

Contents

1	THE LAW ON RECRUITMENT	1
	How do you form a contract?	2
	Conditional offers	3
	Medical assessment by non-medical personnel	5
	What is confidential?	6
	What do managers need to know?	6
	The implications of the Disability Discrimination Act 1995	6
	‘Lying’ on engagement	10
	When is a medical examination necessary?	12
	The purpose of medical assessments	12
	Assessing fitness for work	12
	Medical standards	13
	Legal duty of care	13
	Breach of human rights?	14
	Summary	16
2	ASSESSING HEALTH WHILST IN EMPLOYMENT	17
	Health surveillance	18
	Warnings	18
	Examinations and assessments when at work and off sick	20
	Medical reports	22
	Summary	23

3	SHORT-TERM, PERSISTENT ABSENCE	25
	Authorised absence	26
	Categories of sickness absence	27
	Importance of following fair procedures	28
	Procedure for short-term, persistent, intermittent absenteeism	28
	Obtain medical evidence	29
	Commercial factors	30
	Warnings	32
	Dramatically improved attendance	33
	Unreliability	33
	Reliability	34
	Opportunity to appeal	35
	Fair reason for dismissal – Some Other Substantial Reason (SOSR)	35
	The nature of absence control policies	36
	Concern about publishing ‘acceptable levels’	37
	Customised self certificates	37
	Genuine absences caused by genuine sicknesses are SOSR	38
	Appropriate penalties	38
	Letters to employees	39
	Status of medical statements (MED 3)	40
	General guidance to GPs about the giving of medical statements	40
	MED 3s, MED 5s and MED 6s	41
	Absence control policy – short-term, intermittent, persistent absenteeism: Communication to staff	44
	Dealing with the malingerer	51
	Summary	53

4	LONG-TERM OR ACUTE SICKNESS ABSENCE	55
	Long-term or chronic sickness cases	56
	Underlying medical condition	57
	Obtaining a medical report	57
	Human rights issues	58
	Consult the employee and allow an independent report where relevant – this takes the place of warnings	58
	Consultation is essential in the normal case	59
	The employer is expected to keep in personal touch	60
	Not all duties are suspended when off sick	62
	Employers are not expected to accept a medical report without question	63
	The role of the medical expert – disability cases	63
	Failure by a doctor to investigate the nature of the illness	65
	Occupational Health Adviser versus Specialist	65
	A third medical opinion	66
	New medical evidence	67
	Alternative employment	67
	Frustration of contract	68
	Permanent Health Insurance (PHI) terms in a contract	69
	Compensation reduced for contributory fault	72
	Absence without permission	72
	Personal injury claims and PHI	73
	Waiting for medical reports	75
	Conduct during sickness absence	76
	The fraudulent malingerer	76
	The human rights angle	79
	Summary	79

5 WORK-RELATED ILLNESS OR INJURY 81

Concerns for employers	82
Work Related Upper Limb Disorders (WRULDS)	82
Duty to warn and train	84
Warnings	84
What makes an employer guilty of negligence?	88
The Court's views on work-related injuries	89
The 'egg shell skull' principle	90
Some prescribed diseases	90
Stress and mental illness	91
Alcohol and drug abuse	98
Summary	107

6 DISABILITY DISCRIMINATION – LATEST LAW AND CASE LAW 109

Meaning of 'disabled'	110
How do the tribunals determine whether someone is 'disabled' within the means of the Act?	111
Employer's knowledge of the disability	114
What do employers need to know?	115
Justification in refusing to employ	117
What is 'discrimination' under the Act?	118
Correct comparison	118
Justification defence	119
Making reasonable adjustments	122
The role of the medical expert	126
Some practical advice	129
Guidance for a policy	131
Summary	132

7 MEDICAL ETHICS 133

Why is the duty of confidence so vital?	134
The law and medical ethics	135
Regulatory bodies	135
Professional codes	136
Occupational physicians and nurses	136
Confidentiality clauses in contracts/manuals	137
What is 'disclosure'?	138
Exceptions to the rule of confidentiality	139
Informed consent	139
Consent can be ordered by the Courts	142
Defining 'confidential' information	143
Disclosure without informed consent	144
Difficult ethical issues	145
Unauthorised disclosure can also lead to libel action	145
Data protection	146
Alcohol and drug testing – the legal implications	147
Testing for HIV	147
Other forms of testing	148
Summary	148
Useful websites and guidance	149

APPENDICES 151

Appendix 1: Data Protection Act 1998	152
Appendix 2: Medical consent form	154
Appendix 3: Sickness absence model letters	157
Appendix 4: Long-term absence letters and policies	164
Appendix 5: Medical questionnaire for WRULDS	176
Appendix 6: Alcohol and drug testing policy	179
Appendix 7: Draft policy on controlled (illicit) substances	181
Appendix 8: Confidentiality clause example	186
Appendix 9: List of cases	187