



BIRMINGHAM LAW SOCIETY

one profession • one region • one voice

**Response to the Department of Work and
Pensions**

**and the Department of Health and Social Care
Consultation**

**Health is everyone's business: proposals to
reduce ill health-related job loss**

October 2019

Health is everyone's business: proposals to reduce ill health-related job loss

The Birmingham Law Society is the largest provincial law society in the country having over 5,000 members including both solicitors and barristers. This response has been prepared by the Society's Employment Law Committee which has 21 members with a depth of experience whilst acting for employers and employees/workers. This response represents the collective view of its members who are specialist lawyers practising in all aspects of employment law and from all branches of the legal profession.

Chapter one: What needs to change

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?

Strongly agree, agree, neither agree nor disagree, disagree, strongly disagree.

Response: Agree

Q2. Why do you think employers might not provide support to employees with health conditions not already covered by disability legislation to help them stay in work?

Open question.

Response: We note that there are a range of challenges and/or reasons why the employer may not provide support to a non-disabled employee, which include a lack of time, expertise and capital.

There is no freestanding legal obligation on the employer to provide support following and/or during any period of sickness to a non-disabled employee, although it is recognised that from a health and safety perspective, employers would have to take into account factors to ensure that employees are provided with a safe working environment.

However it is felt that any new legislation in this area needs to keep in mind the burden that might be placed on employers and hence any changes should be proportionate.

Chapter two: a clear legal framework for employers

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

Yes / No / Don't know (with reasons)

Response: Yes

As stated above, there are employees who do not meet the definition of being disabled under the Equality Act 2010. The 'right to request work(place) modifications will empower employees who are not covered under the reasonable adjustments duty and receive the support from their employer but this must be subject to a specific criteria/qualification criteria. Effective work and workplace adjustments can help shorten the length of sickness absences.

Q4. If the government were to implement this new right to request work(place) modifications, who should be eligible?

- ***Any employee returning to work after a period of long-term sickness absence of four or more weeks;***
- ***Any employee with a cumulative total of 4+ weeks sickness absence in a 12-month period;***
- ***Any employee returning to work after any period of sickness absence;***
- ***Any employee who is able to demonstrate a need for a work(place) modification on health grounds;***
- ***Other, please state.***

Response:

- Other:

Any right should not "kick in" too soon.

Our view is that any employee with a cumulative total of 6 weeks sickness in a period of 12-months where the employee is able to demonstrate a need for work(place) modifications on health grounds. The difficulty with a cumulative assessment over a period of time is that potentially the right of work(place) modifications can be granted after several periods of minor sickness, for example the flu or a minor operation with no symptoms. Hence there may be an ability for an employer to consider/take into account the extent to which separate periods of absence are (or are not) linked. It seems to us that any period without being subject to a length of time trigger is likely to be too wide and will be burdensome for the employer and the option to demonstrate a need will be subjective.

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

- ***0-4 weeks;***
- ***5-8 weeks; or***
- ***9-12 weeks?***

Response: 5-8 weeks – allowing sufficient time to obtain any medical and/or other evidence if necessary. 3 months may be too long if these adjustments can be implemented immediately or within a reasonable period and a delay in considering a request can delay the employee's return to work and so extending any period of sickness.

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

- ***To consider requests made under a new 'right to request' work(place) modifications?***

Yes / no / if no – why?

Response: Yes.

- ***To provide a written response setting out their decision to the employee?***

Yes / no / if no – why?

Response: 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 work(place) modification made on health grounds:

- ***The extent of an employer's financial or other resources;***
- ***The extent of physical change required to be made by an employer to their business premises in order to accommodate a request;***
- ***The extent to which it would impact on productivity;***
- ***Other – please state***

Please give further views in support of your response.

Response: All of the above.

The case study referred to is Sainsburys, where there is a centralised budget, which covers costs incurred through making workplace adjustments. However, for smaller businesses who do not have an allocated budget (or any budget) or resources, the adjustment required may disproportionate to the needs of the business and may be difficult and/or impossible to implement. The assessment must be made on a reasonable case-by-case basis subject to the business size and resources and the extent to which the change requested is workable given the employer's premises. Care would need to be taken if allowing an employer to refer to the impact on productivity and this should, we believe, only be a relevant consideration to the extent that the impact can be shown by the employer to be material.

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?

Yes – no – maybe – don't know

Response: Yes

We consider, for example, maintaining early contact and the employer providing transitional work arrangements are key factors to facilitate employees return to work. We agree that

Health is everyone's business: proposals to reduce ill health-related job loss

action taken by the employer which is early and considerate will allow the employer to engage with internal staff and external representatives in planning the employee's return to work. Early support and communication from the employer is likely to avoid long-term sickness absence. There are benefits for both the employee and the employer from the employer taking early, sustained and proportionate action. If statutory guidance would help an employer to better understand what expectations and benchmarks will apply to them it will, we believe, be a helpful support for employers.

Q9. If no, please give reasons for your answer.

N/A

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

- *Principle-based guidance provide employers with sufficient clarity;*
- *Guidance should set out more specific actions for employers to take;*
- *Don't know;*
- *Other – please state.*

Response:

Guidance should set out more specific actions for employers to take although it should in all circumstances allow sufficient flexibility for employers to deal with the various factual scenarios they will face rather than prescribing actions that might not be appropriate in every case;

We consider that the actions an employer should be obliged to consider should be based on the employer's size and resources.

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.

Response: Formal write up (a specimen form can be provided as a template) which records the date, time, notes of conversation, barriers and actions. We recommend that the employer should provide a copy of the form/note to the employee as confirmation of what was discussed.

Q12. As an employer, what support would you need to meet a legal requirement to provide early, sustained and proportionate support to help an employee to stay in work or return to work from a long-term sickness absence?

- *Better quality employer information and guidance;*
- *More easily accessible employer information and guidance;*

Health is everyone's business: proposals to reduce ill health-related job loss

- ***Easier access to quality OH services; or***
- ***Other – please state.***

Response: All of the above.

Q13. As an employee: in your experience, what actions has your employer taken to support your health at work? Please describe how these were effective or ineffective.

Response: From the perspective of those of our members who act on behalf of employees, employers often take little or no action subject to the level and role of the employee. If the employee is in a senior role (i.e. and whose absence has more of a noticeable impact upon the employer's business), the employer is likely to take more action in supporting the well-being of the employee. Equally, however, many of our members who act for employers can testify to a large number of employers who operate consistent and excellent practices in the workplace to support the health of their workers. It is important that any new rules keep in mind that many employers already operate a very supportive environment for its workers in terms of supporting their absences/return to work.

Q14. As an employee: what further support/adjustments would you have liked to receive from your employer?

We do not believe we can usefully answer this question as it is directed to employees.

Q15. All respondents: in order for employers to provide effective return to work support, what action is needed by employees? Select all that apply.

- ***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 – please state.***

Response: all of the above, save that OH is not always needed but can in the right circumstances be beneficial.

Q16. All respondents: do you think the current SSP system works to prompt employers to support an employee's return to work?

Yes – no – maybe – don't know. Please give reasons for your answer.

Response: No. The SSP – the process/payment of SSP does not prompt the employer to provide support other than sick pay. Often the trigger of an obligation is an automatic payroll or HR matter which does not necessarily involve the supervisor/manager of the employee in that process. The prompt is only evident when the period of SSP finishes and usually means that the employee is likely to discuss his/her return to work.

Q17. All respondents: 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;***
- ***A legal framework for a phased return to work which includes rules on how it should be agreed and implemented;***
- ***Clearer medical or professional information on whether a phased return to work is appropriate; or***
- ***Other suggestions.***

Response: All the above.

Q18. All respondents: would the removal of rules requiring identification of specific qualifying days help simplify SSP eligibility?

Yes – no – maybe – don't know. Please give reasons for your answer.

Response: Yes

There could be confusion around the qualifying days based on the contracted days the employee works. We consider that every day of the week as a qualifying day could be considered as a qualifying day (except where no employee is required to work). However the removal of qualifying days may result in SSP being paid earlier based on the new suggested rules.

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

Yes – no – maybe – don't know. Please give reasons for your response.

Response: Yes

There are employees who earn less than the LEL. SMP offers an alternative MA but SSP doesn't. Lower income families do not have the benefit of SSP.

There are employees who earn under the LEL sum because they may have multiple jobs/employers.

Specifically it would be very important to ensure that this did not become an excessive and onerous burden on small employers.

Q20. All respondents: for employees earning less than the LEL, would payment of SSP at 80% of earnings strike the right balance between support for employees and avoiding the risk of creating a disincentive to return to work?

Yes – no – maybe – don't know. Please give reasons for your answer.

Response: Yes.

It would mean that employees were not better off being absent on sick leave.

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

Yes – no – maybe – don't know. Please give reasons for your response.

Response: No.

It may result in employees not benefiting from any income whilst they are off work sick and also possibly deter employees moving roles if they have to accrue the right over time.

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

Yes – no – maybe – don't know. Please give reasons for your answer.

Response: No.

There is a dispute process implemented by the HMRC with fines up to £3,000. This is already a deterrent, but we consider that employers may not be aware of HMRC's role and possible sanctions.

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

Yes – no – maybe – don't know. Please give reasons for your answer.

Response: No.

There is a HMRC disputes process in place. There is no evidence which suggests that the HMRC disputes process does not work other than the .Gov website only provides the prompt. It may be helpful if other parties such as ACAS be tasked with providing such prompts or more available information for employees of this disputes process.

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?

Yes – no – maybe – don't know. Please give reasons for your answer.

Response: Yes

- Earlier prompt from the employer to the employee to discuss their return to work;
- Prompt to discuss what support is needed;
- For employees, it is an opportunity to seek advice from the job centre about suitable job roles or training.

Q25. All respondents: how could a rebate of SSP be designed to help employers manage sickness absence effectively and support their employees to return to work?

Open question.

Response: A rebate could be an incentive for SME's to support employees back to work but any rebate should operate on demonstrating a good outcome, adopting sickness absence

Health is everyone's business: proposals to reduce ill health-related job loss

practice procedures, employer demonstrating steps for the employee to return. The rebate would need to be conditional otherwise SME's may use the benefit of the rebate and fail to support employees returning to work.

Q26. All respondents: 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.

Response: A consideration is that a higher rate of SSP would encourage employers a greater incentive to act and ensure that the employee does return to work and prevent sickness absence. However, a higher rate may be difficult for SME's to implement due to restraints on capital and there needs to be a balance. Increasing the period of SSP is unlikely to support employees returning to work and again there needs to be a balance. The present rate and length achieves that balance.

Chapter three: occupational health market reform

Q27. In your view, would targeted subsidies or vouchers be effective in supporting SMEs and the self-employed to overcome the barriers they face in accessing OH?

Yes – no – maybe – don't know. Please give reasons for your answer.

Response: Yes

- Affordable to the employer;
- Manage sickness absence better;
- Support the employee returning to work;

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.

Open question.

Response: This may help smaller businesses because they often prefer GP reports rather than OH reports due to the fact that GP reports are less expensive.

Q29. In your view, would potentially giving the smallest SMEs or self-employed people the largest subsidy per employee be the fairest way of ensuring OH is affordable for all?

- Yes;
- No;
- Don't know
- If no or don't know – what would be better?

Response: Yes

Health is everyone's business: proposals to reduce ill health-related job loss

Q30. All respondents: what type of support should be prioritised by any potential, targeted OH subsidy for SMEs and/or self-employed people?

- *OH assessments and advice;*
- *Training, instruction or capacity building (e.g. for managers and leads);*
- *OH recommended treatments.*

Response: OH Assessments and advice

Q31. Please give reasons and details of any other categories of support you think should be included.

Response: On site attendance and consideration of the work(place) adjustments. Information concerning treatment.

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

Response: The OH services are purchased from a recommended list of suppliers who are vetted. There could be a role for a body such as the Institute for Occupational and Environmental Medicine (based out of Birmingham University).

Q33. As an OH provider, would you be willing to submit information about the make-up of your workforce to a coordinating body?

Yes – no – maybe – don't know.

Response: N/A

Q34. If no, maybe or don't know, what are your reasons for not providing your data?

- *time;*
- *cost;*
- *confidentiality;*
- *do not see the benefit;*
- *other – please state.*

Response: Question aimed at an OH provider, we are not able to respond.

Q35. As an OH provider, expert or interested party, what are your views on private OH providers' involvement in the training of the clinical workforce?

- *Private providers should be more involved;*
- *Private providers should be more involved but with additional support;*
- *Private providers should not be more involved.*

Question is aimed at OH providers we are not able to respond.

Q36. If providers should be more involved but will need support, what additional support would be needed?

Open question.

Question is aimed at OH providers we are not able to respond

Q37. As an OH provider, expert or interested party, what changes to the training and development of the OH workforce could support the delivery of quality and cost-effective services?

Question is aimed at OH providers we are not able to respond

Q38. As an OH provider, should there be a single body to coordinate the development of the OH workforce in the commercial market?

Yes – no – maybe – don't know. Please state reasons for your answer.

Question is aimed at OH providers we are not able to respond

Q39. If yes, what should its role be?

Question is aimed at OH providers we are not able to respond

Q40. As an OH provider, what would encourage providers, particularly smaller providers, to invest in research and innovation in OH service delivery?

Question is aimed at OH providers we are not able to respond

Q41. What approaches do you think would be most effective in terms of increasing access to OH services for self-employed people and small employers through the market? Please order in terms of priority:

- *New ways of buying OH;*
- *New OH service models; and*
- *The use of technology to support OH service provision.*

We think the order of priority for self-employed and small employers would be:-

- New ways of buying OH;
- The use of technology to support OH service provision; and

Health is everyone's business: proposals to reduce ill health-related job loss

- New OH service models.

Q42. If applicable, what other approaches do you think would be effective? Please explain the reasons for your answer.

- Availability of fixed or capped price, or subsidised services.
- Pro-forma short form response format.
- OH providers who are specifically recommended/declare themselves as being in the market for small businesses.

Q43. As an OH provider, expert or interested party, what more could be done to increase the pace of innovation in the market?

- *Co-funding;*
- *Access to finance;*
- *Help with innovation or evaluation;*
- *Commercial advice;*
- *Don't know;*
- *Other – please state*

Question is aimed at OH providers we are not able to respond

Q44. As an OH provider, expert, interested party, what methods would you find most helpful for finding out about new evidence and approaches that could improve your service?

Question is aimed at OH providers we are not able to respond

Q45. As an employer, what indicators of quality and compliance arrangements would help you choose an OH provider?

- *Work outcomes;*
- *Quality marks;*
- *Process times;*
- *Customer reviews;*
- *Other – please state;*
- *Don't know;*
- *Indicators won't help*

Response:

Health is everyone's business: proposals to reduce ill health-related job loss

- Work outcomes;
- Quality marks;
- Process times;
- Customer reviews;

Q46. As a provider, what indicators of quality could help improve the standard of services in the OH market?

- *Work outcomes;*
- *Quality marks;*
- *Process times;*
- *Customer reviews;*
- *Other – please state;*
- *Don't know;*
- *Indicators won't help*

Response: Question is to an OH provider we are not able to respond

Q47. All respondents: how could work outcomes be measured in a robust way?

Response:

- reduction in sickness absence;
- Feedback/Quality scoring system.

Q48. All respondents: do you have suggestions for actions not proposed here which could improve capacity, quality and cost effectiveness in the OH market?

Response: Universal list of preferred and approved OH suppliers.

Chapter four: advice and support for employers

Q49. Do you need more information, advice and guidance?

Response: Yes

Q50. If so, what content is missing?

- *Legal obligations and responsibilities/employment law;*
- *Recruiting disabled people and people with health conditions;*
- *Workplace adjustments, such as Access to Work;*
- *Managing sickness absence;*

Health is everyone's business: proposals to reduce ill health-related job loss

- ***Managing specific health conditions;***
- ***Promoting healthier workplaces;***
- ***Occupational health and health insurance; [cont.]***
- ***Best practice and case studies;***
- ***Links to other organisations, campaigns and networks;***
- ***Local providers of services and advice;***
- ***Other – please state.***

Response:

- Occupational health and health insurance;
- Best practice and case studies;
- Links to other organisations, campaigns and networks;
- Local providers of services and advice.

Q51. What would you recommend as the best source of such new advice and information?

- ***The main government portal (GOV.UK);***
- ***The Health and Safety Executive;***
- ***Jobcentre Plus; or***
- ***Other – please state.***

Response: The main government portal (GOV.UK).

Q52. As an employer, where do you go for buying advice and support when purchasing, or considering purchasing, OH services?

- ***Internet search;***
- ***Professional/personal contact;***
- ***Legal sources;***
- ***HR person (in-house or external);***
- ***Accountant or other financial specialist;***
- ***Other – please state;***
- ***Don't know;***
- ***I don't seek advice or support.***

Response: We are unable to answer this question (not being an employer).

Q53. As an employer, what additional information would you find useful when purchasing, or considering purchasing, OH services?

- ***Online questionnaire to help you identify what type of services you could benefit from;***

Health is everyone's business: proposals to reduce ill health-related job loss

- ***Toolkit that could include information on OH referral and assessment process;***
- ***Basic online information on the process of buying OH services;***
- ***Provider database;***
- ***Comparison website;***
- ***Information on the value of OH services.***

Response: We are unable to answer this question (not being an employer)

Q54. All respondents: do you agree with the proposal to introduce a requirement for employers to report sickness absence to government?

Yes – no – maybe – don't know. Please give reasons for your answer.

Maybe

Whilst recognised that this would promote a transparent culture in respect of sickness absence and would enable the comparison of data and evaluation, there are concerns with this approach. The main concerns are to ensure that any such requirement should not become burdensome on employers and consideration would need to be given to the thresholds/triggers that apply as well as whether smaller businesses, who would have less ready access to the resources to comply, should be exempt. Moreover, this would only be a worthwhile exercise if something useful to employers or employees is done with the information. The collection of statistics for reporting purposes only is unlikely in our view to be a sufficient justification for such a burden.

Q55. As a small or medium sized employer, would you find it helpful to receive prompts to information or advice when you have an employee on a sickness absence?

Yes – no – maybe – don't know. Please give reasons for your response.

Response: We are unable to answer this question from the perspective of being an employer, but we envisage that such a measure would assist SME's who do not have an internal/external HR function.

It would, we believe, encourage such employers to take action.

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?

Yes – no – maybe – don't know. Please give reasons for your response.

Response: Yes.

Some businesses do not think enough about sickness absence, whether this is supporting employees prior, and when the absence does arise, how to manage sickness and support the employee back to work. The suggestions provide an appropriate balance between employers and employees when managing sickness.