

Happy New Year!

We hope you had a great Christmas and we are looking forward to working with you in to create a successful 2015. We saw lots of growth in 2014 and expect that trend to continue as the SMEs we work with locally are growing at a steady rate.

This month's focus is on sickness absence and sick pay, often more prevalent at this time of year. The information below covers a lot of areas, if you need specific advice on a particular query don't hesitate to contact us, or your HR business partner direct, to get advice. We have template letters for any communication you need to send to your employee and will support you and line managers in making the right decisions.



Sickness and Statutory Sick Pay

At Trivolution we are often asked questions about sickness absence and statutory sick pay so please find below a summary of the main questions and answers that cross our desk:-

1. Under what circumstances do I have to pay sick pay?

You have to pay statutory sick pay (SSP) to all full- and part-time employees, including, agency workers on fixed-term contracts, temporary workers and casual staff 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 National Insurance lower earnings limit (£111 per week in 2014-15, £109 in 2013-14)
- 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.

2. Do we have to pay statutory sick pay (SSP) if we have our own sick pay scheme?

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.

3. Under what circumstances should I pay more than SSP?

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.

4. How much is statutory sick pay (SSP)?

£87.55 per week (£86.70 in 2013-14)

5. When am I supposed to start paying statutory sick pay (SSP)?

SSP 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.

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.

6. How long do I have to carry on paying statutory sick pay (SSP)?

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
- your employee dies

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

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

Short-termers (temporary workers), agency and casual workers are also entitled to SSP, providing they meet the qualifying criteria.

8. What can I require employees to produce by way of evidence that they are genuinely ill?

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

The traditional 'sick note' was replaced by the 'fit note' in April 2010. It indicates whether an employee is:

- not fit for work
- may be fit for work

A 'may be fit for work' statement would be given if the doctor believes your employee's health condition may allow them to work, if you give them appropriate support.

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.

The new Health and Work Service, which is replacing the percentage threshold scheme, will offer health assessments by an occupational health professional once an employee reaches, or is expected to reach, four weeks' of sickness absence. Referral will normally be by the employee's GP. The aim of the assessment is to draw up a plan to enable the employee to return to work.

9. What can we do when an employee takes frequent short absences and we suspect malingering?

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. It is also a good idea to have trigger points covered in your Sickness Policy within the HR Handbook (see the Trivolution model policy).

10. One of our employees is claiming sick pay, but we believe they are moonlighting. Can we stop paying statutory sick pay (SSP)?

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 - they can ask for an adjudication (effectively by HM Revenue & Customs), and has the right of appeal thereafter to the Social Security Commissioners.

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.

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

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 their job because of sickness - provided that you have followed a fair procedure (as detailed in the Acas Code of Practice) 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.

As the Court of Appeal has confirmed in a recent case, you can dismiss even if the employee's sickness is down to you (for example, if they have been incapacitated as a result of stress at work). Under such circumstances, the Court said, the 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 (as defined in the

Equality Act 2010), then you are obliged to consider whether 'reasonable adjustments' could help them return to work, before you make any decision on whether to dismiss. The definition of disability includes long-term conditions such as HIV or Aids, multiple sclerosis, cancer and additional forms of mental illness, including for example recurring depression.

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

Overall, termination may be lawful, but only if you have followed fair and reasonable procedures.



12. If I refuse to employ someone because they have a poor sickness record, could they sue me for discrimination?

That depends on whether their sickness record relates to a disability within the terms of the Equality Act, ie a physical or mental impairment which has a substantial and long-term effect on their ability to carry out day-to-day activities. If it does, and as a consequence you refuse to employ them, they would be able to make a claim for disability discrimination.

If a claim is made against you, you must be able to prove that you had considered making '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, impractical, or would not make any significant difference to the applicant's ability to do the job. You may need to explore, for example, whether you could obtain financial assistance to make such adjustments.

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

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 should follow the Acas Code of Practice - 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 their entitlement to SSP may be eligible for **Employment and Support Allowance** from the State.

14. What penalties could I incur if I don't pay statutory sick pay (SSP)?

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.

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

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 team as a whole, then the team member who has been off sick should be entitled to their 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 Equality 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 or disability.

If you have any queries regarding the above please do not hesitate to ring Trivolution!

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