

# recent legislation and changes to the law



## fit notes

SOON TO BE REPLACING SICK NOTES

## equality

WHAT THE EQUALITY BILL WILL MEAN FOR EMPLOYERS

February 2010 Issue #1

### fit notes ON APRIL 6TH THIS YEAR, GP SICK NOTES, AS WE KNOW THEM, WILL CEASE TO EXIST.

The sick note or FMed3 (Med3) to give it its proper name, has existed in its current form for longer than the NHS itself. It dates back to a bygone era of heavy industry, no occupational sick pay and GPs who made leisurely house rounds before retiring to the golf course each afternoon. At the start of the 21st century the Med3 is widely used to validate sickness absence, dictates a “black and white” approach of “fit or not fit” and generates significant workload for GPs who still technically must see a patient *in person* to sign the note.

Proposals to replace the “sick note” with a “fit note” are intended to be part of a move away from a culture where work is seen as harmful for people with health conditions to one which acknowledges that (good) work is good for us and that not working is as destructive as many diseases themselves. The new FMed32010 will give GPs more options than to say “at work or off work”.

So far so good.

For this to work on a wider scale it will be necessary to create Occupational Health (OH) capacity in the UK – and this is the main challenge to the government’s proposals. At the moment only the minority of UK businesses have access to Occupational Health provision and it is already a skill shortage speciality. The concern has to be that there is a misperception that GPs will now take on an OH role and directly advise employers.

Dr Bill Gunyeon, Chief Medical Adviser at the Department for Work and Pensions, explained that “the fit note simply asks GPs to make a statement of a person’s function and the employer then makes an assessment of how much of their job they can do based on this. GPs are not expected to become Occupational Health specialists.” They are also *not* required to have specific knowledge of a job when they make their fitness statement.

This is echoed by Professor Steve Field, Chairman of the Royal College of GPs, who explained that the fit note allows GPs to say what a person can do and perhaps what adjustments need to be made. “If adjustments can’t be made then the person is signed off as of now.” This is the employer’s call. The new Med3 does not have a “fit for work” option but states that “you may be fit for work taking account of the following advice.”

This is a serious concern for employers who may be

asked to make changes by GPs who have no knowledge of the job. The GP, as the patient’s advocate will be under pressure to put the employee perspective. Managers and HR departments can presumably expect to see comments such as “short hours”, “reduced stress” or “light duties”.

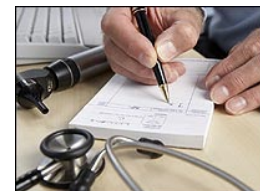
A recent survey of London GPs found that only 4% had received any training around assessing fitness for work. Ninety-five percent of GPs do not feel that they are the appropriate person to complete fit notes with 81% stating that occupational health doctors should take the role. This is alarmingly bad news with just a few weeks before the new fit note is introduced.

The notes may work well in some situations where the new fit note might help to “unblock” situations where employees currently delay their return to work on the basis that they are “signed off” opening the door for Occupational Health advice on duties.

What this really means is that the need for an assessment of what an employee can actually do is being flagged by the GP and directed to the employer. And in order to do that the employer will require expert advice. This is enforcing Occupational Health Provision on employers without legislating for it, and perhaps most worryingly when it is not available on the scale to which it will be required. The government is aware of this movement in responsibility and says it is committed to a massive expansion of Occupational Health capacity but this is probably years away. It is certainly unlikely to be properly funded in the current economic climate. So the cost will also fall to employers in the end.

Our advice remains as always that clients should involve Occupational Health at an early stage and use the new fit note to encourage employees to engage in rehabilitation. Early good quality Occupational Health advice reduces absence and health related costs to business. Not providing it will increasingly be a false economy!

This article was written by Dr Geoff Earnshaw. Dr Earnshaw has been with Roodlane since 2003 and is now an Associate Director.



## equality **THE EQUALITY BILL IS ALMOST CERTAIN TO BE PASSED DURING THE LIFE OF THIS PARLIAMENT - DESPITE DELAYS AND AMENDMENTS WHICH MEAN IT WILL BE PRESSED FOR TIME.**

It was designed to draw together the law on discrimination but now also contains an amendment tabled by Baroness Knight, which will challenge the current employment practice of asking for a medical assessment prior to finalising an offer of employment.

The intention is to avoid a situation where a disabled person is discriminated against and denied employment as a result of health issues disclosed in a pre employment medical examination or on a pre employment form.

There are a number of questions arising for employers:

- Can I ask for a medical assessment of a new joiner?
- What questions can be asked and how detailed should they be?
- Who can see and assess the information?
- How can an employer ensure that the employee is fit for the role? And how can an employer make reasonable adjustments for a disabled employee?
- How can an employer ensure a fair interview process if they are unaware of disabilities such as visual or hearing impairment, which might disadvantage a candidate at interview stage?

We have considered a number of sources including the latest advice from Diana Kloss (Leading Occupational Health lawyer, tribunal judge and recipient of an MBE for her services to Occupational Health Law) in looking at these points.

- An employer can assess the health of a new employee – after the offer of a contract has been made. This means in

reality that the process will simply move from pre offer to post offer stage. For good employers this makes no practical difference as they are already acting within the law and are not refusing employment inappropriately and so would already be considering the Occupational Health advice offered in terms of reasonable adjustment. In the very rare cases where the candidate is unfit for the role and reasonable adjustments cannot be made employment will not proceed.

- Recent case law *Cheltenham Borough Council v Laird [2009] EWHC 1253 (QB)* suggests that the trend over the last few years to ask very few questions may be flawed and that more detailed questions must be asked if the Occupational Health department is to offer a reliable opinion. It seems likely that employers will reverse the trend towards minimal questions if they continue to screen candidates after the employment offer has been made.

- It is very clear that questionnaires should only be seen and assessed by a properly qualified health professional and that advice should be delivered by the professional. Data must be stored correctly. We believe that secure on line systems offer much greater reassurance than paper based systems with the attendant potential for loss of documents and the dependence on postal services. The standard of security of an online system should of course be very high.

- An employer can still ask Occupational Health to assess the health of a new employee and offer appropriate advice and recommendations for modifications,

review and support. The change will be to when this can take place.

- An employer can ask a candidate whether they have any additional requirements to facilitate the interview.

Roodlane has always been very careful to ensure that the advice we offer following pre employment assessment does not breach employment law although of course a decision on employment is ultimately yours and not ours.

We offer a tried and tested secure on line pre employment process with all results assessed by a fully qualified and trained professionals and available to the employer within one working day.

All our advice is offered in context of current legal knowledge and in the very rare situations where a candidate may be unfit for a role this recommendation is only made after internal review at the most senior level in context of careful consideration of the detail of the role and discussion (with informed employee consent) with HR and management.

The Equality Bill is likely to become law and with it the changes to pre employment screening are probably inevitable. In reality this will only affect the timing of assessments and we recommend that our clients move the screening to post offer stage and continue to see it as a helpful process to ensure that employees have all necessary consideration for their health issues.

The assessment should be regarded as a "Placement Medical".

Both these articles were written by our Chief Executive, Dr Gill MacLeod. Dr MacLeod has been with Roodlane since 1994.



## access to **WE HAVE BEEN OPERATING IN LINE WITH NEW GUIDELINES FROM THE GENERAL OH reports **WOULD BE HELPFUL TO REFLECT ON OUR EXPERIENCE SO FAR.****

Our practice is to obtain informed consent at the end of a consultation (so that it genuinely is informed about what was discussed) and to give the employee the opportunity to choose to see the report before it is released. Most people do not ask to exercise that option and just receive a copy of the report. We are specific on the consent in saying that we will not alter our opinion but we do agree to append employee comment if we are asked to do so.

We use secure email and password protected documents to ensure tight timescales and the ability to provide reports to employers in a timely way. We avoid the post where we can because it is unreliable but more importantly definitely not secure.

We allow employees two days to comment. The Faculty of Occupational Medicine takes the view that up to five days may be reasonable and the guidance from the most recent Ethics Committee meeting is awaited, however, the use of email shortens the necessary time and in our experience employees

who feel they need longer usually withhold consent temporarily anyway.

What has been very encouraging is that we are not experiencing a high number of people withholding consent.

The practice of dictating reports in front of the employee is not considered adequate by the ethics committee of the Faculty of Occupational Medicine to meet the requirements of the guidance and we feel it is flawed in that it provides no evidence that the employee has had access to the final version of the report. It can easily be argued that the content had changed or that the individual did not have time to consider the comments or respond. We believe it would be difficult to defend the practice in a tribunal situation and this is also the view of senior legal opinion.

We believe our practice creates a defensible and fair position for the employer and for us. The good news is that it seems to be working smoothly and not delaying the release of reports.

**CITY OF LONDON**  
164 Bishopsgate,  
London, EC2M 4LZ  
T: 020 7377 4646

**CANARY WHARF**  
25 Cabot Square,  
London, E14 4QW  
T: 020 7715 7450

**TOWER BRIDGE**  
2B More London Riverside,  
London, SE1 2AP  
T: 020 7940 1390

**GLASGOW**  
163 West George Street,  
Glasgow, G2 2JJ  
T: 01412 229 950