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INFORMATION NOTE NO 4

August 2017

SICKNESS ABSENCE NOTIFICATION AND STATUTORY SICK PAY

The Labour Relations Agency has prepared this Information Note to make employees and employers aware of their responsibilities with regard to sickness absence notification and the payment of Statutory Sick Pay (SSP).

The Labour Relations Agency can provide free and confidential assistance in drawing up absence notification documentation suited to the needs of individual employers. Assistance is also available on a wide range of related matters such as disciplinary procedures, record keeping and absence control.

The information on the SSP provisions is intended as a summary of very complex and detailed legislation and regulations. More detailed information on SSP can be downloaded from nibusinessinfo. HMRC also has a webinar about SSP which can be viewed at

<https://www.gov.uk/government/news/webinars-emails-and-videos-onemploying-people>

SICKNESS ABSENCE NOTIFICATION AND SSP

1. LEGAL REQUIREMENTS

Every employer is required by law to issue to each employee, within 2 months of commencing employment, a written statement of the main terms and conditions of employment. See the following links for more information:

Employees - see nidirect <http://www.nidirect.gov.uk/written-statement-of-employment-particulars>

There is also an onus on employers to notify employees of any changes in their terms and conditions not more than one month after such changes take effect.

In the written statement the employer should make clear what is expected of an employee who is absent from work through sickness, e.g., telephone call on the first day, self-certification of the reason for absence for periods of less than eight days and submission of doctors' statements from the eighth day onwards.

It is important that changes affecting terms and conditions are notified to employees in writing. Employers are also advised to discuss new arrangements with their employees or their employees' representatives.

2. FIT NOTES AND PROOF OF SICKNESS

Employees must give their employer a doctor's 'fit note' if they're off sick for more than 7 days in a row (including non-working days). Hospital doctors or GPs provide them. They can charge a fee if a fit note is asked for before the 7th day.

The fit note will say the employee is either 'not fit for work' or 'may be fit for work'.

If it says the employee 'may be fit for work', employers should discuss any changes that might help the employee return to work (eg different hours or tasks). The employee must be treated as 'not fit for work' if there's no agreement on these changes.

Employers can take a copy of the fit note. The employee should keep the original.

3. SICK LEAVE AND HOLIDAY

Statutory holiday entitlement (ie. 5.6 weeks holiday per year) is built up (accrued) while an employee is off work sick (no matter how long they're off).

Any statutory holiday entitlement that isn't used because of illness can be carried over into the next leave year. If an employee is ill just before or during their holiday, they can take it as sick leave instead.

4. COMPANY SELF-CERTIFICATION SCHEME

The "company" self-certification form can be used for purposes of absenteeism control, as evidence for any occupational sickness payment to which an employee may be entitled and for Statutory Sick Pay (SSP) purposes.

The following guidelines may prove useful to employers in drawing up a self-certification scheme:

- Design a form for issue to employees who have been absent through illness for a period of less than eight days. In completing the form each employee will be required to state the duration of and the reason for the absence.
- Decide whether the form will be issued through the immediate supervisor/manager or through the Personnel or Wages Department.
- Decide whether self-certification forms are to be completed in the presence of the supervisor/manager or in another location such as the Personnel Department. This is an important decision as the circumstances under which an employee has to explain the absence may be important to the individual for reasons of confidentiality and will have a bearing on the overall control of the scheme, e.g. monitoring or initiating disciplinary action.
- Require an employee to sign the form attesting to the accuracy of the statement in respect of the duration of and reason for the absence.
- Have a management representative countersign the form. Countersigning a self-certification form will normally mean that the supervisor/manager is satisfied that the form has been completed properly, i.e., that it has been signed and that adequate details have been given, but not that the supervisor has confirmed the nature of the employee's illness.

It is advantageous to have the immediate supervisor/manager countersign the form, as this will give the supervisor/manager a greater role in absence control by, for example, triggering requests for a review of an employee's absence record.

5. DISCIPLINARY RULES AND PROCEDURE

Employers should maintain adequate personnel records in order to detect any trends in absenteeism. Management should be in a position to identify possible abuses of its self-certification scheme and should be prepared to deal with any such problems through the company's disciplinary procedure. (See Information Note No. 2 for information on disciplinary matters.)

The disciplinary procedure and rules should make clear how the employer intends to deal with any misuse or breach of self-certification arrangements. For example, where the employer operates a company sick pay scheme or is due to pay SSP, and an employee makes an inaccurate statement on the self-certification form, the sickness payment could be withheld or the employee could be given a warning depending on the circumstances of the case in question.

6. STATUTORY SICK PAY

6.1 *The Employer's Liability*

Subject to paragraph 5.13 below, every employer is required to make a payment to an employee for incapacity for work in relation to the contract of service with the employer. Agreements which purport to exclude or modify this liability are rendered void, as is any obligation on an employee to make payments towards statutory sick pay. Incapacity for work in relation to a contract of service is incapacity, by reason of some specific disease or bodily or mental disablement, to do work of a kind which the employee can reasonably be expected to do under that contract.

It is important to note that:

- i. All employers, regardless of size, are subject to the SSP Regulations.
- ii. Part-time employees are treated no less favourably than full-time employees (provided that they meet the required earnings level).
- iii. There is no minimum service qualification for SSP.
- iv. SSP is payable to all qualifying employees regardless of their age.
- v. SSP is liable to taxation and National Insurance deductions

6.2 *Periods of Incapacity for Work (P.I.W.) and Qualifying Days*

To qualify for SSP on a specific day, the day in question must:-

- form part of a "P.I.W." i.e. any period of four or more consecutive calendar days, including Saturdays, Sundays and holidays, each of which is a day of incapacity (thus an employer will need to know whether an employee was sick on rest days); and
- be a "qualifying day" i.e. normally a day on which an employee is required by the contract to be available for work. (Qualifying days should not be defined by reference to the days when the employee is sick). The legislation gives considerable scope for employers and employees to agree any day or days of the week as qualifying days but usually qualifying days are the days of the week on which employees are required to work. There are fall back rules where there is no agreement on qualifying days.

6.3 *Waiting Days, Linking and Maximum Liability*

No SSP is payable **for** the first three qualifying days in a P.I.W. However if two P.I.W.'s are separated by not more than 56 calendar days, they are treated as a single P.I.W. (linked). If P.I.W.'s are linked, then only the first three qualifying days in the linked P.I.W.'s taken together are waiting days. P.I.W.'s with a previous employer cannot be linked to P.I.W.'s with a new employer.

SSP in any one P.I.W. (unlinked or linked) is limited to a maximum of 28 times the appropriate weekly rate. The 28 week maximum liability recommences with any P.I.W. which does not link with an earlier P.I.W. In the event that a linked P.I.W. runs for over 3 years, liability ceases at the end of the third year for the remainder of that linked P.I.W. The maximum liability of 28 weeks may be reduced in the case of new employees; in order to calculate their liability employers will require a "leavers

statement" [Form SSP 1(L)] issued by the previous employer. The timing of receipt of a leaver's statement can affect this calculation. If an employee is still sick when SSP stops after 28 weeks, the individual can then transfer to a state benefit. Employers are obliged by law to provide a special form [SSP 1] for this purpose.

6.4 Notification of Incapacity for Work

An employer may establish company rules about the manner and timing of sickness absence notification and it may be possible to use the same rules for SSP purposes. In the absence of any company rules, SSP regulations provide that if notification of sickness on a qualifying day is given in writing no later than the seventh calendar day after that day, it will be in time for SSP purposes. Under the legislation the employer is entitled to withhold payment of SSP, e.g. if he or she has not been duly notified without good cause. However there are certain SSP rules which should be followed; a notification which is late for company rules may be in time for SSP. Days of SSP withheld for late notification do not count towards the employer's overall liability to pay a maximum of 28 weeks SSP in a period of incapacity.

6.5 Rate of Payment

The daily rate is the appropriate weekly SSP rate divided by the number of qualifying days in the week. Employees whose average earnings are below the lower weekly earnings limit for National Insurance contribution liability are excluded from SSP.

The weekly rate of SSP is currently £ 89.35 and the weekly earnings limit is currently £113.00. These are subject to review usually in April each year.

6.6 Method of Payment

Employers will generally pay their employees SSP on the first normal pay day after the start of the period of incapacity for work. SSP will normally be paid in the same way as earnings. DHSS regulations deal with the manner of payments (including cases where an adjudication officer, social security appeal tribunal or Commissioner decides that an employee is entitled to an amount of SSP) and the time within which such payments are to be made (allowing for time to bring an appeal, etc.). These regulations also deal with problems involving employees who die or who are incapable of managing their own affairs.

6.7 Reclaiming Statutory Sick Pay

Employers cannot reclaim Statutory Sick Pay (SSP) for sick leave after 5 April 2014.

They may be able to reclaim SSP for a previous tax year if a high proportion of their employees were off sick at the same time. They can reclaim the difference if SSP was more than 13% of their Class 1 National Insurance in a tax month.

6.8 Relationship between Statutory Sick Pay and Benefits and Other Payments

Whilst as a rule there would not be an entitlement to SSP and at the same time an entitlement to other social security payments, in some circumstances such as income supplement more than one entitlement could be payable. The legislation also sets out the relationship between SSP and any other remuneration to which an employee is contractually entitled. General regulations also stipulate which payments are to be treated as contractual remuneration. The legislation provides that SSP due for any day shall be offset against contractual remuneration for the

same day and vice versa. This would be particularly relevant in cases involving occupational sick pay and holiday pay.

6.9 Determination of Questions Arising

An employee who disagrees with the decision of the employer may ask for a written statement of certain details and can refer any question about entitlement to SSP to an adjudication officer. (In practice, however, employees are encouraged to try to resolve such disagreements with their own employers before any formal decision is made by an adjudication officer.) The adjudication officer can either deal with it or refer it to a social security appeal tribunal. There is a right of appeal to a social security appeal tribunal from the decision of an adjudication officer. There is a further appeal, where necessary, from a social security appeal tribunal to a Social Security Commissioner (provided leave to appeal has been granted by the Chairman of the social security appeal tribunal or the Social Security Commissioner) but only if the appellant thinks the decision is not in accordance with the law. Once an employee establishes entitlement to SSP following a reference to an adjudication officer, steps can be taken through the county court to recover the sum owed by producing the decision in favour. A number of specific questions are reserved for the DHSS to determine. A point of law arising on a question reserved for the DHSS may be referred to the Court of Appeal for decision. Adjudication regulations give more details as to how questions for decision by the DHSS or the independent adjudicating authorities should be referred. The enforcement of entitlement to SSP is explained in greater detail in SSP (General) Regulations.

6.10 Provision of Information

The DHSS is enabled to disclose to an employer information relevant to determining entitlement to SSP. Employees and employers are required to provide each other and the adjudicating authorities with similar information. Employees must provide such information as may be reasonably required to allow their employers to determine the duration of the period of entitlement and whether a period of entitlement exists between them. The general regulations require employers to keep such records concerning SSP as may be prescribed and also spell out the information employers and employees must give an insurance officer to allow the officer to adjudicate on a reference. Employers must comply with a request for information, to the extent that it is reasonable, within a reasonable time. (It would appear that an aggrieved employee could make a reference to the DHSS to enforce this obligation.)

6.11 Inspections and Offences

Sections of the legislation also deal with the powers given to inspectors of the Department of Health and Social Services and with offences and penalties.

6.12 Mistakes

The basic things for employers to remember if mistakes are made are that:-

- the employer must put them right and correct the records, payments and deductions from monies due to the Collector of Taxes unless they are in a previous tax year (in which case advice should be sought from the local social security office);
- the employer must tell the local social security office if the mistake is one that may have resulted in the under- or overpayment of a State benefit.

It will be left to the employer to consider the matter of recovery of any amounts wrongly paid to an employee (e.g. overpayment of SSP).

6.13 Circumstances in which Periods of Entitlement do not arise

Some employees cannot get SSP from you when they are sick. You must give them form SSP1 explaining why they are not entitled to SSP. They may be able to claim a social security benefit instead.

If they

- are not sick for four, or more, days in a row
- their average weekly earnings in the 'set period' are below the LEL for National Insurance purposes.
- are within the 18/26 or 39 week exclusion period due to pregnancy or recently having had a baby.
- have already had 28 weeks' worth of SSP from the employer and this new spell of sickness links to their last one
- were not entitled to SSP the last time they were sick, for any reason, and this spell of sickness links to that one
- started or returned to work for the employer after getting IB from DWP/SSA.

If an employee cannot get SSP at the start of a PIW they will not be entitled to it in any later linking PIW.

An employee cannot get SSP if, on the first day of the PIW

- they are outside the UK and the employer is not liable to pay employer's Class 1 NICs, and would not be liable even if their earnings were high enough.
- they are a new employee and have not yet done any work for the employer.

See LRA website for further information on services provided at www.lra.org.uk

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