



Napo guidance

NPS Attendance Management Policy PI 01/2017

HS06/2019

Napo guide to NPS AMP (Attendance Management policy) **PI 01/2017**

Introduction

This guide is written for Napo members, Napo representatives and manager members (who are taking decisions as part of AMP). It brings together previous Napo AMP guidance (BR20-17 and BR20-18). This is not a guide to general sickness absence issues or a definitive guide to AMP, instead it covers specific issues that members and Napo representatives report to us as being the most problematic aspects of the policy, these being:

- A.** Application of managers' discretion in respect to warning trigger points (**Page 1**)
- B.** Disability and trigger points (**Page 3**)
- C.** Disability leave (**Page 6**)
- D.** Women's occupational health and sickness absence (**Page 7**)
- E.** Sickness absence caused by stress at work (**Page 10**)

Background

In late 2016 the POA (Prison Officers Association) and ourselves went into dispute over AMP, when after a long period of consultation the employers refused to soften the most draconian aspects of their new policy. These being lower 'trigger points' than previously, eight days or four spells of sickness absence (instead of 10 days in two or more periods within a 12-month rolling period as in the old policy) and formal action to be taken in the event of unsatisfactory attendance involving three stages (rather than four as previously).

Because of our dispute the then Chief Executive Officer of HMPPS agreed that their assessment of the equality impact of the policy (as required under the Public Sector Equality Duty) was not sufficient and agreed to review this (aspects of this reviewed doc are included in this guidance). Despite admitting that their equality assessment of was not sufficient, NOMS still went ahead and imposed AMP in early 2017.

Since then we have continued to raise our concerns about the policy and the impact it has on our members. In 2017 we were successful in persuading NOMS to organise two pilot AMP workshops with NPS managers – and encouraged them to roll this out across the country (this was left to divisional teams and unfortunately the rollout has been patchy). We also worked with NOMS on the re-write of their equality assessment of AMP. Most recently, after many times of us raising the issue with the NPS, they have finally agreed to ban the panel meetings of managers and HR to decide on absence management warnings. Now NPS managers will be able to make decisions on issuing sickness warnings without going to a panel or meeting, as was the case previously. Only recently we asked Sonia Crozier to explain how confident she is that the AMP is fit for purpose in the light of the influx of several thousand staff into the NPS in 2021.

We hope that this guide will be of some use to you in helping to address by the problems caused by the more pernicious aspects of AMP.

If you have any concerns about how AMP is being applied, please contact your Napo branch in the first instance - and you can also write to info@napo.org.uk

Sarah Friday
Napo National Official (Health and Safety)

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A. AMP and Manager's discretion

Just because an individual has reached a trigger level of days and/or spells of sickness absence this should not be an automatic action to issue a warning. Instead trigger points are an opportunity for the manager to ensure they understand the reasons for the absence(s) and that appropriate action is being taken – whilst individual circumstances have been considered.

The AMP managers guide states:

“Line managers may use their discretion to decide not to issue a warning when an employee reaches or exceeds their trigger point. Line managers should consider the circumstances of the absence and the employee's absence history. If they decide not to issue a warning, they should record their decision and the reason for it.

If the line manager decides not to issue a warning that does not mean a period of sickness absence is removed from the sickness absence record or permanently discounted. It is important that employees are aware of the decision not to give a warning. If there are further sickness absences for the same or a different reason, the line manager may make a different decision. This decision should be based on all of the employee's sickness absences over the rolling 12-month period.

In applying discretion over whether or not to issue a warning, line managers should consider the employee's overall attendance record over the rolling 12-month period.

In applying discretion over whether or not to issue a warning, line managers should consider the employee's overall attendance over the past 12 months. You may decide not to give a Written Improvement Warning following a sickness absence which is uncharacteristic for an employee who has a positive work-focused approach and whose sickness absence record is otherwise satisfactory. Occupational Health advice may help line managers to determine whether the employee is likely to be able to meet the attendance standard expected of them in future.

Further information is available on [My Services](#).”

It is worth being aware of the fact that managers can apply discretionary decision at any stage of the formal action decision points.

Below is a non-exhaustive list of situations of when a warning should not be given:

- the sickness absence is due to an injury or assault or disease contracted in the course of the employee's duties (2.54 of AMP)
- The line manager has decided it is not appropriate/necessary (2.56 of AMP)
- Bone marrow or organ donation, or other treatment which benefits someone else (see 'Is there flexibility not to issue an Unsatisfactory Attendance Warning?' (<https://myservices.justice.gov.uk/noms/i-need-to-manage/staff-being-away-from-work/sick-absence>))
- someone is recovering from the after-effects of IVF treatment (See 'Is there flexibility not to issue an Unsatisfactory Attendance Warning?' (<https://myservices.justice.gov.uk/noms/i-need-to-manage/staff-being-away-from-work/sick-absence>))

- a member of staff has had an operation or treatment which could help to improve attendance or prevent sickness absence (See 'Is there flexibility not to issue an Unsatisfactory Attendance Warning?' <https://myservices.justice.gov.uk/noms/i-need-to-manage/staff-being-away-from-work/sick-absence>)
- Staff have been absent due to chronic conditions such as cancer, any discussions regarding their absence must be dealt with sensitively, with the primary aim to provide them with the appropriate support and assistance they may require. (See 'Is there flexibility not to issue an Unsatisfactory Attendance Warning?' <https://myservices.justice.gov.uk/noms/i-need-to-manage/staff-being-away-from-work/sick-absence>)
- a sickness absence is uncharacteristic for an employee and whose sickness absence record is otherwise satisfactory (See 'Is there flexibility not to issue an Unsatisfactory Attendance Warning?' <https://myservices.justice.gov.uk/noms/i-need-to-manage/staff-being-away-from-work/sick-absence>)
- There is likelihood of further sickness absence for the same reason. Occupational Health advice may help determine this. (See 'Is there flexibility not to issue an Unsatisfactory Attendance Warning?' <https://myservices.justice.gov.uk/noms/i-need-to-manage/staff-being-away-from-work/sick-absence>)
- food handling, anyone, known to be or suspected of suffering from, or to be a carrier of a disease likely to be transmitted through food should not be permitted to work in an environment where they are handling food. (See 'Is there flexibility not to issue an Unsatisfactory Attendance Warning?' <https://myservices.justice.gov.uk/noms/i-need-to-manage/staff-being-away-from-work/sick-absence>)
- Personal or domestic issues, it may be appropriate not to issue a warning when the primary cause of sickness absence is due to personal or domestic issues, which are substantial, but may lead to short-term sickness absence only. (See 'Is there flexibility not to issue an Unsatisfactory Attendance Warning?' <https://myservices.justice.gov.uk/noms/i-need-to-manage/staff-being-away-from-work/sick-absence>)
- absence as a result of injury caused by the negligence of the employer (see 2.150 to 2.152 of AMP)
- pregnancy related sickness absence (2.53 of AMP)
- Absences attributable to a successful 3rd party claim (2.57 of AMP).

AMP, the Equality Act 2010 (disability, sex, age) and trigger points

B. 1) Disability

What counts as a disability?

Disability is a protected characteristic under EA10 (Equality Act 2010) which protects staff with a disability from unlawful discrimination. For the condition to benefit from protection under the Act it must first be shown that there is a physical or mental impairment; secondly, that it must have a substantial adverse effect; thirdly, that it must have a long-term adverse effect and, finally, this adverse effect must relate to the ability to carry out normal day to day activities. If it meets these tests then it will be classed as a disability.

Employees will automatically be protected against discrimination under the EA10 from the day they are diagnosed if they have Cancer, HIV or Multiple Sclerosis or if they are blind or partially sighted. EA10 also protects those who were disabled in the past but have since recovered.

If a member has a condition that they believe meets the tests outlined in the first paragraph of this section they must declare this to the employer. The employer will then refer the member to have an Occupational Health (OH) assessment. The OH report will provide the employer with their assessment if the condition is likely to be classed as a disability under the Equality Act and furthermore make recommendations for any reasonable adjustments that may be required for the employer to meet their legal obligations; this includes potentially amending the trigger points for sickness absence used to instigate formal procedures.

Occupational Health Assessments

Occupational Health provide the employer with advice about any ill-health concerns. The OH report will provide specific advice regarding the management of health conditions in relation to work and any support and/or reasonable adjustments that should be considered.

The benefits of and reasons for an OH referral should be discussed with you by the manager prior to completing the referral form. OH will advise on fitness to work and the impact of any health problem and its impact on your ability to perform your job, including any reasonable adjustments or work modifications that should be considered.

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Therefore we advise that you take note of the following:

1. Ask to see a copy of the OH referral before the meeting,
2. Engage with the OH medical adviser positively,
3. You do not have to accept a telephone assessment you can request a face-to-face meeting,
4. Go prepared and be clear what work modifications or reasonable adjustments you require to perform your job (if necessary write it down and list the things you want covered), and finally
5. Ask for a copy of the report before it is sent to the employer to ensure that there are no factual mistakes before the report is shared with the employer.

OH reports do not override GP advice and should not be considered in isolation from other information.

Trigger points and disability

Adjusting trigger points

Adjusting the trigger point is a reasonable adjustment that could allow disabled employees to have more absence related to their disability before they are considered for formal action. If you are a member in this situation of requesting that your trigger points be adjusted, it might be useful to involve your Napo rep at this stage to ensure that the adjustment is reasonable and if you are not happy with the outcome then submit a grievance.

Any adjustment should be included in the RAP (Reasonable Adjustment Passport – see page 5 of this guide).

Advice for manager members considering adjusting trigger point as a reasonable adjustment

Not everyone with a disability will need this adjustment. If other reasonable adjustments have been applied in order to remove or reduce the disadvantage faced by the disabled member of staff, for example through providing AT equipment or allowing working from home, this can remove the amount of time the member of staff may need to take off sick in relation to their disability.

HMPPS guide M18 'How to consider reasonable adjustments, Advice for managers' <https://intranet.noms.gsi.gov.uk/support/hr/wellbeing-and-attendance/Attendance> states that in deciding whether to increase a Trigger Point as a reasonable adjustment, you should take into account:

- The employees absence record
- The stability of the condition
- The level of absence the business can support

If in doubt as to how best to proceed, managers can consult with SSCL or Napo for advice.

If you are representing a disabled member, or are a manager member applying AMP, please be aware of the following:

- i) AMP relies on a system of managers' discretion for disability related absence - rather than automatic exemptions (during the AMP consultation period we argued for automatically excluding disability related sickness absence from the running total. We were not successful which is unfortunate, as this would have made things much easier and clearer).

The relevant section of AMP as regards disability related absence is 2.55 and this reads as follows (the bold is ours, the italics theirs):

“Disability related absences will count towards the trigger calculation, **but managers will be able to use their discretion to decide whether to issue employees with a warning.** *A manager must make sure that reasonable adjustments are considered, such as adjusting the trigger point, variations to working practices or providing specialist equipment for an employee covered by the disability provisions of the Equality Act 2010 to take into account absences that are directly related to that disability.* The trigger point may vary for disabled employees where a higher trigger point has been deemed a reasonable adjustment. Where employees exceed the adjusted trigger point warnings may be issued”.

In addition to AMP 2.55, the manager's guide to AMP states that managers will be able to use their discretion to decide whether to issue employees with a warning when they reach or exceeds a trigger point and “this is particularly relevant if an employee is disabled or has a medical condition covered by the Equality Act 2010”.

- ii) Managers should comply with the HMPPS Equality Impact of AMP, this states that managers should:
 - exercise discretion around warnings/sanctions in appropriate circumstances;
 - act fairly and reasonably, considering each case on its own facts and merits;
 - make reasonable adjustments to aspects of the policy to take into account disability;
 - receive appropriate training on diversity issues e.g. unconscious bias training;
 - Obtain appropriate occupational health advice before making key decisions to ensure disability issues are taken into account.

- iii) In relation to sickness absence, disability and trigger levels ACAS advise that (the bold is ours):

“Managing sickness absence so employers do not discriminate against disabled employees is a contentious area where legal opinions can differ. This is particularly so over ‘absence triggers’ ”.

“An employment tribunal may expect an employer to have modified its ‘absence triggers’, if that would have been a ‘reasonable adjustment’ in the particular circumstances of the individual case. What is ‘reasonable’ can depend on the alteration being sought by the disabled employee for an illness linked to their disability”.

Some of our manager members have reported to us that they have been put under pressure by their more senior officers not to apply their discretion and instead to issue a formal warning. If you are a Napo manager member and coming under such pressure please contact your local branch for support.

If you are able to give clear reasoning as to how you came to your decision - and this comes within that allowed for in the AMP and the associated guidance documents – you should not have anything to worry about. Please also be aware that if the member of staff your decision making applies to decide to take their case to an Employment Tribunal - the Tribunal will look to see that you came to an independent decision.

If you are a manager member making decisions under AMP and concerned about how any aspect of the policy is being applied please let Napo know.
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C. Disability leave (see AMP, section 2.116-2.119)

2.116 states:

“Disability leave is a form of paid special leave that may be offered as a reasonable adjustment under the Equality Act 2010. Employees with a disability can apply for disability leave if they are fit for work but need time off to attend appointments for treatment, rehabilitation or assessment relating to their disability”.

2.117 of AMP explains that disability leave may also apply while waiting for adjustments to be put in place and that the manager should discuss with the employee whether any temporary changes would assist while waiting for adjustments to be implemented and if not disability leave will apply.

Disability leave is different from sick leave and it should be recorded separately to sickness absence and does not count towards attendance management of sick pay calculations. Employees with a disability can apply for disability leave if they are fit for work, but need time off to attend appointments for treatment, rehabilitation or assessment relating to their disability. It may apply for example when attending hospital and GP appointments to taking time off to come to terms with a new diagnosis or cope with treatment side effects - what is required will vary from person to person.

This is a non-exhaustive list of when disability leave may be relevant (each worker's needs should be considered individually):

- hospital treatment as in or out patient;
- assessment for diabetes;
- dyspraxia – related treatment;
- Cancer treatment and rehabilitation
- HIV – related treatment;
- training with a guide dog or other assistance dog;
- training in use of specialist equipment; in training on Braille, BSL, lip reading, counselling or therapeutic treatment;
- Counselling for mental health problems
- recovery after transfusion, dialysis, chemotherapy or radiotherapy;
- physiotherapy;
- to allow adaptations or reasonable adjustments to be made; and
- Surgical treatment.

Disability leave should also apply where the employee has gone sick immediately following or because of treatment to manage the effects of their disability - or can be directly attributed to changes or a new use of medication to manage their disability.

Reasonable Adjustment Passport (RAP)

The HMPPS HR Directorate, in liaison with the HMPPS Disability Network lead, have developed a 'Reasonable Adjustment Passport' and supporting guidance. The aim of the RAP is to improve the ease with which employees with a disability, health condition or where other workplace adjustments may be needed, can move jobs.

There are three functions within the passport:

- to support a conversation between an employee and their line manager about the disability, health condition or requirements around gender reassignment and any workplace adjustments that might need to be made;
- to act as a record of that conversation and of the adjustments agreed;
- to act as a record of any adjustments made for individuals as a temporary supportive measure.

D. 2) Sex

Certain health conditions (such as menstruation and menopause) that could give rise to sickness absence only affect women and sex is a protected characteristic under EA10.

As mentioned previously, Napo successfully challenged HMPPS on their screening doc of the EIA equality impact assessment of the AMP. One of our main concerns regarding their original assessment was that it did not mention women's reproductive health issues - other than in relation to pregnancy and maternity – the policy has now been amended to reflect such issues.

In relation to **pregnancy related sickness absence** 2.53 of the AMP states that if sickness absence is pregnancy-related it must be exempted:

“If the sickness absence is pregnancy-related, a Written Improvement Warning must not be given. The line manager can tell the employee at the Return to Work Discussion they will not be given a warning. However, they should still meet with the employee to discuss ways of helping them meet the attendance standard expected of them.

For further guidance see M15 “How to manage pregnancy related sickness absence guide”.

Menopause related sickness absence.

A **Napo Members Women’s Health Survey** in 2016 found that in connection with sickness absence the majority (93%) of respondents had not taken any absence from work because of the menopause. However up to 11% of women had left work early and about 10% had arrived late.

It is feasible that women do not always record the reason for their sickness absence being due to the menopause, as they may feel embarrassed about this or feel it carries a stigma. If applicable, women should be encouraged to report the menopause as the reason for sickness absence. This should be getting easier as there has been more press coverage recently of the menopause and how it can affect at work.

It is important to be aware of ACAS guide on the menopause and sickness absence, cut and pasted as follows (the bold is ours):

Menopause at work, ACAS guide:

“Managing absence from work should be handled sympathetically because the menopause is a long-term and fluctuating health change. Employer and worker should be prepared to make changes to help the worker continue to work, and minimise, reduce or remove any dips in their job performance because of symptoms. A worker should also be given a reasonable amount of time to adjust to changes. **In an employment tribunal, menopause symptoms have been accepted to be a disability. Consequently, it is advisable, as well as being good practice, for an employer to consider making changes for a worker experiencing perimenopausal or menopausal symptoms.**

If a worker is off sick because of the menopause or perimenopause, the employer should not include these absences in their attendance record. This means that absence because of the menopause or perimenopause should not lead to a disciplinary warning.

Employers and managers need to be aware that there are risks of disability discrimination and/or sex discrimination, and/or age discrimination if a worker is mismanaged because of their menopause or perimenopause symptoms. See the section, **Risks of sex discrimination, disability discrimination and age discrimination**, further into this guidance”.¹

Case Law:

Davies v Scottish Courts and Tribunal Service is a recent case in which the symptoms of the menopause were accepted to be a disability under the Equality Act 2010 and the claimant found to have been discriminated against for a reason arising out of that disability and unfairly dismissed.

If a women has a pre-existing health condition or disability the may find that the menopause can exasperate their existing health problems. Menopausal symptoms can be made worse by the disability/existing health problem.

For more information, please see Napo guide to Menopause at work
<https://www.napo.org.uk/sites/default/files/Napo%20guide%20to%20the%20menopause%20at%20work.pdf>

Menstruation related sickness absence

In the menopause case mentioned above, Davies v Scottish Courts and Tribunal Service, the applicant suffered from heavy bleeding, dizziness and poor concentration - symptoms that could also apply to periods.

There is a difference between period pain and menopause symptoms. Period pain symptoms will usually only occur once a month and usually only for a few days, whereas the menopause occurs over a longer period of time. It has not yet been tested in court as to whether period pain amounts to a disability. Even if it does not amount to a disability for all women, employers should take period pain seriously and support and assist their employees and be reasonable when addressing frequent, short-term sickness absence. If there is a pattern that may indicate extreme symptoms of period pain, such as monthly absence for one or two days, employers need to consider this instead of operating blanket absence trigger points.

¹ ACAS guide to Menopause at Work, <https://www.acas.org.uk/menopause>

3) Age

Age is a protected characteristic under EA10.

Older employees are more likely to require regular health screenings to preserve their health. Employees should schedule medical appointments/screenings outside of normal working hours. When this is not possible employees should book appointments that minimise disruption to work (2.124-2.126 of AMP).

E. Sick leave excusal

AMP 2.150 reads as follows:

“Someone who contracts a disease or is injured whilst at work may qualify for sick leave excusal. If excusal is granted all sick leave, up to maximum of 6 months (182 calendar days), relating to that injury or disease is removed from reckoning against the individual’s sick leave record for sick pay purposes and excluded from consideration under the Unsatisfactory Attendance procedures”.

Sick leave excusal and sickness absence caused by workplace stress

Napo representatives have successfully argued that the emotional impact of occupational stress equates with any physical injury that might be caused for example through an assault at work - and that therefore a sick leave excusal should be granted.

To be able to argue this successfully, it is important that when suffering from physical or mental symptoms related to stress (whether this be entirely work related or a combination of work and personal related stress) that members raise and record instances of stress and stress-related health symptoms on fit notes.

If an application for SLE has not been approved the applicant can appeal twice during a 12 month period and they should also consider submitting a grievance if not successful.

Stress at work

Even if you are not at the stage where you have to go sick from work due to stress, you should ensure that your work-related stress is recorded. This can be done by raising the issues at appraisal meetings, by issuing a Napo Foreseeability Notice <https://www.napo.org.uk/stress-work> or by reporting this stress as an accident incident recording system. Reporting the problem as occupational stress is important to allow the employer to try to resolve the problem and could be important evidence if you go on to make a legal claim.

For more information on stress at work, see Napo guidance <https://www.napo.org.uk/stress-work>

Sources for this guide:

ACAS Guidance, Disability discrimination: key points for the workplace
LRD booklet, Sickness absence and sick pay