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LEGAL PRACTICE



Can I be terminated due to long term sick leave?

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An employee's absence due to illness or injury may interrupt the workplace, particularly if that absence is long-term. However, employees who exercise their lawful right to sick leave are afforded protections under state and federal employment law, from dismissal due to illness or injury. In this article, we look at workers' rights and entitlements to paid sick leave and the potential implications of long-term or extended sick leave.

The difference between sick leave and carer's leave

Sick leave and carer's leave allow an employee to take time off to assist in dealing with personal illness or caring responsibilities. Whilst different in nature, these two types of leave come under the same leave entitlement for employees known as 'personal leave'. This type of leave is a minimum entitlement under the National Employment Standards ('NES').

Sick leave can be utilised when an employee is ill or injured. An employee is entitled to take paid sick leave when they are unable to work due to personal illness or injury. This can include stress and other mental health issues and pregnancy-related illnesses.

Carer's leave can be utilised when an employee may be required to take time off work to care for an immediate family or household member who is sick or injured.

What personal sick leave entitlements do I have?

In Australia, the *Fair Work Act 2009* ('FWA') covers most employees and employers. In Queensland, the FWA covers national system employees and employers (that is, employees and employers in the private sector). Employees and employers of the

Queensland Government, as well as local councils, are generally covered by the *Industrial Relations Act 2016* ('IRA').

Under the FWA, permanent full-time employees are entitled to 10 days of paid personal leave per year. This leave accrues progressively each year such that the balance of any unused leave can roll over to the following year. However, should an employee resign (or be terminated), any personal leave they have accrued over the years will be lost; that is, it is not paid out on departure.

Part-time employees accrue personal leave on a pro-rata basis which is calculated based on the number of hours they work each week. To calculate your sick leave and carer's leave entitlements, you can use the Leave Calculator on the Fair Work Ombudsman website.

Notably, casual workers are not entitled to any sick leave or carer's leave under the NES.

What if I have used all my sick leave but I am still sick?

Employees who have exhausted all of their paid personal sick leave entitlements may be able to take other types of paid leave, such as annual leave or long-service leave, at their own election.

If an employee has exhausted all of their paid leave entitlements, they are able to take unpaid personal leave if they can support their absence with reasonable medical evidence.

Will extended sick leave and absence jeopardise my employment?

Employees are entitled to take as much accumulated **paid** sick leave as they have available, without any threat of termination of employment.

Under the FWA, employers are prohibited from dismissing an employee due to a temporary absence from work due to illness or injury. Employees are automatically protected from dismissal due to illness or injury if they are absent on **unpaid** personal sick leave for a period of less than three consecutive months or a total of less than three months over a twelve-month period.

An absence is no longer deemed 'temporary' where the employee's absence **exceeds** three months of unpaid absence. Consequently, this means that employees will not be protected from dismissal if they have utilised all of their paid sick leave and their absence exceeds more than three consecutive months or more than three months in total over a twelve-month period.

Other protections afforded to employees who are dismissed due to illness

In addition to the protections available under the FWA, employees are protected from dismissal on the grounds of illness, injury, or disability through a number of overriding pieces of state and federal legislation and rehabilitation compensation legislation.

Employers are required to follow the appropriate rules for carrying out a dismissal and employees may challenge the termination of their employment by making:

- an unfair dismissal application if the reason for the dismissal is harsh, unjust or unreasonable;
- an unlawful termination claim; or
- a claim under a state or federal anti-discrimination law such as disability discrimination legislation.

Can my employer direct me to undertake a medical examination if I am on extended sick leave?

In appropriate circumstances, employers are entitled to require their employees to undergo an independent medical examination to provide more information about their illness or injury.

In the case of *Australian and International Pilots Association v Qantas Airways Ltd [2014] FCA 32*, the Federal Court held that employers have an implied right to require an employee, who is on long-term sick leave to provide more than a basic medical certificate.

In addition, the Federal Court held that an employer is entitled to this information to enable it to make business arrangements to adjust for the impact that extended sick leave has on the business.

I am a casual worker. Am I protected from dismissal due to extended sick leave?

As mentioned above, casual employees are not entitled to paid personal sick leave. Subsequently, this means casual employees are not specifically protected from dismissal for extended periods of absence due to injury or illness.

However, this does not exclude casual employees from having genuine absences from work when unwell.

Get help from an employment lawyer

Problems can arise in any workplace. If you are an employer who requires advice regarding leave entitlements for your employees or if you are an employee on extended sick leave and concerned about your job security, Gilshenan and Luton Legal Practice has the tools and information to assist you.

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