDUSTRIAL RELATIONS ONLINE**

WHEN CAN YOU ASK EMPLOYEES FOR A MEDICAL CERTIFICATE?

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- **When can you ask employees for a medical certificate or other evidence of illness?**
- **Can an employer question the validity of a medical certificate?**

Other than casual employees, all employees have a right to take paid personal leave in circumstances where the employee is not fit for work because of personal illness or injury.

The same employees also have the right to take paid carer's leave in circumstances where a member of the employee's immediate family, or a member of their household, requires care or support because of a personal illness or injury.

NOTICE REQUIREMENTS

For an employee to be entitled to paid personal or carer's leave, they must comply with the notice requirements provided for in the *Fair Work Act*.

The notice requirements imposed by the Act aren't onerous, and they simply require employees to give notice of the taking of personal or carer's leave to their employer "as soon as practicable" (which might be after the leave has commenced) and to advise the employer of the duration, or expected duration, of leave required.

CERTIFICATE AFTER TWO DAYS? THREE DAYS?

Employers often think that an employee needs to take at least two days' leave before they can ask the employee to provide a medical certificate; however there is no minimum period of leave that an employee needs to take before their employer can ask for evidence of the illness or injury.

The Act provides that an employee who has given notice to their employer of taking paid personal or carer's leave must, if required by the employer, give the employer evidence that would satisfy a reasonable person that the leave is taken because of the illness or injury of the employee, or a member of the employee's immediate family or household.

The evidence need only be reasonable and is not limited to a medical certificate. For example, a statutory declaration may also suffice.

PRACTICAL RECOMMENDATIONS

Although technically, you can ask employees for evidence every time paid personal or carer's leave is taken, such a requirement may be a significant burden on both the employer and the employees. For instance, administrative staff may not have the resources or time to police the provision of medical certificates for absences on each and every occasion, and employees may struggle to obtain a certificate if they are absent on one day's leave with a sick family member (who may not be able to make a doctor's appointment).

As with most matters involving management of staff, common sense and flexibility about the application of the policy is advisable.

Our advice to employers is to implement a policy surrounding the expectations of employees giving notice of personal or carer's leave, and the circumstances in which you as an employer will expect evidence to be provided. The policy should include details of the method of giving notice and to whom the notice should be given.

Before any policy is implemented, an employer should ensure that employees are trained in the policy, and that a copy is available to all employees.

Having a policy in place that is available to all employees can minimise the impact of personal or carer's leave on your business, and will also assist

employers in properly dealing with problems that may arise when employees fail to comply with the policy.

CAN YOU QUESTION A MEDICAL CERTIFICATE?

As a nation, Australia has a reputation for the propensity of its workers to take the odd sickie and even sometimes getting a GP to sign off on it by providing a medical certificate.

Employers can become frustrated when repeat offenders get away with taking numerous sickies by using medical certificates that an employer may consider to be "dubious".

The Federal Magistrates Court has considered the circumstances in which an employer can question the validity of a medical certificate and it is only in "exceptional circumstances".

The case before the Court involved an employee who travelled to Perth over a weekend to watch an AFL game that was to be Kevin Sheedy and James Hird's last game at Essendon. The employee then took personal leave on the following Monday, and produced a medical certificate to his employer.

Prior to travelling to Perth, the employee had informed colleagues and even his manager that it was his intention to take personal leave on the Monday following the game, but that he would have a medical certificate to do so.

The employee's manager warned the employee that they would take any misuse of personal leave very seriously and it could possibly lead to termination. The manager also suggested that the employee instead request to take annual leave.

The employee's employment was terminated and he filed an unlawful termination claim, arguing that he was terminated for a temporary absence due to illness, which is discriminatory.

The employee also suggested that his employer had no right to question the validity the medical certificate that he supplied.

The Court found in favour of the employer, confirming that employers do have the right to question the validity of a medical certificate, but only in the most exceptional circumstances.

In the case before the Court, the circumstances were exceptional because of the employee's conduct in being open about the fact that he intended to take personal leave after the game, and being warned in advance by his employer that they would take his misuse of personal leave very seriously.

While this case might provide some hope for employers, extreme caution should be taken any time an employer is considering questioning a medical certificate because the ramifications of getting it wrong could be costly for your business.

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