



HM Government

Health is everyone's business

A response by the Association of Personal Injury Lawyers

October 2019

We welcome the opportunity to respond to the Department for Health's consultation on proposals to prevent ill-health related job losses. The consultation is a step in the right direction, but we are concerned that while intentions are good, there need to be the resources in place to achieve change in reality. We challenge the assumption throughout the document, however, that there is a reluctance from SMEs to help those who are injured or suffering with ill-health back into work. It is often SMEs, being smaller, family run businesses, which are more likely to be keen to help their employees to remain in work, and to see them as a person who needs help.

Q1) Do you agree that, in addition to government support, there is a role for employers to support employees with health conditions, who are not already covered by disability legislation, to support them to stay in work?

We agree. We welcome that the consultation considers what more can be done to help employers to support employees with health conditions to stay in work. Employers have a large role to play in this.

Q3) Do you agree that a new "right to request workplace modifications" on health grounds could be an effective way to help employees to receive adjustments to help them stay in work?

We agree that the right to request workplace modifications would be beneficial, for those who have fluctuating health needs and who do not necessarily qualify for reasonable adjustments under the Equality Act. This additional right to request workplace modifications would mean that the employee would be able to access help at an earlier stage than if they were to rely on the Equality Act (which requires the disability must be likely to continue for one year or more). The earlier an intervention or modification is put in place, the more beneficial it will be. We also welcome that the flexible nature of the right to request modifications will assist those with fluctuating mental health issues, in particular. The existence of a right to request modifications would go some way towards levelling ground between physical and mental illness.

Q4) If the government were to implement this new right to request workplace modifications, who should be eligible?

We suggest that any employee who is able to demonstrate a need for a workplace modification on health grounds should be eligible to do so.

Q5) How long do you think an employer would need to consider and respond formally to a statutory request for a workplace modification?

We think that there should be a 0-4 week turnaround on the request for a workplace modification. One of the key benefits of this right to request modifications is that it could be used to assist those who have fluctuating health needs. The decision as to whether a modification can take place should therefore be made efficiently, so that the modifications can be in place as and when the employee needs them.

Q6) Do you think it is reasonable to expect all employers:

- **To consider requests made under a new “right to request” workplace modifications?**
- **To provide a written response setting out their decision to the employee?**

Yes.

Q7) Please identify what you would consider to be legitimate business reasons for an employer to refuse a new right to request for a workplace modification made on health grounds?

We accept that depending on the size of the business and the degree of modification required, the requirement may be too onerous. The test as to whether an employer can refuse to make modifications should be whether there would be a significant, detrimental and long-term impact on the running of the business if the modification were carried out, and/or else that not making the modification would expose the employee to a further risk of harm/injury.

Q8) The Government thinks there is a case for strengthened statutory guidance that prompts employers to demonstrate that they have taken early, sustained and proportionate action to support employees return to work. Do you agree?

We agree. Education on how employers should address the issue of ill-health in their employees is extremely important. There must be a focus in the guidance on the employer treating the employee as a person, and the benefits of taking action to support the employee in returning to work.

Q10) Would principle-based guidance provide employers with sufficient clarity on their obligations, or should guidance set out more specific actions for employers to take?

Guidance should include worked examples setting out the sorts of actions that employers need to take to support employees who have issues with ill-health.

Q11) The Government seeks views from employers, legal professionals and others as to what may be the most effective ways in which an employer could demonstrate that they had taken – or sought to take – early, sustained and proportionate action to help an employee return to work. For example, this could be a note of a conversation, or a formal write-up.

The system must be evidence based. Employers should keep a record of the actions taken, the discussion that has been had and the steps identified and followed. This can be a note or more formal write-up, depending on the circumstances, but there should be an accurate record of what has happened.

Q15) In order for employers to provide effective return to work support, what action is needed by employees?

- To have discussions with their employer to identify barriers preventing a return to work and to inform workplace support
- To agree a plan with their employer to guide the return to work process
- To engage with OH services or
- Other

There must be an open conversation between the employer and the employee, about what the employee needs and what the employer can give them. A plan, which is agreed between the employee and the employer, should be put in place. Whether the employee engages themselves with OH services will depend on the services on offer and the type of organisation. We suggest that it would be beneficial for there to be a telephone service in place for employers to contact OH services, and for them to be able to ask questions and for advice on how best to support the employee.

Q16) Do you think the current SSP system works to prompt employers to support an employee's return to work?

We do not think that the current SSP system works to prompt employers to support an employee's return to work. The current system simply allows an employer to put an employee on SSP, and then they do not have to offer them any sort of support to return to work – it is completely up to the employee to decide whether to return to work of their own volition.

Q17) What support would make it easier to provide phased returns to work during a period of sickness absence?

Guidance on how to implement a good phased return to work, and clearer medical or professional information on whether a phased return to work is appropriate would make it easier for employers to offer this as an option.

Q19) Do you agree that SSP should be extended to include employees earning below the LEL?

Yes.

Q20) For employees earning less than the LEL, would payment of SSP at 80 per cent of earnings strike the right balance between support for employees and avoiding the risk of creating a disincentive to return to work?

Yes, this would strike the right balance.

Q21) Do you agree that rights to SSP should be accrued over time?

No, the rights to SSP should not be accrued over time, as this will create injustice in particular for those who for example work zero hours contracts - the young and those who are unable to secure stable employment. A person cannot control when they are unwell or when they are injured, and they should not be worse off simply because they have been unfortunate enough to fall ill, for example, within a few months of starting a job.

Q22) Should the government take a more robust approach to fining employers who fail to meet their SSP obligations?

Yes.

Q23) Do you think that the enforcement approach for SSP should mirror National Minimum Wage enforcement?

Yes. The existence of SSP helps employees to be retained, and greater enforcement of the requirements to pay SSP, will ensure that people are kept in employment. SSP is the first step and bare minimum that employers can do to support those with health issues who are off work, and the package of measures in this consultation will then help employers to put in place mechanisms to allow them to support employees to get back to work.

Q24) Do you support the SSP1 form being given to employees four weeks before the end of SSP to help inform them of their options?

Employees should be informed before their SSP entitlement ends. We welcome the suggestion that employees should receive notice four weeks before their SSP ends.

Q25) How could a rebate of SSP be designed to help employers manage sickness absence effectively and support their employees to return to work?

It is unclear from the consultation who will be paying the rebate. Any rebate of SSP must not require the employee to pay money back to the employer. Where there is a tortfeasor responsible for the ill-health/injury, it would seem sensible for the costs of statutory sick pay to be recouped from the tortfeasor.

Q26) At this stage, there are no plans to change the rate or length of SSP. The Government is interested in views on the impact of the rate and length of SSP on employer and employee behaviour and decisions.

The rate of SSP is currently very low, and should be raised. The current level of SSP does little to alleviate the struggle and hardship that those injured through no fault of their own experience, when having to take time of work. SSP should be calculated as a reasonable proportion of the particular employee's salary, with a certain amount of weeks at one percentage, with the percentage decreasing as time goes on. This would achieve the correct balance between providing support to the employee who cannot work, and helping and encouraging them to get back into work when they are able to.

Q27) Would targeted subsidies or vouchers be effective in supporting SMEs and the self-employed to overcome the barriers they face in accessing OH?

Yes.

Q28) Please provide any evidence that targeted subsidies or vouchers could be effective or ineffective in supporting SMEs and the self-employed to overcome the upfront cost of accessing OH services?

We assume that one of the barriers that SMEs must overcome when accessing OH services is the cost of those services, so targeted subsidies will go some way to alleviating these barriers.

Q32) How could the government ensure that the OH services purchased using a subsidy are of sufficient quality?

It is important that there are quality assurance safeguards in place.

Q54) Do you agree with the proposal to introduce a requirement for employers to report sickness absence to government?

There may be some merit in the employer being required to report cases where someone has gone on long term sick, in order to monitor whether the proposals in this consultation have achieved their objectives. We question the need, however, for all sickness absences to be reported to the government.

The HSE already monitors certain workplace health incidents, and their role could be extended to monitor to ensure that these proposals are achieving their aims. However, the data must be anonymised, and care must be taken to ensure that data protection rules are followed.

Q56) Do you think this overall package of measures being explored in this consultation provides the right balance between supporting employees who are managing a health condition or disability, or on sickness absence, and setting appropriate expectations and support for employers?

We believe that this consultation is a step in the right direction to helping those with health conditions or on sickness absence to be supported to stay in, or go back to, work. However, there must be the resources in place to achieve these aims. There must be a focus on educating employers on how to support employees who are managing a health condition, disability or injury, and how this will affect their behaviour. There are many sources of support and training that are free of charge on the issues of, for example, brain injury, and it should be mandatory for employers to undertake these forms of training and for awareness to be heightened.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for almost 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have more than 3,000 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

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