

Sickness and sick pay: frequently asked questions

Below are some frequently asked questions (FAQs) about sickness and sick pay. Although these FAQs highlight some key issues relating to Employment law, they are not comprehensive and the answers should not be treated as a substitute for seeking professional advice on a specific issue.

Q: Under what circumstances do I have to pay sick pay?

A: You have to pay statutory sick pay (SSP) to all full and part time employees except where, on the first day of the 'period of incapacity for work' (PIW):

- their PIW links with a claim for certain other Social Security benefits, such as incapacity benefit;
- they have already had (or been due) 28 weeks' SSP over a three year period with the same employer;
- their average weekly earnings in the relevant period (calculated over at least eight weeks up to the most recent normal pay day) are below the NI lower earnings limit (currently £95 per week);
- in the case of a female employee, she is within the disqualifying period related to pregnancy;
- they are away from work because of a trade union dispute;
- they are in custody;
- they are outside the UK, and the employer is not liable to pay Class 1 National Insurance contributions;
- they are a new employee, and have not yet done any work for you.

The previous age restrictions have disappeared, as a result of the introduction

of legislation banning age discrimination unless it can be justified.

Q: Do we have to pay statutory sick pay (SSP) if we have our own sick pay scheme?

A: Not if your scheme is as generous as (or more generous than) the statutory scheme. SSP should be deemed to be included in what you pay.

Q: How much is SSP?

A: Currently £79.15 a week.

Q: Under what circumstances should I pay more than SSP?

A: There is no legal obligation to pay more than SSP. But many employers have their own sick pay schemes which replace or top up SSP, details of which will be set out in the contract of employment and/or company handbook. Typically these will provide full pay for a period, possibly up to six months, followed by half pay for another period. This kind of scheme can obviously be expensive, but it helps with recruitment and retention and may be a factor when trying to retain the services of a valued employee.

Q: Can I recover sick pay, or is it just another expense?

A: You may be able to recover some Statutory Sick Pay if you have a high proportion of employees away sick at the same time, under the Percentage Threshold Scheme. Under this scheme - which is not restricted to small employers - you may be able to recover the excess, if you are paying more than 13% of your gross National Insurance contributions in sick pay in the

Head Office
3 Lonsdale Gardens
Tunbridge Wells
Kent TN1 1NX
T 01892 510000
F 01892 549884

Thames Gateway
The Old Rectory
St. Mary's Road
Greenhithe
Kent DA9 9AS
T 01322 623700
F 01322 623701

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month. You do it by deducting the excess from the NI contributions you are due to pay; if the amount exceeds the NI contributions you are due to pay, you take it from the amount you are due to pay in PAYE. However, unless you qualify under the scheme you are not entitled to recover any of the SSP paid to your employees.

Q: When am I supposed to start paying SSP?

A: You start calculating payments at the SSP rate after the third 'qualifying day' of sickness. A qualifying day is basically a day on which the employee would normally be at work - so for people who work Monday to Friday, sickness over the weekend does not count towards the qualifying days.

The payments should be made at the same time as you would have paid the employee's salary for the same period - so for weekly-paid employees, you pay at the end of the week.

Q: Do I pay it gross, or do I deduct tax and NI?

A: You deduct tax and NI.

Q: How long do I have to carry on paying SSP?

A: You can stop paying SSP when your employee's incapacity for work ends — for example, when they return to work, or stop sending doctor's certificates. In addition, you do not have to pay SSP for any day after:

- your employee's contract ends;

- your employee has been due 28 weeks' SSP in a 'period of incapacity for work' (PIW);
- your employee's linked PIW with you has run for three years;
- a female employee's disqualifying period related to pregnancy begins;
- your employee is taken into custody;
- your employee goes outside the UK, and your liability to pay Class 1 NICs ceases; or
- your employee dies.

Q: Do part-timers qualify for sick pay, and if so, at the full rate or pro-rata?

A: Providing that the part-timers earn the same as or more than the lower earnings limit, they qualify for SSP at the normal weekly rate. So you pay the full rate, not pro rata for part timers.

Short-termers are in a different position. Agency workers with contracts for less than three months are not entitled to Statutory Sick Pay. If, however, you allowed employment to continue beyond three months (either in one single contract or several contracts added together, provided the contracts are less than 8 weeks apart), you would potentially be liable, even if the formal contract had come to an end.

Q: What can I require employees to produce, by way of evidence that they are genuinely ill?

A: You are entitled to ask for reasonable evidence of incapacity, but should inform your employees of exactly what you want

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them to produce. For example, you might ask for:

- self certification for spells of up to seven calendar days;
- a doctor's statement for periods after the first seven days (you cannot normally obtain a doctor's certificate for the first seven days);
- with employees who have been off long-term, it is reasonable to ask for a medical assessment from their GP, or alternatively to arrange for an independent medical examination.

In April 2010 a new type of doctor's 'fit note' was introduced. Unlike previous sick notes, which just said whether or not an employee could work, these notes should outline what, if any, work an employee can do to help prevent employees going on unnecessary long term sick leave.

Q: What can we do when an employee takes frequent short absences and we suspect malingering?

A: Monitor sickness absences, and if a pattern of frequent short absences emerges, interview the employee, show the attendance record, and ask for an explanation - it is possible that there is an underlying problem, such as a personality clash, or a domestic or family difficulty. You may be able to do something about the problem that could improve attendance. Require the employee to complete a self-certification form on each occasion and make it plain that records are being kept and that the current level of absences is unacceptable. Tell the employee that their absences will continue to be monitored and that you may take disciplinary action if their attendance record does not improve.

Q: One of our employees is claiming sick pay, but we believe he is moonlighting. Can we stop paying SSP?

A: SSP is a statutory entitlement. It is payable after four or more consecutive days of sickness (including weekends and holidays), providing that the employee is too ill to be capable of doing their work.

You can refuse to pay SSP if you reasonably believe your employee is not genuinely ill, or if your employee has not complied with the notification requirements. However, your employee can then ask for written reasons for the decision and you are obliged to respond within seven days. If you fail to do so - or if the employee does not accept your reasons - he (or she) can ask for an adjudication (effectively by the HMRC) and has the right of appeal thereafter to the independent Tribunal.

If the employee does challenge the reason for non-payment, you will need to have evidence for your reasons for refusing to pay. This evidence must have been reasonably and proportionally obtained.

Q: We have a sick employee who seems unlikely ever to work again. Can we terminate his contract of employment?

A: The answer to this one depends on why the employee is unlikely ever to be able to work again.

You can legitimately dismiss an employee who is unable to do his job because of sickness – provided that you have followed a fair procedure before doing so. This involves consulting with the employee, obtaining up-to-date medical evidence as to the prognosis and considering whether alternative work could be offered. You can

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dismiss even if the employee's sickness is down to you (for example, if he has been incapacitated as a result of stress at work). Under such circumstances an employer would be expected to 'go the extra mile' in finding alternative employment; but if that failed, the question of culpability would be 'relevant' but not 'decisive' in determining whether dismissal was reasonable. (However, the employee would have grounds for suing you for damages.)

If, however, your employee is suffering from a disability then you are obliged to consider whether 'reasonable adjustments' could help him return to work, before you make any decision on whether to dismiss. The definition of disability has been extended to include long-term conditions such as HIV-Aids, multiple sclerosis, cancer and additional forms of mental illness, including for instance recurring depression.

If you fail to consider 'reasonable adjustments' under these circumstances, dismissal might well be discriminatory, as well as unfair.

Q: We have a comparatively new employee with a neurological condition that he did not tell us about when he interviewed. Can we dismiss him?

A: The first question is whether you asked the employee about his medical history, in the course of the recruitment process, or whether the job was offered subject to a satisfactory medical. If you did ask and no problems were revealed at that stage, but they became apparent shortly after he started, then potentially you may be able to dismiss him. However, it will depend on the nature of his condition, and how it is likely to affect the job.

If you do not ask questions and/or required a medical, then you are potentially on more difficult ground. Either way, you need to consider whether the neurological condition is a disability under the Disability Discrimination Act (DDA). If so, you are also obliged to consider whether it would be possible to make 'reasonable adjustments' to enable the employee to do the job, or alternatively to provide another job.

This is a tricky situation to deal with, even if you have succeeded in identifying the problem within a year of the employee being taken on, and therefore before the unfair dismissal protections apply. If it has been longer, it is going to be trickier. And if the condition turns out to be a disability within the terms of the DDA it will be tricky no matter when you identify the problem, because there is no length of service requirement for a discrimination claim. Seek legal advice.

Q: Am I allowed to ask job applicants for details of any illnesses lasting more than three days over the last five years?

A: You can ask for such information, but be careful what you do with it. If you refuse to take someone on because of a medical condition which is a disability within the terms of the Disability Discrimination Act, you could find yourself fighting a discrimination claim, and/or required to make 'reasonable adjustments'. If in any doubt, take specialist legal advice.

Q: If I refuse to employ someone because she has a poor sickness record, could she sue me for discrimination?

A: That depends on whether her sickness record relates to a disability within the terms

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of the Disability Discrimination Act, i.e. a physical or mental impairment which has a substantial and long-term effect on her ability to carry out day-to-day activities. If it does, and you refuse to employ her in consequence, then she would be able to make a claim for disability discrimination.

You could argue in your defence that you had considered whether it was possible to make 'reasonable adjustments' to enable the applicant to do the job, but disregarded such adjustments as they were not 'reasonable', for example because they were too expensive, or impractical, or would not make any significant difference to the applicant's ability to do the job. You must be able to prove that you had considered making such adjustments and can explain why they were unreasonable, if you want to be able to defend yourself against a charge of discrimination. You may need to explore, for example, whether you could obtain financial assistance to make such adjustments.

Q: What do I have to say about sick pay in my employment terms?

A: Most employers spell out the fact that employees are entitled to SSP, and what the qualifying requirements are. If you have decided to pay more than SSP, you should explain this in your employment terms, together with the practical arrangements for dealing with sickness absences. These could include, for example, to whom employees should report their sickness absence, and details of the self-certification or doctor's certification processes.

Q: What happens to employees once SSP runs out? Am I responsible for continuing to pay them?

A: SSP is only payable for 28 weeks in a three year period. Once SSP runs out, you are not obliged to pay any more — unless your contract of employment provides otherwise. You are, however, still the employer and the contract continues — unless you have decided to terminate the employment, on the grounds of incapacity/sickness. If so, you must follow your normal disciplinary procedures — which must be equivalent to or better than the statutory minimum – warnings, consultation with the employee, obtaining medical evidence, the opportunity for the employee to make representations, the opportunity for the employee to appeal and so on.

An employee who has exhausted his entitlement to SSP may be eligible for employment support allowance from the State.

Q: What penalties could I incur if I don't pay sick pay?

A: Failure to pay SSP can amount to a criminal offence, for which you could be fined. Failure to pay any benefits above and beyond SSP, promised under the terms of the employment contract, could result in claims for breach of contract or unlawful deduction of wages, or potentially even a constructive dismissal claim.

Q: What do I do about team bonuses, if one member of the team has been off sick for most of the relevant period?

A: The first thing to consider is what the basis for the team bonus is, and how it is calculated.

If it is dependent on the performance of the

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team as a whole, then the team member who has been off sick should be entitled to his (or her) share.

If, however, it relates to individual performance or the individual contribution to the team, then the individual's bonus may be reduced pro rata, for the time that they were sick.

However, if the employee in question suffers from a disability under the terms of the Disability Discrimination Act, failure to pay them their share of any bonus could lead to a discrimination claim.

Bonuses are potentially such a contentious area that specialist advice should be sought in drawing up any scheme, and certainly before withholding any payments where employees are absent because of ill health.

For further information, please contact Nick Hobden on 01892 510000 or by e-mail at nick.hobden@ts-p.co.uk.

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