

1. Introduction

LRD monitors workplace and bargaining trends, through its *Payline* database, and publishes handbooks like *Law at Work* and *Health and Safety Law*, and guides including the *Sickness absence and sick pay* booklet, which I'll be drawing on today.

Negotiating good sick pay and sickness absence policies has three benefits:

- **Income protection:** securing the best possible income protection for everyone affected by sickness or disability
- **Health protection:** a focus on health, with absence procedures that are fair and reasonable
- **Employment protection:** representing individuals caught up in those procedures

2: Income protection

Statutory Sick Pay (General) Regulations 1982: Apply to “a person who is not incapable of work of which he can reasonably be expected to do under a particular contract of service (who) **may be deemed to be incapable** of work of such a kind by reason of some specific disease or bodily or mental disablement...”

The Statutory Sick Pay (General) Regulations 1982

UK Statutory Instruments ▶ 1982 No. 894 ▶ Regulation 2

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What Version ?

● Latest available (Revised)

● Original (As made)

Opening Options ▼ ?

More Resources ▼ ?

Status: This is the original version (as it was originally made) by Westlaw and is taken from the printed publication. [Read mo](#)

Persons deemed incapable of work

2.—(1) A person who is not incapable of work of which he can deemed to be incapable of work of such a kind by reason of :

3: SSP vs Occupational Sick Pay

SSP: £109.40 for a full week (daily rate depends days normally worked). Each **period of incapacity (PIW)** must be at least 4 days including non-working days (unless “linked period”).

Not paid for first 3 normal working days (qualifying days). **Must earn £123p/w (the lower earnings limit)** to qualify (harder for women, black and ethnic minority workers, young workers, part time, or if not working from home)

BUT SSP is payable for up to 28 weeks.

OSP: Does not encourage **absenteeism** – wide variations between employers with the same OSP rules show **“it is not the scheme but its management that impacts on absence levels”** (2011 review for DWP).

- **contractual**, counts as wages; and
- **may protect income for up to a year** or longer (may include a period on half pay)
- **may have a limited service requirement** with rapid build-up of service-related entitlement
- pays as **close to normal pay** as possible, ideally with **zero waiting days**

4: Improving OSP

Employer adaptations during the pandemic led to both temporary and lasting improvements to OSP:

- Replacing SSP with OSP
- Ending two-tier conditions
- Extending its maximum duration
- Reducing or eliminating waiting days
- Reducing/eliminating qualifying rules
- Raising OSP closer to normal earnings
- Linking contractors' OSP to main OSP
- Harmonising OSP



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AAH Pharmaceuticals

Agreement began: 01/04/20

Agreement known to be in effect: 01/04/21

Occupational sick pay

Years of service	Period	Weeks	Payment (%)	Comment
1	1st	8	100	

Waiting days: Occupational sick pay is paid from day 4 of sickness absence.

Notes: For staff with over 12 months' service, 8 weeks of sick pay with a three day waiting period, extending to 12 weeks' sick pay for critical illnesses. From 1 April 2021, policy of sick pay not being paid to staff on a verbal warning ends.

Agriculture (Northern Ireland)

Agreement began: 01/04/20

Waiting days: Occupational sick pay is paid from day 4 of sickness absence.

Notes: Sick pay for full-time workers who have worked continuously for the same employer for 52 weeks or more. A worker will not be paid for the first three days of absence unless he or she is absent for 14 days or more. A qualifying worker will be entitled to a half day's pay plus Statutory Sick Pay for every day of absence.

5: Health protection – duty of care

Employers owe a general duty of care to ensure the health, safety and welfare at work of all their employees, including mental health under section 2 of the Health and Safety at Work etc. Act 1974

2 **General duties of employers to their employees.**

- (1) It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees.
- (2) Without prejudice to the generality of an employer's duty under the preceding subsection, the matters to which that duty extends include in particular—
 - (a) the provision and maintenance of plant and systems of work that are, so far as is reasonably practicable, safe and without risks to health;
 - (b) arrangements for ensuring, so far as is reasonably practicable, safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
 - (c) the provision of such information, instruction, training and supervision as is necessary to ensure, so far as is reasonably practicable, the health and safety at work of his employees;
 - (d) so far as is reasonably practicable as regards any place of work under the employer's control, the maintenance of it in a condition that is safe and without risks to health and the provision and maintenance of means of access to and egress from it that are safe and without such risks;
 - (e) the provision and maintenance of a working environment for his employees that is, so far as is reasonably practicable, safe, without risks to health, and adequate as regards facilities and arrangements for their welfare at work.

6: What the stats say

Sources: Different sources provide different figures for average sickness absence (eg from 3.9 to 5.8 days per worker) with significant variations from year to year, industry to industry, job to job. Industry level statistics may be more useful (eg NHS).

Causes: In official statistics the main causes are “Minor illnesses” (coughs, colds, flu, sickness, nausea and diarrhea), Musculoskeletal problems, “Other” illnesses (including accidents, poisonings, infectious diseases, skin disorders, diabetes), Mental health and Gastrointestinal problems.

Demographic/population factors: Varying patterns of absence are associated with age, sex, employee/self-employed status, part-time/full-time status, public/private sector employment, industrial sector, workforce size, manual/non-manual work, occupations, and key worker status.

Work-related causes: (HSE Figures) **36.8 million** working days lost due to work-related illness and workplace injury (2021/22)

More likely to be work-related ill health (**30.8 million**) than non-fatal workplace injuries (**6 million**) and including **17 million** attributed to stress, depression or anxiety, and **7.3 million** for musculoskeletal disorders.

7: Scope of absence policy (NHS Wales)

- Wellbeing (physical, mental and psychological, environmental and social)
- Responsibility of managers, of employees and of union reps
- Short term and long-term sickness absence
- Terminal illness or conditions
- Planned sickness absence
- A sickness day, and rolling year
- Tailored adjustments and reasonable adjustments
- Work-related absence
- Pregnancy-related illness
- Notification of sickness absence
- Communication and maintaining contact
- Entitlement to sick pay
- Medical appointments
- Occupational health
- Rights of accompaniment
- Premature retirement on health grounds
- Return to work, phased return and temporary redeployment

8: Employment protection

Sanctions may be triggered as a result of sickness absence monitoring and procedures, up to and including dismissal. What could happen?

- **Trigger points** can be based on patterns of attendance, the duration of absence, and the frequency of absence; there could be multiple triggers or a system such as **Bradford Factors** that calculates the number of absences in a period (multiplied by itself) with the duration.
- Employers are required to make **reasonable adjustments** where a provision, criterion or practice (PCP) puts a disabled person at a substantial disadvantage; they should help the worker return to or remain at work
- If an employer is considering dismissal, a **Capability or Disciplinary** procedure may be applied
- In judging **whether a dismissal is fair**, an Employment Tribunal considers all the surrounding circumstances and decides “in accordance with equity and the substantial merits of the case”

9: Capability or discipline?

Capability is one of five “fair” legal reasons for dismissing an employee but how does a capability process differ from a disciplinary one? Lord Justice Elias (December 2015 Appeal Court):

“It is unfortunate that **absence policies often use the language of warnings and sanctions which makes them sound disciplinary in nature**. This suggests that the employee has in some sense been culpable. That ...will generally not be the case, at least where the absence is genuine, as no doubt it usually will be. **But an employer is entitled to say, after a pattern of illness absence, that he (sic) should not be expected to have to accommodate the employee’s absences any longer”**.

(Griffiths v The Secretary of State for Work and Pensions [2015] EWCA Civ 1265).

10: What might a tribunal look for?

- **nature and cause** of the illness, any **underlying disability**, and if **work-related**
- whether **support and adjustments** have been offered to help improve attendance
- **likelihood of attendance improving** if the employee is given another chance
- the **number and length of absences** compared with intervals of good health
- impact on **productivity/service commitments** and **rest of the workforce**
- **employer's size and resources** (& the need to safeguard public funds)
- difficulties of **organising work** and arranging **short-term replacements**
- **need for the role**
- need to treat workers **consistently**
- whether **attendance management procedures** were followed and **reasonable adjustments made** for disabled workers
- whether the employee was **clearly warned in writing of the dismissal risk**