

STATUTORY SICK PAY

LEGISLATION

Social Security (Contributions and Benefits) (NI) Act 1992

The Social Security (Medical Evidence) Regulations (NI) 1976

The Statutory Sick Pay (Medical Evidence) Regulations (NI) 1985

The Statutory Sick Pay (General) Regulations (NI) 1982

The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) regulations (NI) 2010



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GLOSSARY

AA – Attendance Allowance

CPAG – Child Poverty Action Group

CA – Carer’s Allowance

CTC – Child Tax Credit

DDA – Disability Discrimination Act

DLA – Disability Living Allowance

DfC – Department for Communities

DfE – Department of the Economy

ESA – Employment and Support Allowance

GP – General Practitioner

HMRC – Her Majesty’s Revenue and Customs

MA – Maternity Allowance

PC – Pension Credit

PIW – Period of Incapacity for Work

RMO – Regional Medical Officer

SMP – Statutory Maternity Pay

SSP – Statutory Sick Pay

SDA – Severe Disablement Allowance

WTC – Working Tax Credit



INTRODUCTION

Statutory Sick Pay (SSP) is a benefit paid to a person in employment, earning more than the lower earnings limit (currently £112 per week or more), who falls ill (whether due to physical or mental disablement) for a period of four days or more. The employer is responsible for paying SSP. SSP is payable for up to 28 weeks (in any period of incapacity separated from a previous period of incapacity by more than eight weeks) at a rate of £88.45

The National Insurance Contributions Office of Her Majesty's Revenue & Customs (HMRC) is responsible for disputes concerning entitlement to SSP. Issues about SSP are submitted to an officer of the board of HMRC for determination. The individual may also in certain circumstances complain to an industrial tribunal about an unlawful deduction from wages or sue in the county court for breach of contract.

1. WHO CAN CLAIM?

Only those in employment with earnings equal to or more than the lower earnings limit (currently £112 per week) can claim SSP.

The definition of 'employee' in this legislation is wider than that in other areas and includes most workers. The Court of Appeal had ruled that an agency worker whose contract is for a specified period of three months or less is not entitled to SSP but legislation that came into force on 27 October 2008 reversed this position. All agency workers are now treated in the same way as other employees.

A self-employed or unemployed person cannot claim SSP. S/he should claim Employment and Support Allowance (ESA) instead.

2. QUALIFYING CONDITIONS

In order to claim SSP, the main qualifying conditions must be met. The day of sickness must:

- fall within a period of incapacity for work; (see 2.1 below)
- fall within a period of entitlement; (see 2.2 below)
- be a qualifying day. (see 2.3 below)

2.1 A period of incapacity for work

The first qualifying condition for SSP is that the day on which illness is occurring must be within a period of incapacity for work (PIW).



This means that the person must be incapable of doing the job because of sickness or disability or unable to attend work due to the operation of public health legislation to prevent the spread of infectious disease for at least four or more days in a row. Sundays and public holidays are counted. SSP is not payable for the first three days.

PIWs that are eight or less weeks apart are linked and count as one single PIW.

This is useful given the fact that the first three days of any PIW are 'lying days', ie no benefit is payable. Therefore, if a person is sick for five days, SSP is only payable for the fourth and fifth days of that PIW. If, however, s/he falls ill again for another five days only six weeks later, this new period is linked with the old PIW and benefit is payable for all five days of this new spell of incapacity.

2.2 A period of entitlement

The second qualifying condition is that the day of incapacity must fall within a period agreed between the employer and employee as a period of entitlement. This simply means there must be a period of time when the person is entitled to SSP and not excluded from receiving SSP. The period of entitlement normally starts on the first day of the PIW and ends when the employer has no further liability to pay SSP.

The employer is not liable to pay SSP if the person:

- is no longer sick;
- has reached the maximum entitlement to SSP, ie had 28 weeks of SSP from the employer during the period of incapacity or from a former employer where the last day in which SSP was paid by the former employer was within eight weeks of the current period of incapacity;
- has reached the end of the contract of employment (special provisions apply where the employer brings the contract to an end solely to avoid paying SSP);
- works for an employer who is abroad and the employer is not liable to pay national insurance contributions;
- is disqualified on maternity grounds. The maternity disqualification period is for 39 weeks if entitled to either Statutory Maternity Pay (SMP) or Maternity Allowance (MA). Payment of these starts no sooner than eleven weeks before the baby is due (ie from week 29 of the pregnancy) or the date the baby is born. Where a woman is not entitled to SMP or MA the maternity disqualification period is eighteen weeks. Legal advice should be sought by any woman off sick or planning to go off sick whilst pregnant as this may affect whether she will have satisfied earnings conditions to qualify for SMP. If a woman goes sick in the four weeks before her expected week of childbirth, maternity leave may be triggered but only if she is absent due to a pregnancy related reason;

Note: An expectant or new mother up until the baby is six months old or a breastfeeding mother (regardless of how old the child is) suspended from work due



to risks to health and safety identified by a risk assessment may be entitled to full pay where the employer is unable to alter the employee's working conditions or hours of work.

- has not actually started work with the employer under a contract of employment;
- is affected by a strike at work and has a direct interest in the outcome. Thus, if s/he falls ill during a strike, SSP is generally not payable;
- earns less than the lower earnings limit (currently £112 per week);
- is in legal custody, whether convicted of an offence or not;
- started or returned to work after getting Employment and Support Allowance and is a 'benefit recipient' who is sick within the first 12 weeks of starting or returning to work;
- is within eight weeks of a maternity disqualification period before or during which a period of incapacity had started.

2.3 Qualifying days

SSP is only payable for days that are qualifying days, ie days that the person would normally have been required to have been available for work under the terms of the contract of employment. Therefore, an agency worker who is between assignments and not required to be available for work when s/he falls ill will not be entitled to SSP.

If the working pattern varies from one week to another, eg shift work, the person and her/his employer can arrange which days in any one week are qualifying days. There must always be one qualifying day in each week.

In the event of the parties failing to reach agreement as to what days should be qualifying days, then qualifying days will be the days that the contract would have required the person to work if s/he was not sick.

If it is not clear which days would have been working days in a particular week, then regulations state that every day of the week, except days agreed as rest days on which no one works, will be the qualifying days for SSP purposes.

If the person would not normally have worked in a particular week (eg s/he works shifts, three weeks on and one week off) and has no agreement with the employer as to what are qualifying days, then Wednesday of that week will be a qualifying day regardless of anything else.

3. HOW MUCH IS PAYABLE?

SSP is payable at a standard rate of £88.45 per week if the person earns at least the lower earnings limit (currently £112 per week). SSP is a flat-rate benefit with no additions for any dependants. It is also subject to tax and national insurance (NI)



contributions. However, if the person is not receiving any other sick pay from her/his employer (eg under the contract of employment), NI contributions will not be payable as the rate of SSP is below the limit for these.

4. PAYMENT OF STATUTORY SICK PAY

SSP should normally be paid at the same time and in the same way as wages would have been paid, ie a normal payday. Where there is no agreement or normal practice on which day payment is to be made, SSP should be paid at least on the last day of the month.

SSP can be collected personally, or by someone nominated by the person claiming. S/he could also ask for it to be sent out by giro cheque or cheque.

5. CLAIMING STATUTORY SICK PAY

5.1 Notification

The first step in claiming SSP is to notify the employer of the illness.

The employer can decide on a manner in which, and the time within which, notification is to be given. The employer must take reasonable steps to make the manner of notification known to the employee. If the employer has not set a time limit, or has set one but has not taken reasonable steps to make this known to the employee, the time limit for notification is seven days.

The employer's rules on notification should comply with HMRC guidelines. The employer cannot insist on notification being given personally. S/he must accept it from someone else on behalf of the person claiming. For the first seven days, self-certification is sufficient and the person cannot be made to give notification in the form of medical evidence. Nor can the employer require her/him to complete a special form at any time during the claim. If notification is sent by prepaid post, the employer should treat it as having been given on the day it was posted. The employer cannot demand notification more than once in every seven days.

Note: There may be a provision in the contract for company sick pay at a higher rate of SSP. In such a case, to qualify for any amount over what would be payable as SSP, the employee would have to follow the employer's rules. Such rules could be more stringent than the rules on SSP.



5.2 Late notification

A person can be disqualified from receiving SSP for any day of incapacity notified late. The employer's time limit (or the seven day time limit) - see 5.1 above, can be extended to one month, and SSP can be payable, if the employer accepts that there was good cause for late notification. If it is not practicable for the employee to give notice within the one month period, the time limit can be extended to 91 days.

Generally speaking, an employer should accept notification of a qualifying day of incapacity for work so long as it is given in writing no later than seven days after that day. If the employer does not pay out because s/he does not believe that there was good cause for the delay, the person can ask HMRC for a decision.

5.3 Evidence of incapacity for work

After the first seven days of self-certification of incapacity for work, the employer is entitled to seek reasonable evidence of a person's illness. The usual evidence of incapacity for work is a doctor's line issued by a general practitioner (GP).

5.4 Terms and conditions relating to sickness

An employee employed for more than one month is entitled to be provided by her/his employer with a statement of initial employment particulars within two months of starting employment.

The statement must include any terms and conditions relating to incapacity for work due to sickness or injury, including any provision for sick pay.

Where the employer fails to provide the initial statement of particulars, an employee can make a reference to an industrial tribunal. In limited circumstances, compensation is provided to an employee due to her/his employer failing to provide an initial statement. The tribunal can also determine the particulars which ought to have been included by the employer.

The matter can be referred to an industrial tribunal whilst the employment continues or within three months of the date on which employment ceased (see *Law Centre (NI) Encyclopedia of Social Welfare Rights*, C.1, Rights of Employees, section 4.6).

6. SHORT ILLNESSES

If a person is frequently off sick for periods of less than seven days, most of the absences will be self-certified. If a person has had at least four self-certified illnesses over twelve months and the employer does not believe that s/he has been incapable of work, the employer may want to discuss the matter. This could involve the person (with consent) being sent to the company doctor.



If there are any doubts, the employer may refer the case to HMRC for help. HMRC will contact the employee's GP who will be asked, with the employee's consent, to give a medical report to the regional medical officer (RMO). The RMO will then be asked to give an independent medical opinion which will be forwarded to HMRC. HMRC will then make a formal decision on the person's capacity for work and whether or not there are reasonable grounds for frequent absences from work for medical reasons.

The employer will not receive the RMO's report. Instead, s/he will be told whether or not the person is fit for work. If there is a decision of fitness for work, the employer will stop SSP and the person will have the right to appeal.

7. LENGTHY ABSENCES

If the employer feels that a person has been off work for a long time given the nature of her/his stated incapacity, then s/he may ask HMRC for an opinion on the person's continuing incapacity for work. HMRC help is reserved for cases where the employer has been unable to make her/his own arrangements to get more medical evidence but the case can only be referred to HMRC with the person's consent.

If HMRC agrees to help, the case is referred to the RMO who, after consulting with the person's own GP, may ask her/him to attend a medical examination carried out by the Medical Support Service. The employer will not be given a copy of this medical but will be told whether or not the person is capable of work. This is not a decision. It is only a guide as to whether or not SSP should remain in payment.

If the employer stops SSP, then the person has the right to approach the HMRC officer for a decision.

8. DISPUTES OVER INCAPACITY FOR WORK

If an employer does not accept that an employee is incapable of work, the employee has the right to ask for a written statement of the reasons for this belief. This will include the dates when SSP will not be paid.

HMRC can also be approached by the employee for a decision. An application for a decision by HMRC must be made within six months of the earliest date for which the entitlement to SSP is in dispute.

Both the parties involved will be asked to send in written comments to HMRC. The person claiming can also send in any further medicals. There is no oral hearing. HMRC will make a decision and send copies of it to both parties.

If HMRC decides that SSP should be payable, the employer, unless s/he is going to appeal, must repay SSP. If HMRC states that the person is capable of work, s/he also has the right to appeal.



9. NON-PAYMENT OF SSP BY EMPLOYERS

If HMRC rules that SSP is payable and an employer still refuses to pay, the responsibility for paying SSP can be transferred to HMRC.

9.1 Appeals

Appeals are made in writing to HMRC. When an appeal is made, HMRC reviews the decision and may decide to change the decision. The person making the appeal is informed and has the opportunity to accept the varied decision or to have the appeal heard by an independent tribunal.

Appeals are heard by appeal commissioners who can be non-legally qualified general commissioners or legally qualified special commissioners. The person making the appeal can choose which type of commissioners should determine the appeal.

Appeals by either the employer or the person claiming must be made within 30 days of the date of issue of the notice of decision. Further appeal by the person claiming, employer or HMRC is to the High Court on a point of law.

9.2 Protection of wages

SSP is treated as wages. Provided there is no dispute over whether an employee is actually entitled to SSP, s/he may complain to an industrial tribunal if her/his employer fails to pay SSP. The employee will claim for unlawful deductions from wages specified in the Employment Rights (Northern Ireland) Order 1996 (see *Law Centre (NI) Encyclopedia of Social Welfare Rights*, C.1, Rights of Employees, 6.3).

The complaint must generally be presented within three months of the failure to pay the last instalment of SSP due but the employee must comply with the LRA Code of Practice (see *Law Centre (NI) Encyclopedia of Social Welfare Rights*, C.1, Rights of Employees, section 5).

The tribunal can order the employer to pay the SSP due as wages.

Such a claim can only be brought in cases where there is no dispute over entitlement to SSP but payment has not been made. Dispute over entitlement (according to the Employment Appeal Tribunal in *Taylor Gordon & Co Ltd v Timmons [2004] IRLR 180* and *Sarti (Sauchiehall St) Ltd v Polito (2008) ICR 1279*) lies with HMRC, not an industrial tribunal.

9.3 Breach of contract

A person who qualifies for SSP may bring a complaint for breach of contract if her/his employer fails to pay SSP. The right to SSP may be treated as a contractual term



implied by statute. Where the employment has ended, the claim for breach of contract may be brought to an industrial tribunal.

The time limit for bringing the claim in the industrial tribunal is generally three months from the failure to pay SSP but the employee must comply with the LRA Code of Practice (see *Law Centre (NI) Encyclopedia of Social Welfare Rights*, C.1, Rights of Employees, section 5).

Where the employment continues, the claim for breach of contract cannot be brought in the industrial tribunal. (However, as stated at paragraph 9.2 above, where employment continues, a claim for unlawful deductions of wages can be made in the industrial tribunal). A claim can be brought in the county court by way of Application for Arbitration, commonly referred to as a small claims action, within six years of the breach of contract.

Note: It should be noted that, where an action is brought for breach of contract, an employer may counter-sue against the employee and claim damages for any loss s/he has suffered. The damages claimed by an employer may be substantially more than what the employee is claiming.

9.4 Unfair dismissal

A person dismissed because s/he:

- brought proceedings against her/his employer in an industrial tribunal complaining of a unlawful deduction of wages due to the failure to pay SSP; or
- alleged that the employer had infringed the right not to suffer an unlawful deduction of wages by failing to pay SSP;

will be treated as automatically unfairly dismissed.

Such an employee does not require any period of continuous employment to claim unfair dismissal. The complaint of unfair dismissal must be presented to an industrial tribunal within three months of the dismissal.

The employer should normally follow statutory disciplinary and dismissal procedures (see *Law Centre (NI) Encyclopedia of Social Welfare Rights*, C.1, Rights of Employees, section 5).

9.5 Disability discrimination

A person who suffers from a disability (ie a physical or mental impairment which has a substantial or long term effect on her/his ability to carry out normal day to day activities) may have a remedy under the Disability Discrimination Act 1995 (DDA) if the employer:

- on the ground of the disabled person's disability treats her/him less favourably than the employer treats or would treat a person not having that particular disability



whose relevant circumstances, including her/his activities, are the same as, or not materially different from, those of the disabled person;

- victimises an individual because s/he brought proceedings under the DDA or gave evidence or information in connection with proceedings or did anything under the DDA or alleged the employer has contravened the DDA;
- for a reason related to the disability treats her/him less favourably than a person who does not suffer from a disability and the employer cannot show that the treatment in question is justified; or
- fails to make reasonable adjustments where any provision, criterion or practice made by or on behalf of an employer or any physical feature of premises occupied by the employer places her/him at substantial disadvantage in comparison with persons who are not disabled.

A person in this situation should seek legal advice immediately.

10. MISCELLANEOUS

10.1 Occupational sick pay

If an employer has her/his own occupational sick pay scheme, payments made under that scheme count towards a person's SSP entitlement (and vice versa). If, however, the occupational sick pay scheme pays less than the full SSP, the employer must make up the balance so that all the SSP due is paid.

10.2 Effect on other benefits

SSP is not payable when a person is receiving Contribution-based Jobseeker's Allowance, Statutory Maternity Pay (SMP), Maternity Allowance (MA), Statutory Paternity Pay and Statutory Adoption Pay.

It can be topped up with Income Support, Pension Credit (PC) and/or Housing Benefit.

The person's partner may qualify for Income Support, Income-based Jobseeker's Allowance, Income-related ESA, PC and/or Housing Benefit.

SSP can be paid on top of Attendance Allowance, Disability Living Allowance, basic war or industrial injury benefits, bereavement benefits and Carer's Allowance if earnings are low enough.

Where a claimant has at least one dependent child it is also possible to claim Child Tax Credit.

A person with a partner in full-time paid work may also be able to claim Working Tax Credit.



In addition, a person even if off sick may still be treated as in full-time work providing s/he was in full-time work immediately before falling sick.

10.3 Hospitalisation

Hospitalisation will not affect entitlement to SSP.

10.4 Earnings from another job

A person can earn money from a different type of work while receiving SSP providing the employer paying SSP agrees that s/he is incapable of doing her/his job. For example, a typist breaks her hand and cannot type but she might be able to do work as a bingo caller until her hand heals.

11. TRANSFERS TO STATE BENEFITS

If entitlement to SSP ends and a person is still incapable of work, s/he may be able to get Employment and Support Allowance (ESA).

The transfer is effected by the employer completing section 1 of form SSP1, which should be given to the person, together with any medical certificates covering the period for which there is no entitlement to SSP. The person should complete sections 2 to 4 and forward the form to the Employment and Support Allowance Branch, Castle Court, Royal Avenue, Belfast, BT1 1DF.

For past claims, if Incapacity Benefit was not payable and the person still remained ill, s/he could claim Income Support. The disability premium of Income Support became payable after 364 days of incapacity or, where a person was terminally ill, after 196 days of incapacity. From 27 October 2008, ESA has replaced both Incapacity Benefit and Income Support for most new claims.

12. LEGISLATION

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The Statutory Sick Pay (General) Regulations (NI) 1982

The Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) regulations (NI) 2010



13. FURTHER INFORMATION

Welfare Benefits and Tax Credits Handbook, 18th Edition, CPAG, 2016/2017, £61.

Disability Rights Handbook, Disability Alliance ERA 2016/2017, 40th Edition, £35.

Both available from CPAG, 94 White Lion Street, London, N1 9PF.

A useful SSP manual for employers can be accessed at:

www.hmrc.gov.uk.

HMRC operates an employers' helpline which provides guidance on all aspects of SSP. The telephone number is 0845 7143 143.

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