



**July 2018**

THE BUSINESS NEWSLETTER FROM AUSWILD & CO  
PO Box 527 Kogarah NSW 1485  
*Chartered Accountants and Business Consultants*

Website: [www.auswild.com.au](http://www.auswild.com.au)  
Telephone: (02) 9588 0100  
Facsimile: (02) 9588 7865

## “I’M SICK.....AND THAT’S THAT!”

What rights do you have, as an employer, in relation to your employees’ sick leave?

Your employees may hold the belief that you, as an employer, may not question their absence from work or challenge their medical certificate. They (and their unions) may believe it is their right to take sick leave.

However, Workplace Relations & Employment Executive Lawyers, **James Mattson & Darren Gardner** from *Bartier Perry*, in a recent article, say that as an employer, you do have the right to manage employee absences. To ensure your business delivers its services effectively and efficiently, you must manage your resources (including staff) and discharge your legal obligations (including safety) with full and proper information to make the right decisions. Your employees are obliged to cooperate.

### ***Dishonesty and misuse ... an obvious basis to challenge***

An employer may question absences and medical certificates in cases of suspected forgery or misuse. Examples of misuse include employees:

- undertaking secondary employment whilst allegedly absent for 'viral illness'; and
- providing a medical certificate but attending a football match instead.

But **Mattson & Gardner** cautions employers not to jump to conclusions. In *Marshall v Commonwealth Of Australia (represented by The Bureau Of Meteorology) [2012]* an employee unwell for work (due to the anxiety and stress of the workplace) was nevertheless deemed to be fit to engage in other activities, such as appearing on the television show 'Beauty & the Geek'.

### ***A contract to fulfil***

Underpinning every relationship is an employment contract, whether written or unwritten. A commitment given by an employee to their employer is to attend work, as agreed, and to perform the duties of employment to the best of their ability, in the best interests of their employer.

### ***Sick leave***

And yes, an employee can be given leave from their contractual commitment, if sick. However, two important qualifications need to be made to that broad statement:

- firstly, sick leave is not an entitlement but a contingent benefit; and,
- secondly, sick leave is available when the employee is unfit to attend to duties because of illness or injury – that is, they may be ill or injured but still able to work.

### ***The Fair Work Act 2009 and reasonable proof***

Sections 97 and 107 of the Fair Work Act 2009 provide that, if an employer requires it, an employee must provide evidence that would satisfy a reasonable person that sick leave is taken because the employee is not fit for work because of a personal illness, or personal injury.

An employee's entitlement to take paid sick leave is contingent on them complying with the evidence requirements. What constitutes "reasonable evidence" depends on the circumstances – however, generally a medical certificate or statutory declaration should be accepted as appropriate evidence.

Statutory declarations have long been found to be an acceptable alternative to unnecessarily requiring an employee to incur the cost and inconvenience of obtaining a medical certificate, especially in rural areas. Equally, statutory declarations to prove absence have also been found to be open to misuse by irresponsible employee attitudes.

### ***Workplace safety - a fundamental responsibility***

**Mattson & Gardner** say that an employer has a positive duty to ensure, so far as is reasonably practicable, the safety of employees and others at work. To discharge this duty, an employer needs to be properly informed. As such, it may be reasonable and necessary for an employer to require an employee (who is certified fit to return to work by their doctor) to undergo an independent examination by a company doctor – to ensure that the worker is not exposed to unacceptable levels of risk. Where an employee does not comply with such requests, it may (depending on the circumstances) provide a valid reason for dismissal.

It is also important to keep in mind that employees have duties under work health and safety legislation. These duties include ensuring that their acts or omissions do not endanger them or others; and that they co-operate and comply with lawful and reasonable directions and policies of their employer.

### ***It is okay to (reasonably) ask questions***

Yes, it is ok for an employer to ask questions. Indeed, an employer should do all that is reasonably practicable to ask and inform itself on employee absences from work to ensure that there are no work, health and safety risks.

Of course, there are limits to what can reasonably be asked. If the sick leave absence is not work related, then it is rarely relevant what caused the illness or injury. It may also be unlawful to ask an employee to disclose their disability in circumstances where a person without a disability would not be required to do so.

Good management means asking the right questions.

Whilst not easy, managing absences is an important part of a manager's role. **Mattson & Gardner** recommend:

- engaging with the ill/injured employee early and regularly (but not be harassing);
- talking to the employee (not just about incapacity but) about their fitness, and what they can safely do;
- where possible, liaise with them and their doctor, or other occupational health and safety experts, about a safe and healthy return to work (with any reasonable adjustments if necessary); and
- remember – the end goal is to achieve a timely, functional and safe return to work.

Managing absenteeism is difficult but knowing you may reasonably ask questions and manage any absence, gives confidence to do so.

*This month's article was adapted from "I'm sick.....and that's that": Managing Employee Absences written by **James Mattson & Darren Gardner**, Workplace Relations & Employment Executive Lawyers at Bartier Perry Lawyers. [www.bartier.com.au](http://www.bartier.com.au)*

### ***ausNEWS! ausNEWS! ausNEWS!***

***Birthday Greetings*** this month go to **Tony White, Caroline Townsend and Jane Bunting** all of whom celebrate special birthdays this month. ***Happy Birthday*** to you all.

**Important:** This is not advice. Clients should not act solely on the basis of the material contained in this bulletin. Items herein are general comments only and do not constitute or convey advice per se. Also changes in legislation may occur quickly. We therefore recommend that our formal advice be sought before acting in any of the areas. This bulletin is issued as a helpful guide to clients and for their private information. Therefore it should be regarded as confidential and not be made available to any person without prior approval.