

Guide to managing medical incapacity

This guide provides information on how to manage and work through a potential termination of employment due to medical illness or incapacity.

Remember

- Termination for medical illness or incapacity is complex, we suggest contacting the HR advice line for assistance before you begin the process.
- To deal with each situation on a case-by-case basis.
- Deal with the employee in good faith throughout the whole process.
- Ensure that you have the employee's signed consent before writing to any medical practitioners.
- Good process from the start is essential to avoid the risk of a personal grievance for an unjustified termination.

This topic, much like employment relations in general, can be rather unpleasant to work through for employers (let alone for the employee), especially when the notion of returning to work is hard to foresee. Much like any employment process, the obligation for the employer to act in good faith is required when considering the employees' capacity, and their ability to carry out the role.

Below are some common questions, answers and templates which will help you navigate through what is a sometimes overwhelming process.

Do I need to hold an employee's job open if it is looking unlikely that they will be able to return to work?

There is no legal obligation for an employer to hold a job open indefinitely. However, any dismissal must be justified and properly carried out following due process. It's important to remember that the employee you are dealing with may probably feel very overwhelmed and unsure due to the reason they are off work, so it's important to assess each situation and the facts separately. An employer is required to consider all information available (including medical information) and allow the employee to respond to any information regarding their incapacity and return to work.

Should an employer get the process wrong, then the employee may choose to raise a personal grievance and/or ask for their job back or compensation.

How long do I need to hold the job open for?

This is reliant upon many factors but is generally governed by the medical incapacity clause in the employee's individual employment agreement. Where there is no length stated, it would be dependent on:

- The likely time it will take the employee to return to work as dictated by their medical certificate.
- The ability for the employer to hold the position open and for how long.
- If there are alternative duties available for the employee to do or if they can work reduced hours.
- Whether the employer can temporarily fill the position to cover the period of absence.

If I need to follow a process, what does that look like?

A fair process requires clear communication. If you believe that you may need to start discussions with the employee regarding termination due to medical incapacity, then it is best to start these discussions early. Working with the employee, their support person and their medical practitioner will ensure that you have all relevant and necessary information available to you when making your decision.

Where an employee's return to work is likely to be longer than a few weeks, it's a good idea to meet with the employee and their support person to discuss the current plan to return to work including their doctor's advice around timeframes and duties. You may need further information from the employee's doctor to be able to fully understand the situation and what has contributed to it or how the condition will affect the employee in the workplace. To do this the employee will need to sign a consent form – see Appendix one and Appendix two for a suggested letter template and consent form.

Once you feel you have enough information, consider discussing if there are any alternative duties or reduced hours the employee could work (you are not required to make up alternative duties if there are none).

If you find it hard to determine the incapacity and timeframes from the employee's medical certificate or doctor's prognosis, you may be able to request the employee to attend a second medical assessment at your cost and with a medical practitioner of your choice (check your employment agreement to ensure you have this provision). If they agree to this assessment, you can discuss the report with the employee and determine the best solution moving forward.

If you find that the time to recover is too long and may impact the business and the role, invite the employee to a meeting, along with their support person, to discuss the current situation with them, the accommodations you have made to this point and propose that you may be considering termination for medical incapacity. Allow the employee time to think about, comment on and respond to this proposal, giving them time to take into consideration anything they might bring forward or any alternative suggestions they may have.

If your final decision is to terminate due to medical incapacity, ensure that your process is well documented, and you have considered all reasonable alternatives before terminating. Like a dismissal under misconduct, even if there is substantive justification for the dismissal for incapacity, the dismissal may still be unjustified if a fair process has not been followed. Open, honest and constructive communication, a fair enquiry and the element of consultation are all crucial factors and part of the process in potential terminations, it is best to be thorough.

A quick glance of a thorough process

1. Meet with the employee and their support person to discuss the return to work plan and their doctor's advice and timeframes.
2. If you need further information from their doctor, request the employee to sign a consent form for you to write to the doctor to gain a better understanding of the condition/injury/illness and how will affect the employee in the workplace.
3. Work out a plan for any reduced hours or alternative duties plan and for how long this will be accommodated.
4. If appropriate, request the employee to attend a second medical assessment at your cost to determine a clearer prognosis and return to work timeframe and plan.
5. If you can no longer make reasonable accommodations, invite the employee and their support person to a meeting to discuss the situation with them, and what you have done to date.
6. Propose to the employee that you may be considering termination for medical incapacity, allow the employee time to think, comment and respond to your proposal.
7. Consider any response from the employee and any new information before making your final decision.
8. Once you have made a final decision, confirm everything in writing and ensure you provide the required notice period as per their employment agreement.

Medical incapacity is a minefield and can be a very time-consuming process. It is highly recommended that you contact the HR advice line should you need to go through this process.

Appendix one: Letter requesting consent

Date

Name

Address

Consent for the collection and release of health information

Dear Name,

Thank you for sending through a copy of your medical certificate.

We are concerned about your health and wellbeing and I am keen to work with you and your doctor to understand and provide the support needed for you to return to work.

For this reason, I would like to request your consent for us to write to your doctor to gain a better understanding of your condition in relation to your role as XXX at XXX Pharmacy.

For us to do this we do ask that you fill in the consent form attached and return this to us as soon as possible, we will need to provide a copy of this to the doctor attached with the letter requesting information.

We will be asking the doctor for further information regarding your condition specifically what work-related functions or aspects have caused/contributed to it, what further support you may need in returning to work and what we need to be aware of in order to prevent a relapse and you needing further time off.

I am keen to ensure that we can provide an environment that you feel safe in and able to fulfil your duties without any ill effects on your health or wellbeing.

Yours sincerely,

Name

Title

Appendix two: Consent for medical information document

Purpose of this consent

To enable us to assist you with your rehabilitation from the incapacity/medical condition you are experiencing, in a safe and constructive manner, we require information from you and/or your treatment providers/s. This information will only be related to your incapacity/medical condition. This may include personal biographical and health-related information, accident details and (for the purpose of weekly compensation) details of your earnings.

Privacy of your information

XXX Pharmacy, like any agency collecting personal or medical information, is bound by the Privacy Act 2020 and the Health Information Privacy Code (HIPC) 1994 in handling your personal information. As such, information may only be collected or released as necessary to carry out our functions as your employer or under the Accident Insurance Act 1998.

The information privacy principles of the Privacy Act and the HIPC ensure that, with certain exceptions:

- The minimum amount of personal information is collected.
- The individual concerned must know of, and consent to, the claim administrator collecting personal information.
- Information must be kept securely.
- Any person has the right of access to, and correction of, any information kept about them.
- Information is only used for the purpose that it was collected for.

Information handling

XXX Pharmacy may if necessary collect or release information about you in order to obtain details about the assistance that you may be entitled to. Depending on the circumstances of your claim this may include releasing information to agencies which carry out assessments on our behalf and other providers and agencies involved in your case.

What if I decline to sign this consent?

We would encourage you to sign the attached consent to enable us to manage your condition safely and to ensure the success of your rehabilitation.

It is also important to sign this consent for the following reasons:

- Your incapacity may either be caused or aggravated by workplace hazards. Both yourself and XXX Pharmacy have obligations under the Health and Safety at Work Act to address potential hazards. Therefore, we require information from you to enable us to address these hazards.
- Your incapacity/medical condition may currently prevent you undertaking the full duties of your position. While XXX Pharmacy is committed to assisting your rehabilitation, its success is equally dependent on your commitment. As such we require the information necessary to assist with your rehabilitation.

Unreasonable refusal to sign this consent would be viewed seriously by XXX Pharmacy and further action may be taken.

Consent for the collection and release of health information

I authorise my employer, XXX Pharmacy, to collect and release such information about myself as is required to:

- assess any ACC or injury entitlement, or
- facilitate treatment and rehabilitation for any work incapacity.

I understand that this authority includes all aspects of incapacity and extends to appropriate service providers (including general practitioners, specialists, health assessment agencies) and previous employers. This authority extends only to the information required by the circumstances of this incapacity.

I understand that this information will only be used for the purposes described above. In the collection, use and storage of this information, XXX Pharmacy will at all times comply with the obligations of the Privacy Act 2020 and the Health Information Privacy Code 1994. I understand that, within the provisions of the Privacy Act and the Code, I have the right of access to information that XXX Pharmacy holds about myself. I may request correction of this information as required.

This authority is valid for six months from the date of this consent or until advised by me in writing.

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Signed

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Date

Doctor's/specialist details:

Name of doctor/specialist:

Contact phone number:

Address: