

Clients regularly contact Fair Work Lawyers frustrated with employees who are unwilling to divulge information about alleged medical circumstances. In many cases, there is a habitual refusal to provide anything beyond a basic certificate stating they suffer from a 'medical condition'. In all such cases, the lack of information makes it impossible to assess any risks the employee may pose to themselves – or others – and often there is the suspicion the employee may be 'gaming' the system.

### Evidence required for a claim for sick leave

Under the National Employment Standards (NES), an employee must provide [evidence that would satisfy a reasonable person](#) in relation to their claim for sick leave. There has not been any helpful judicial guidance about what this means but, in general, a doctor's certificate should be accepted on its face unless there is good reason to doubt its validity.

The NES permits agreement about the sorts of evidence that may be provided, however for [award covered](#) employees, this must be by way of an [enterprise agreement](#). Award-free employees may agree on these methods by less formal mechanisms (eg. their contract or an appropriate policy). It is recommended that employers concerned about this area consider a suitably drafted enterprise agreement to address this issue, especially in relation to the contents of the certificate.

### Looking "through" a medical certificate

The usual position is that the employer should [accept a medical certificate](#) as evidence that would satisfy a reasonable person. However, an employer can look beyond a medical certificate in circumstances where they have [good reason](#) to do so. However, this threshold is high and unfair dismissal decisions confirm this (also, the employer is exposed to adverse action, see below). As a result, this is only recommended where the employer has strong evidence. Relevantly, to claim sick leave, an employee must be [not fit for work](#), not simply that they had some sort of sickness. With appropriate evidence, an employer is entitled to reject a claim for sick leave.

### Obtaining an independent opinion

While the options for looking through a medical certificate are limited, it is [established](#) that an employer has the capacity to direct an employee to attend an independent medical, at least where good reason exists, such as a return to work after a long absence or high risk duties. This is a crucial step for the employer's [ability to manage](#) its [primary duty of care](#) under health and safety legislation.

In other words, while the capacity to seek information about an absence may be limited at the start of leave, an employer has more ability to require this information where the employee seeks to return to work. However, even though employers have this ability, the decision to exercise it must be used with discretion and balanced against other risks.

### Adverse action

Sick leave and workers compensation are protected [workplace rights](#). An employer cannot take [adverse action](#) against an employee for [exercising](#) a workplace right. Because these proceedings carry a [presumption](#) against the employer, employers must exercise caution when looking to manage inappropriate claims for sick leave and ensure that they have a sound legal and evidentiary basis for doing so. Furthermore, adverse action can arise where an employer takes adverse action against an employee for reasons that [include](#) the protected reason, even if it is not the sole or dominant one.

NB: there are also many other pieces of overlapping legislation that provide similar rights and different avenues for redress, such as [State](#) and [federal](#) anti-discrimination legislation.

### Workers unwilling or unable to provide suitable medical evidence

Where an employee refuses to attend an independent medical certificate, the usual course of action is that they would remain on sick leave (paid or unpaid) pending satisfaction that they are able to return to work. If this leave extends beyond a [temporary absence](#), or the employee cannot and will not be able to perform the [inherent requirements](#) of their position, and employer may look to terminate the employee. However, if the employee is [protected from unfair dismissal](#), caution should be exercised as there are [other factors](#) that need to be considered before a decision can be made.

Employers must be mindful that they have a positive obligation to consider [reasonable adjustments](#) to [accommodate a disability](#), even a temporary one. Where workers compensation is involved, there may also be an obligation to [provide suitable duties](#). In all cases, employers should obtain legal advice before terminating or taking other adverse action against an employee who claims to be sick.

### Workers' compensation

The interaction between medical issues, industrial laws and workers compensation entitlements adds another layer of complexity to managing these issues.

### Sick leave and workers compensation

Sick leave and workers compensation are [independent entitlements](#), and a claim for sick leave does not include a period where an employee is entitled to compensation. However, in practice issues are often intertwined, creating considerable confusion and complex legal issues when managing.

### Claims arising from managing employees

A subsidiary risk in the process of managing personal leave claims is that an employee may claim that the management process itself gave rise to a compensable illness. In South Australia, a psychological injury is only compensable if employment is the [substantial contributing factor](#) and it did not wholly or predominately arise from reasonable management action, taken in a reasonable manner.

### Need more information

If you would like further information about medical certificates, or assistance managing this process, including drafting enterprise agreements, please contact the team at Fair Work Lawyers.



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