

DISABILITY LEAVE

Disability leave is time off from work for a reason related to someone's disability. It is a type of 'reasonable adjustment' which disabled workers are entitled under the Equality Act 2010.

This factsheet tells you why disability leave is important to your branch; how to organise around it; and how to negotiate a good disability leave agreement. Disability issues have been on branch agendas for some time and employers may welcome an approach from UNISON representatives to jointly agree policies for disabled workers. The second half of this factsheet is a briefing on disability leave which you can share with your employer.

A) What has disability leave got to do with my branch?

One person in five of the working age population is disabled. Disabled people face such widespread discrimination that many are not even 'out' at work about having a disability. UNISON supports the legal right of disabled workers to equality, but this can be meaningless without the back-up of a trade union.

Disability leave is also an open door for UNISON campaigners and negotiators. The Equality Act 2010 says 'reasonable adjustments' must be made for disabled workers, but many employers have poor or non-existent disability policies.

The Equality Act is still a relatively new obligation on employers, it widens the scope of the original Disability Discrimination Act and requires public bodies to actively promote disability equality. This is an ideal time to campaign for better agreements covering disabled workers.

B) How can we use disability leave to organise?

Campaigning on disability issues gives the chance to organise and recruit a group of marginalised and often ignored workers. It can involve a new group of potential activists and show other potential members that UNISON is at the forefront of equality in the workplace and beyond. Use a disability leave campaign to develop your branch by:

- Negotiating better conditions of service for your Disabled members.
- Improve employment relations with the employer by working together to eliminate discrimination from workforce policies and procedures
- Recruiting workers on the back of a disabled workers rights campaign and an improved disability agreement.
- Developing branch organisation by establishing a working group or self organised group to involve and develop new activists, and making better links with the UNISON regional Disabled Members Committee.
- Networking with the local community – with campaigning and advice organisations, the Disability Employment Advisor at your Job Centre Plus,

the Equality and Human Rights Commission and other UNISON branches in your region that already have disability leave agreements.

C) How to negotiate a disability leave agreement

In the sections below, the checklist will guide you through the negotiating process and the key negotiating points will help you back up the case for a good agreement. You should base this on UNISON's model disability leave agreement.

Disability is still a new issue, and you may be able to work in partnership with your employer over it. Approaching them with a model agreement means they are more likely to accept good practice. Some employers have given paid time off for a disabled members group, which can also give 'expert' advice on changes to the workplace environment.

Example: Nottinghamshire County Council gives all disabled employees the right to attend the Corporate Disabled Workers Group in work time. This is a self managed group which meets monthly and gives disabled employees the opportunity to meet colleagues discuss areas of mutual interest, share problems and develop strategies for dealing with particular issues and provide feedback on County Council policy.

Use the 'business case' in the second part of this factsheet for arguments to persuade your employer that disability leave is good for the organisation, and be ready with your responses to the 'common arguments'.

There is a general lack of understanding about disability discrimination and how to support disabled people. If you do not already have a good disability policy, this may be an important opportunity to request disability awareness training for managers and union reps. Even disabled members may not be aware that they qualify for protection under the Equality Act 2010, or that they are 'disabled' according to the Act's definition of a disabled person. Knowledge can be power, so publicise disabled people's rights.

But remember that the most important thing is to use the process to develop activists and your organisation, recruit new members and promote UNISON. Then the branch will be in a stronger state for its next campaign.

D) Organisers and Negotiators Checklist

1. Set up a Working Group
2. Confidentially map or survey your disabled members
3. Consult with UNISON members, UNISON bodies and external organisations
4. Make your claim, using the business case
5. Agree a disability leave policy, or a wider disability policy
6. Agree a time-scale for implementation
7. Publicise the result and recruit non-members

8. Tell your UNISON regional disabled members' group and send a copy to UNISON's Bargaining Support Group at bsg@unison.co.uk.
9. Encourage new activists to become reps and/or join the branch committee
10. Ensure the working group monitors the policy

E) Key Negotiating Points

The model agreement aims to bring together best practice from the range of disability leave agreements that are currently in place. You may need to tailor it to your particular circumstances. The notes below guide you through the model agreement, section-by-section.

Before you start to negotiate, check the UNISON Bargaining Information System report on disability leave for your service group or region to find out what others have negotiated. You can get this from your region or the Bargaining Support Group. Set up a disability working group to feed in ideas and experience, and to develop members into activists.

Overall

Try to build in a review date for the agreement after a year so you can see how it is working in practice.

I Introduction

A disability leave policy may be your first step towards a disabled workers policy or an extension to your existing one. It should complement existing equal opportunities agreements but do audit other policies to ensure they comply with the Equality Act 2010.

It is vital that disability leave is paid. Experiences from other leave, such as paternity/ maternity support leave, shows that take-up is very low if it is unpaid or low paid.¹ In addition, disability leave is an absence that is distinctly related to the employee's impairment or health condition and is being requested to eliminate discrimination against disabled people as well as ensure the workplace offers a safe and healthy environment.

Example: Salford Council allows, following a careful process of formal and informal consultation and assessment, up to six weeks additional leave to assist in the adjustment process if an employee becomes disabled. This leave is paid at the usual full salary/wage.

2 General principles

If an employer accepts that disability is a social problem, not a medical problem, they have taken the first step towards equality for disabled workers. The social model of disability says that people with impairments are disabled by the barriers society puts in their way.

¹ A MORI survey for the Chartered Institute of Personnel and Development (CIPD) in 2004 found that Less than half (46%) of fathers would take paternity leave at the statutory rate of pay (just over £100 a week); but at 90% of full pay this increases to four out of five (80%), and at full pay the figure rises to nearly nine out of ten (87%).

Example: Derby City Council supports the social model of disability. They “accept that ‘disability’ is discrimination against disabled people, caused by physical, communication and social barriers. It is these barriers, which prevent disabled people from having equality in all aspects of life. For example, printed material can be a barrier for a visually impaired person. This is not because the individual is a visually impaired person, but because the printed material has not been put into a format accessible for them. Under this model, disabled people usually self declare that they consider themselves to be a disabled person.”

Resolving disability cases through negotiation means that workers and employers don’t have to go through the expensive, lengthy and sometimes traumatic employment tribunal process. It can also save the disruption and staff time that grievances take.

The positive duty on public authorities to promote disability equality came into force in the Equality Act 2010. It applies to all public authorities and contractors providing public services on behalf of a public authority. Employers who will be covered by this duty should explicitly recognise it, and others should adopt it as best practice.

It is important that members are aware of the definition of a disabled person, what constitutes discrimination according to legislation and for the right to have reasonable adjustments made in the workplace. If an employer disputes that a worker is covered under the Equality Act, the final decision would be made by an Employment Tribunal.

3 What is disability leave?

Doctors, employers or even occupational health, cannot decide what is a reasonable adjustment for a disabled person. A medical diagnosis can say what a person’s impairment is, but it is only possible to know the effect on a person by consulting with them about their experience of barriers to full inclusion in society.

Occupational health used to be a byword for doing the management’s dirty work. However, in recent years their image has improved and many disabled people have found them helpful in confirming disability status as well as advising on the range of options and obtaining reasonable adjustments at work.

Example: Strathclyde Police do permit absences during working hours for rehabilitation, assessment or treatment. But a good disability leave agreement should go beyond this.

4 Disability leave and sick leave

Many employers are currently clamping down on sick leave, especially with the ‘Gershon’ reforms in the public sector. They may see disability leave as a way to avoid their attempts to reduce sickness absence, but it should be kept strictly separate and they would be running the expensive risk of being taken to an employment tribunal for disability-related discrimination.

Example: Chief Officers at Luton Council are authorised to grant up to 20 days paid absence every year to disabled employees needing counselling related to their disability specialised training or ad-hoc treatment. This is not a replacement for sick leave and can only be taken when the employee is ‘well’.

Try to stress the business case to employers and the benefits of planning for when disabled staff may be off. Having clear procedures for taking disability leave means that its use is transparent, and if other reasonable adjustments are put in place, such as working from home, the need for actual leave will be minimised.

5 Who is entitled to disability leave?

The government took a step towards including all degenerative illnesses in the legal definition of disability, but decided to only specifically include HIV, Cancer and MS. Some employers include more. If you have a forward thinking employer, try to get the definition of 'disability' widened to include 'others who have a long-term degenerative illnesses' as well as those who have an impairment where the day to day affect falls below substantial. Disability is being widely interpreted by Employment Tribunals, and general learning difficulties can now amount to a mental impairment.²

Although it may be difficult to get 'reasonable adjustments' made if a disabled person does not reveal that they are disabled, it is essential not to 'out' someone as disabled if they don't want to be. It may still be possible for adjustments be made, including disability leave, but kept confidential. The Data Protection Act gives guidelines for keeping medical information confidential.

Example: At Leicester City Council, the meaning of 'disabled' and 'impairment' is explained to staff, and they may then classify themselves as being eligible for disability leave. They are expected to explain to their manager, or confidentially to personnel, why they need disability leave.

6 Disability leave procedure

Disability leave will not be necessary for many disabled employees, but it is one of a range of 'reasonable adjustments' that might be appropriate. Many adjustments are quite small, and the government provides 'Access to Work' funding through the Department for Work and Pensions to help with them.

If disability leave can be mutually agreed by an employee and their line manager, there is no need for it to become a major issue. Therefore the model procedure includes 'stage 1' where any necessary leave can be agreed. Only if no agreement can be reached does it go onto the more formal 'stage 2'.

How an impairment affects a person varies depending on the individual and their circumstances. So it's best not to specify the length of disability leave in an agreement but agree it on an individual basis. But there is a clear difference between disability leave planned in advance, and illness brought on by the disability which is not. Both are 'disability leave' and a disabled person should not suffer detriment for taking either.

The first objective is to have disability leave recorded separately from sick leave, so that disabled workers are not penalised under absence management schemes for being disabled.

The second objective is to agree disability leave that is planned in advance, as part of agreeing (and reviewing) reasonable adjustments for a disabled worker on an annual basis.

Example: University of Central Lancashire (draft agreement) requires disabled employees to complete a disability leave form whenever they are absent from work for a disability-related reason, whether it is for a prior appointment or an unpredicted absence on impairment grounds. This includes the disability-related reason for the absence. Sickness absences is recorded in the usual way.

7 Review of planned disability leave

It is important that any reasonable adjustment is reviewed to see if is working for the disabled worker, and if any other adjustments are needed especially if the impairment has deteriorated or the person's job has changed. This can also improve communication between the worker and manager.

Example: North West Wales NHS Trust aims to ensure that there is a mechanism in place to discuss at any time, but at least once a year with disabled employees, what they as employers and the individual employee can do to ensure equality of opportunity.

8 Other issues

It is important that colleagues of the member of staff are supportive and aware why disability leave is available. Colleagues should not be disadvantaged because someone is exercising their right to disability leave.

Example: North West Wales NHS Trust Staff recognizes the important role of trade union reps by advising staff who have believe they have experienced discrimination to report the problem to their trade union representative as an alternative to their Supervisor/Manager or the Personnel Department.

E) Resources

“**Negotiating to end disability discrimination**” - for bargaining advice on disability issues, stock no. 1924 or on www.unison.org.uk/bargaining/equalities.asp.

“**Local Bargaining**” - for general local bargaining advice, stock no. 1801 or on www.unison.org.uk/bargaining.

“**UNISON Stewards Handbook**” - for advice on organising, stock no. 1055 or on www.unison.org.uk/acrobat/11534.pdf.

Inclusion Scotland is a disability led coalition of organisation and individuals - www.inclusionscotland.org.

The **Employers Forum on Disability** is the leading employers organisation on disability. Its website is www.employers-forum.co.uk.

Information on **data protection** is in the UNISON guide to “Bargaining on Privacy” on www.unison.org.uk/bargaining/conditions.asp.

1. What is disability leave?

Disability leave is time off from work for a reason related to someone's disability.

Employers must make 'reasonable adjustments' for disabled people, and the Equality and Human Rights Commission recommends disability leave as an example of a reasonable adjustment³. Many organisations already have disability leave in some form, and UNISON, the TUC and disabled peoples' organisations are campaigning for it to be an explicit legal right.

Absence management policies often discriminate against disabled workers because time that they take off work for disability-related reasons is recorded as sickness absence. This may result in unlawful discrimination. Paid disability leave allows disabled workers to take leave relating to their disability without facing detriment.

Because the effect of an impairment depends on the individual concerned, disability leave needs to have a wide scope. It may be an occasional few hours planned in advance for treatment or assessment, or a longer period of time for recuperation. It may also be unplanned time off work, related to a person's disability, which would otherwise be recorded as sickness absence.

2. What does the law say about disability?

The Equality Act 2010 defines a disability as "a mental or physical impairment that has a substantial and long-term effect on a person's ability to carry out normal day-to-day activities." Long term usually means 12 months or more, and now HIV infection, cancer or multiple sclerosis are included from the point of their diagnosis. A recent change means that mental impairments no longer have to be "clinically well-recognised".

Employers are also obliged to make 'reasonable adjustments' to working arrangements or the work environment for actual or potential disabled employees.

Disabled people are protected against discrimination in the areas of recruitment and selection; terms and conditions of employment; employment benefits; training, development and promotion opportunities; termination of employment; and any other disadvantage.

There are five types of unlawful discrimination:

1. Direct discrimination, when an employer treats someone less favourably because of their disability

³ It recommends that employers should "Establish a policy in relation to disability-related leave, and monitor the implementation and effectiveness of such a policy."

2. Disability-related discrimination, when an employer treats a disabled person less favourably for a reason related to their disability and cannot show that the treatment is justified
3. Failure to make a reasonable adjustment in relation to a disabled person
4. Victimisation, when an employer treats someone less favourably because they have either asserted a right under the Equality Act or assisted someone in doing so
5. Harassment, when, for a reason relating to a person's disability, someone engages in unwanted conduct that has the effect of either violating the disabled person's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for that person.

From December 2006, the "public sector disability duty" means public authorities and contractors providing public services on behalf of a public authority have to operate with "due regard" to the need to eliminate discrimination against and harassment of disabled people, promote positive attitudes, and encourage disabled people to participate in public life.

3. Examples of disability leave

The Equality and Human Rights Commission's Code of Practice (which can be given as evidence in court) gives a number of examples of where disability leave would be a reasonable adjustment:⁴

"An office worker with cancer says that he does not want colleagues to know of his condition. As an adjustment he needs extra time away from work to receive treatment and to rest. Neither his colleagues nor the line manager need to be told the precise reasons for the extra leave but the latter will need to know that the adjustment is required in order to implement it effectively."

"An employee who has cancer needs to undergo treatment and rehabilitation. His employer allows a period of disability leave and permits him to return to his job at the end of this period."

"If an employer operates a policy of dismissing all employees who take six months' sick leave, it has not directly discriminated against Disabled people because it does not treat them less favourably. However, it may be disability-related discrimination, and the employer has failed to make a reasonable adjustment to its policy, for example, by allowing disability leave."

"A woman with an autoimmune disease has taken several short periods of absence during the year because of the condition. When her employer is taking absences into account as a criterion for selecting people for redundancy, he discounts these periods of disability-related absence."

In addition, there are several examples of case law involving sick leave but related to disability leave:

When an employee was off sick because her employer had failed to make a reasonable adjustment, the Court of Appeal held that it was unjustified less favourable treatment for her employer to move her onto half pay after a period of full pay. If the reasonable adjustments had been made, she would have been at work on full pay (*Nottinghamshire County Council v Meikle* [2004] IRLR 703, CA). If she had been on fully-paid disability leave while the reasonable adjustments were made, the situation would not have occurred.

A woman on sick leave for stress was dismissed for a reason related to her disability (poor time keeping and high sickness absence). An Employment Appeal Tribunal ruled that this was discriminatory (*Rowden v Dutton Gregory* [2002] ICR 971 EAT). If she had been on disability leave, rather than sick leave, the situation may not have occurred.

4. What does UNISON say about disability?

UNISON supports the Social Model of Disability. We believe the way society is organised creates barriers to inclusion and prevents disabled people from taking an equal part in life. As a union we campaign on disability issues including:

- Inaccessible workplaces
- Information systems that don't allow for disabled people's access needs
- Negative attitudes and prejudices

There is still too little understanding of disability. Negotiating collective agreements to support Disabled workers; making members aware that they may be entitled to rights under the Equality Act and ensuring employers fulfil their responsibilities, is vital.

5. How far have you got?

Still non-league:

You've no provision for disability leave, and absences due to a disability are still recorded as sickness absence. Your employer may be open to disability related discrimination claims.

Getting promotion:

Your employer records disability related absence separately from sickness absence, and disregards it when looking at absence management. However disability leave is not planned, and staff cannot take disability leave when they are well but need to be absent from work for a disability-related reason.

At the cup final:

Your employer has a commitment to equality for disabled staff and the social model of disability. Disability leave is available and staff are aware of their entitlement. Managers have been trained in disability awareness and monitor staff with a high level of sickness absence for the possibility

they may have an underlying disability which requires a reasonable adjustment. Management consults with the UNISON disabled members' group, via the branch on an ongoing basis.

6. Why should an employer to agree to disability leave?

Apart from the legal duty to make reasonable adjustments, disability leave allows potential absence management problems to be identified at an early stage and enables managers and workers to find a mutually acceptable solution. In addition, there is an excellent business case for introducing disability leave:

1. Avoiding court cases and the time and cost they involve. In 2004, an Employment Tribunal awarded £203,617 to a court usher when she resigned after more than three years of trying to get her employer to make reasonable adjustments for her disability.⁵
2. Giving time to assess and implement the adjustments that a newly disabled person may need, with guidance from the worker themselves and others such as the occupational health service.
3. Retaining skilled and experienced employees. In purely financial terms, replacing a worker currently costs £4,625 on average, not including the costs of early retirement on medical grounds.⁶
4. Saving on early retirement or ill-health retirement payments.
5. Maintaining or improving the self esteem, motivation and performance of the staff involved.
6. Motivating other staff by visibly reinforcing a commitment to providing equal opportunities for all.
7. Appearing an 'employer of choice' in the current tight labour market by projecting a good public image.
8. Giving a wider group of staff to recruit from by encouraging disabled workers to apply, or to continue to work.
9. Creating the social benefit of reducing the marginalisation of disabled people.

7. Some answers to common arguments

People will just abuse the scheme.

Any scheme is open to abuse. But a properly designed scheme, regularly monitored, managed locally, and with trade union involvement should prevent abuses.

Disabled people are getting preferential treatment

The purpose of any policy that addresses equality issues is to ensure equal treatment not preferential treatment. Disabled people are much

⁵ Browne v Greater London Magistrates' Court Authority.

⁶ Recruitment, Retention and Turnover 2005, Chartered Institute of Personnel and Development.
Bargaining Support Group e-mail: bsg@unison.co.uk

more likely to be penalised under an absence management policy than non-disabled people, and disability leave is a legal right as a 'reasonable adjustment'.

We already have a special leave policy

Disability leave involves issues far beyond occasional special leave. It should be part of assessing what reasonable adjustments are necessary for a disabled person. It may involve a degree of confidentiality such that the line manager does not know about a worker's impairment. In addition, it should cover leave which would otherwise be classed as sickness absence.

Our policies are already Equality Act compliant; we don't need a disability leave policy.

Although other policies should be audited to ensure they are compliant with the Equality Act, it is unlikely that organisations will have reasonable adjustments, disability leave and other important conditions of service already included in other policies. Even if they are, it is difficult to find out what a disabled person is entitled to if it is scattered amongst a range of other policies. It is better to bring them together into one place so disabled people can easily find out what they are entitled to.

Disability absences are recorded separately from sick leave – why do we need another policy?

Although recording disability leave separately from sick leave is an important first step, disabled people should be entitled to paid leave when they are not sick but need time off work due to their impairment. It is also important that disability leave isn't seen as sick leave – disabled people are not, as a rule sick but have an impairment.