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Statutory Sick Pay and Agency Workers

Introduction

Statutory Sick Pay (SSP) is payable to all employees. It is also payable to all agency workers for whom the employment business is liable to pay Class 1 National Insurance Contributions. Agency workers are entitled to SSP from the first day of their first assignment provided they satisfy all the other conditions for entitlement.

The application of SSP for workers on assignment refers particularly to workers on contracts for services. Those labour providers who employ their workers on overarching contracts of employment will wish to apply the rules differently.

The SSP Regulations prevent a labour provider from ending a contract or assignment solely or mainly to avoid SSP. The labour provider shall continue to be liable to pay SSP if the contract is terminated by the labour provider solely or mainly for the purpose of avoiding liability for SSP.

The legal obligations regarding SSP are contained in the Social Security Contributions and Benefits Act 1992 and the Statutory Sick Pay (General) Regulations 1982.

SSP – The Basics

A labour provider is liable to pay SSP provided the worker is off sick on a day on which they would normally work as part of a “period of incapacity for work”.

Period of Incapacity for Work (PIW) – This is a period of sickness lasting four or more calendar days in a row. All days of sickness count towards the total number of days in a PIW, even non-working days. If there are less than four consecutive days there is no PIW and no SSP is due.

Qualifying Days (QDs) – These are the only days for which SSP is payable. For agency workers these will be the days the worker normally works on their current assignment. A contract should specify which day or days of the week are to be qualifying days.

Waiting Days (WDs) - SSP is not payable for the first three Qualifying Days in a PIW. These are called Waiting Days (WDs). They are not always the first three days of sickness as the worker may have been sick on non-QDs.

Linked PIW's - If a worker has more than one period of sickness, each of which lasts for four or more calendar days in a row, and those two periods of incapacity for work are separated by periods of no more than eight weeks they will be treated as one single Linked PIW. Where PIWs are linked and all three WDs have been served in the first PIW, there will be no WDs in any later linked spells of sickness. But, if all three WDs have not been served in the first PIW, any remaining WDs must be served at the beginning of the next linked PIW or series of linked PIWs.

Calculating and Paying SSP

The weekly rate for SSP changes in April each year. The current rate can be found in the [Employer Helpbook for Statutory Sick Pay](#). The daily rate is the weekly rate divided by the number of qualifying days in the week. SSP is only paid for qualifying days.

SSP must be paid on the usual payday. SSP is treated like pay and so deductions for PAYE and NI Contributions must be made before payment. The maximum liability to pay SSP is 28 weeks at the appropriate weekly rate.

Notification of Absence for SSP Purposes

The labour provider must inform workers what the notification requirements are for absence and what is expected as evidence of incapacity for SSP purposes and when it is required by.

For SSP qualification purposes (though it may be required for other company procedural reasons) the labour provider cannot insist that workers tell them:

- In person
- Earlier than the first qualifying day in a period of sickness
- By a specific time on the first qualifying day
- More frequently than once a week
- On a special form
- On a medical certificate.

If notification is made on a day after the worker first claims they were sick and the labour provider considers there was no good cause for the delay in notification, the first Waiting Day for SSP purposes will be the first Qualifying Day on or after the day that the worker notified the labour provider. If notification is by post, the date of posting is to be regarded as the date of notification.

The terms within a standard agency worker contract for services regarding notification of absence are as follows:

“If the Temporary Worker is unable for any reason to attend work during the course of an Assignment s/he should inform the Client and/or the Employment Business within one hour of the commencement of the Assignment or shift.”

If the Temporary Worker does not inform the Client or the Employment Business [in accordance with the above paragraph] should they be unable to attend work during the course of an assignment this will be treated as termination of the assignment by the Temporary Worker in accordance with clause [#] unless the Temporary Worker can show that exceptional circumstances prevented him or her from complying with clause [the above paragraph].”

HMRC advise that if a labour provider invokes this clause to terminate a contract once they know a worker is sick it is likely to be regarded as ending a contract or assignment solely or mainly to avoid SSP. In such a case SSP will be payable until the latest date work had been offered and accepted.

In addition to notifying the labour provider of their absence, workers must provide reasonable evidence of incapacity. Incapacity for work is defined as being “incapable by reason of some specific disease or bodily or mental disablement, of doing work which he can reasonably be expected to do under the contract”.

During the first seven days of a spell of sickness, the worker is able to self-certify their sickness. A labour provider cannot insist upon a doctor’s statement. The labour provider can provide workers with the HMRC form [SC2 “Employee’s statement of sickness”](#) to self-certify or design their own form. If the worker does not provide an SC2 or other self-certification form and the labour provider doubts the validity of the sickness to the extent that SSP is withheld, a written statement should be provided to the worker as detailed below explaining this.

Thereafter, a labour provider can require evidence in the form of a doctor’s statement or sick note. A doctor’s statement is strong evidence of incapacity and should usually be accepted as conclusive unless there is more compelling evidence to the contrary.

Although the labour provider can withhold payment of SSP because of late notification of sickness, the labour provider cannot withhold payment of SSP for late receipt of medical evidence.

If the worker provides certificates from someone who is not a registered medical practitioner, such as an osteopath or chiropractor the labour provider should consider such certificates on their own merits. It is for the labour provider to decide whether or not to accept this evidence. If the labour provider chooses not to accept this and to withhold SSP a written statement should be provided to the worker as detailed below explaining this and requesting a doctor’s statement.

If a worker leaves the UK while they are off work sick the labour provider is still liable to pay SSP during their absence providing the worker has supplied a medical certificate (including a non-UK one) covering that period and it is considered that the incapacity is genuine. However entitlement to SSP will also depend on the position with regard to the assignment as explained below.

If the labour provider has strong doubts about the worker’s sickness they may obtain advice from the worker’s GP, an Occupational Health Specialist or can ask HMRC to arrange for the worker to be medically examined by their medical services provider. Further advice on this may be found [here](#).

In what situations are agency workers not entitled to SSP

There is no entitlement to SSP if, on the first day of the PIW any of these apply:

- The worker is not sick i.e. the worker is no longer ill or the absence is for reasons other than related to illness or injury.

- The worker is not on assignment (refer to the more detailed explanation below).
- The worker's average gross earnings are less than the [Lower Earnings Limit](#) for NI contributions. Average gross earnings are calculated over the last full eight weeks prior to the start of the period of sickness absence up to the last payday before the period of incapacity for work began (including any weeks in which the worker did not work).
- If the worker claimed Employment and Support Allowance during the last 12 weeks or if s/he claimed Incapacity Benefit or Severe Disablement Allowance within the last 8 weeks or if s/he claimed any of these during the last 104 weeks if s/he returned to work or training within 1 month of leaving benefit. To confirm this, the labour provider may ask the worker to provide a "linking letter" but if one is not provided and the labour provider suspects this situation to apply the labour provider may refuse SSP and mark this as the reason on the SSP1.
- The worker has already had SSP for 28 weeks and the new absence links.
- The worker is in the disqualifying period due to pregnancy or recently having had a baby. This is the 39 weeks that the worker is entitled to Statutory Maternity Pay (SMP) or Maternity Allowance (MA) or if not entitled to SMP or MA for an 18 week specified period.
- The worker is away from work because of participation in a trade dispute.
- The worker is in legal custody, or sentenced to a term of imprisonment.

Other reasons a labour provider may decide not to pay SSP

In the following circumstances the labour provider may decide to refuse to pay SSP:

- Late notification (as explained previously) where it is not accepted that the worker had a good reason, or
- The worker has not provided acceptable medical evidence, or has refused to cooperate with seeking further medical advice. N.B. The labour provider cannot withhold payment of SSP for late receipt of medical evidence.
- The labour provider has evidence that the worker is fit for work
- The labour provider has another reason why it considers that SSP is not payable.

SSP and the "Assignment"

For agency workers, whether SSP is due will depend on whether the worker is on assignment. The various scenarios are explained below:

- An agency worker, who, on the first day of the PIW has not yet commenced any assignment with a client, even if one has been offered and accepted, is not entitled to receive SSP.
- An agency worker who on the first day of the PIW is on assignment, is entitled to SSP, all other qualifying conditions having been met, until the end of the current assignment or where a future assignment has already been offered and accepted, the end of that future assignment.
- An agency worker who on the first day of the PIW is not on assignment but has previously undertaken assignments and has been offered and accepted a future assignment, is entitled to SSP, all other qualifying conditions having been met, until the end of that future assignment even for the gap between the assignments.
- An agency worker who has previously undertaken assignments but on the first day of the PIW is not on assignment and has not been offered (or has been offered but has refused or not yet accepted) a future assignment is not entitled to SSP.

The previous two situations also apply if the worker is on holiday on the first day of the PIW i.e. if a future assignment has been offered and accepted SSP will be due, if no future assignment has been offered SSP will not be due.

As to when an assignment (and consequently SSP) ends will depend on what was offered to and accepted by the worker, either verbally or in writing:

- If the assignment is ongoing SSP will be payable, all other qualifying conditions having been met, during the absence.
- If the assignment is for a fixed period, say six weeks, any entitlement to SSP ends at the end of this period.
- If the assignment is for one week, say Monday to Friday, any entitlement to SSP ends at the end of this period. Therefore the maximum entitlement to SSP if the worker notifies the labour provider on the first day is two days, as the first three days are waiting days.
- If work is truly only offered on a day to day basis, and this is actually what happens in practice, then SSP cannot be due as a Period of Incapacity for Work can never be formed.

There is a term within a standard agency worker contract for services which states:

“If the Temporary Worker is absent during the course of an assignment and the contract has not been otherwise terminated under clauses [#]the employment business will be entitled to terminate the contract in accordance with clause [#] if the work to which the absent worker was assigned is no longer available for the Temporary Worker.”

HMRC advise that if a labour provider invokes this clause to terminate the contract of a worker who is absent through illness or injury solely or mainly for the purpose of

avoiding liability for SSP, then SSP remains due until the end of the assignment as it was originally offered and accepted.

However in an operational situation where the Client advises that there is a reduction in the number of the workers required and through a fair selection method (i.e. other than to avoid paying SSP) the worker is one of those affected then the assignment will have ended and entitlement to SSP will end.

Procedure if the labour provider considers that SSP is not due

If the labour provider considers that the worker is not entitled to SSP for a qualifying day, for whatever reason, the decision should be explained to the worker.

A Form [SSP1](#) must be completed stating why SSP has not been paid or why it is ending and the last date of payment and must be given or sent to the worker within seven days together with the worker's doctor's note and any other relevant documentation.

If the labour provider considers that the worker is not entitled to SSP for any reason not included on form SSP1 a written statement should be provided to the worker, within seven days. HMRC provide the following template for this:

Date:

Dear [name of worker]

I am writing to tell you why I cannot pay you Statutory Sick Pay (SSP) for the period from..... to.....[insert dates].

You cannot get SSP for these days because.....[insert reasons here].

If you have any questions about why I am not paying you SSP please contact me.

If you do not agree with my decision not to pay you SSP, you can ask HMRC to make a formal decision. You should contact the National Insurance Helpline, telephone number 0845 302 1479.

Yours sincerely.

If the worker is still off work because of an illness or disability s/he can contact Jobcentre Plus to make a claim for benefit.

If a worker disputes a decision to refuse SSP

The worker has a right to ask for and be given, a written statement detailing those days that the labour provider regards SSP is payable for; how much SSP it is considered the worker is entitled to; why the labour provider does not regard itself as liable to pay SSP for other days in the period.

If the worker does not accept the decision not to pay they can register a dispute with the HM Revenue & Customs Disputes Team on 0191 22 55 221. Both the labour provider and the worker will be asked for observations in writing. Neither party will be asked to appear before the officer making the decision. The officer making the decision will send the formal decision to both parties. If the decision is that the worker is entitled to SSP, the decision will give the time limit by which the labour provider

must pay the SSP. The parties will be given full details of the appeal rights with the notice of decision.

Any decision to terminate a worker's contract due to ill health or injury may also enable a claim for discrimination if they have been subjected to disability discrimination under the Disability Discrimination Act 1995. A pregnant worker could have a claim for direct sex discrimination if absent due to a pregnancy related illness. A worker with over one year's service may claim that they are an employee and seek to bring an unfair dismissal claim

Record Keeping Requirements

Labour providers are required by law to keep:

- all dates of employee sickness lasting four or more days in a row
- a record of the payment dates and the amount paid during each PIW
- the date the pay period began
- a record of any unpaid SSP with reasons

This information must be accessible for Inspectors on request. Such records must be kept for at least three years after the end of the tax year to which they relate.

Legislation provides that employers failing or refusing to operate the SSP scheme correctly can incur civil penalties up to £3000. This includes fraudulent and negligent actions and failure to keep records.

Advice Sources

Detailed advice on SSP is contained in the [Employer Helpbook for Statutory Sick Pay](#)

The SSP Employer Helpline on 08457 143143 provides a very useful advice service. All calls with regard to agency workers are referred to a Technician.

It is recommended that in any situation where a labour provider decides to withhold SSP that the Helpline is contacted for specific advice.

[The Statutory Sick Pay \(SSP\) calculator](#) is a useful tool to help labour providers to work out if SSP is due and if so how much to pay. It will also help work out how much SSP can be recovered under the Percentage Threshold Scheme (any SSP paid over and above 13% of NI contributions liability for the same tax month can be reclaimed).