

**Health is everyone's business – proposals to reduce ill health related job loss  
Response from the Low Incomes Tax Reform Group (LITRG)**

**1 Executive Summary**

- 1.1 We are a group of tax specialists with an interest and expertise in labour market issues, particularly in the pay, tax and related benefit matters of low-paid and vulnerable employees. We welcome the opportunity to respond to this paper.
- 1.2 Given our remit, we feel we can best add value by commenting on the proposals as to how Statutory Sick Pay (SSP) should be reformed to better support people with disabilities and long-term health conditions. We also highlight some practical issues for consideration.
- 1.3 In general, we do wonder whether the disability employment gap is a symptom of a problem with our labour market more generally, which cannot be remedied by reforms to SSP alone. The government need to think holistically about how they can create supportive working environments – the availability of SSP, in reality, is probably only a very small part of this.
- 1.4 However, we agree that the system of SSP is inflexible and does not reflect modern working practices – improvements to the system would help alleviate the increasing (and often competing) pressures in the workplace and so would be worthwhile from that perspective at least.
- 1.5 We do not think that the current SSP system will be acting as a prompt for many employers to support an employee to return to work. However, something like the Fit for Work occupational health assessment service and related tax exemption (if properly explained and promoted by government) could help small and micro employers be more proactive. However it must be remembered that often small and micro businesses just do not have much time for what they might consider to be extraneous matters such as supporting an employee back to work, as they are too busy managing the business activities on a day-to-day basis.

- 1.6 Facilitating phased returns to work within SSP is a good idea. In addition to an online calculator on GOV.UK, HMRC's Basic PAYE Tools should also be programmed to calculate and record phased return to work SSP. In order to help employers fully comply with their obligations, any such calculator should be able to deal with non-standard working arrangements (unlike the current SSP calculator, which tells you to calculate SSP manually if you indicate that your employee has an irregular work schedule).
- 1.7 Against the backdrop of the move away from 9-5 employment, we agree that the concept of having to nominate 'qualifying days' on which to be paid SSP is confusing and unfair for workers. Although what is being proposed in the consultation document to tackle this is not 100% clear, we support the general gist. We would urge the government to produce further, more nuanced, examples of how the proposals would work in practice, for complete clarity.
- 1.8 We agree with widening SSP eligibility to those who earn under the Lower Earnings Limit (LEL) and to the proposed 80% of earnings rate. Such workers may well be on welfare benefits or have more than one job. We recommend that work is done to ensure that there are no unintended consequences and that all interactions such as with universal credit (UC) entitlement have been considered before making a decision on how best to move forward.
- 1.9 In terms of widening eligibility, it would be helpful and intuitive if SSP was also made expressly a 'worker' employment law right rather than one reliant on there being a secondary contributor (that is, someone that is liable to employers' National Insurance), in order that some 'dependent' self-employed people could benefit.
- 1.10 Making SSP an accrued right would remove an important safeguard for employees in a new job but on the other hand, the current system can be catastrophic for small and micro employers. We think SSP in a new employment should be funded by the government rather than the employer.
- 1.11 We would urge the government to improve the provision of specific SSP information for workers at the end of SSP but also at the start of an employment. Simply directing an employee to where general information on SSP can be found is inadequate, particularly for short term, agency and casual workers who often work on an irregular basis and can struggle to find and understand official information that is relevant to their working arrangements.
- 1.12 HM Revenue & Customs (HMRC) should, with appropriate additional resources, strengthen their action against deliberately non-compliant employers to ensure employees are paid what they are due – however, they could do this by using the powers they already have rather than introducing new ones. In order to have a deterrent effect, HMRC should publicise when and how they have used their powers (we are not aware that they currently do this).
- 1.13 It has long been our view that the low-paid require their positions to be protected through effective state enforcement (due to the imbalance of power/their inability to articulate problems, etc.) and this must include payment of SSP. However, enforcement officers should be careful not to get bogged down in chasing small administrative errors or technical oversights, as

there are more serious abuses to be tackled that serve to deny employees SSP – for example, bogus self-employment.

- 1.14 We think that agency workers face a uniquely tough time in securing SSP because they work in a sector in which avoidance behaviour seems to be widespread, so any enforcement work should tackle this sector as a priority.
- 1.15 We are pleased that this consultation considers how a rebate of SSP might work, as the removal of the Percentage Threshold Scheme (PTS) was a material and significant change for small and micro employers – including many care and support employers<sup>1</sup> – leaving employers unable to mitigate their losses due to sickness. It was extremely disappointing that it happened without detailed public consultation.
- 1.16 We do not think that a rebate should only be available to those that demonstrate ‘best practice’ in supporting employees on sickness absence, as it is not clear what would be considered ‘best practice’ or how this would be monitored. We believe the simplest and fairest thing to do would be to make a rebate universal to small and micro employers (ideally at a rate of 103%, to match other statutory payments, although we recognise there are no easy answers as to where this money would come from). It should be quick and easy to claim in order to avoid cash flow issues – the ‘advance funding’ system in place for statutory payments may need to be improved.
- 1.17 It seems to us that there is a need for a much fuller debate about reforming the rate or length of SSP. Although in this consultation SSP is being considered in the context of those with disabilities and long-term health conditions, a good starting point would be to identify the true aim of SSP. Is it to support short-term illness and temporary incapacity or long-term health conditions and disability? Once this has been established, discussions about the rate and length of SSP can follow. We also note that the SSP system is currently more generous to part-timers than full timers and this could be acting as a disincentive to returning to work. We think the government should produce a separate call for evidence to look at these fundamental issues in more depth.

## **2 About Us**

- 2.1 LITRG is an initiative of the Chartered Institute of Taxation (CIOT) to give a voice to the unrepresented. Since 1998, LITRG has been working to improve the policy and processes of the tax, tax credits and associated welfare systems for the benefit of those on low incomes. Everything we do is aimed at improving the tax and benefits experience of low-income workers, pensioners, migrants, students, disabled people and carers.
- 2.2 LITRG works extensively with HMRC and other government departments, commenting on proposals and putting forward our own ideas for improving the system. Too often the tax and

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<sup>1</sup> Disabled people who take on a personal assistant to help them with their care needs.

related welfare laws and administrative systems are not designed with the low-income user in mind and this often makes life difficult for those we try to help.

- 2.3 The CIOT is a charity and the leading professional body in the United Kingdom concerned solely with taxation. The CIOT's primary purpose is to promote education and study of the administration and practice of taxation. One of the key aims is to achieve a better, more efficient, tax system for all affected by it – taxpayers, advisers and the authorities.
- 2.4 Our CIOT colleagues are also putting in a response to this consultation, in which they look at the question of reporting sickness absence through the PAYE Real Time Information (RTI) returns. We support their comments.

### **3 General comments**

- 3.1 We welcome the high aspirations the government has in this area, in terms of wanting to support workers who have disabilities, or chronic or recurrent health problems.
- 3.2 We would also like to commend the government on producing an easy-to-read version of the (very long) main consultation document. We hope that this has encouraged more meaningful comment from stakeholders.
- 3.3 LITRG previously responded to the green paper on halving the disability employment gap,<sup>1</sup> highlighting that the wider tax and related benefits systems are capable of influencing behaviour in this area.
- 3.4 We made recommendations on where we think rules and practice could be changed to improve incentives, reduce burdens and thus contribute to the government's overall objective. These included that all employed disabled people should be able to claim as an employment expense the costs of putting themselves, as far as possible, on a par with non-disabled people and that there should be VAT relief for employers for modifications in the workplace.
- 3.5 It is disappointing that the government do not appear to be considering any such changes and we think this decision should be revisited as part of moving this policy intervention forward.
- 3.6 In terms of the proposals before us, we are not disability or health experts. Others are in a better position than us to provide detailed comments on the likely effectiveness of the overall package of reforms suggested. However, we have specifically answered the questions on SSP – some of these, when taken together with these general comments, may be useful input to other aspects of the consultation.
- 3.7 Before moving on to the SSP questions, we would like to say (based on what we *do* know, from people writing into our website for example), that issues for disabled people or those with long

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<sup>1</sup> <https://www.litrg.org.uk/latest-news/submissions/170217-improving-lives-work-health-and-disability-green-paper>

term conditions in work are probably more complex than has been shown in the consultation document. The government need to think holistically about how they can create supportive working environments – the availability of SSP, in reality, is probably only a very small part of this.

- 3.8 We appreciate that this is probably easier said than done, against the backdrop of a reduction in permanent, direct employment and a growth in temporary roles, sub-contracting, etc. (the Director of Labour Market Enforcement talks of *'the fissuring of employment relationships'*<sup>1</sup>). For example, it seems to us that arranging modified hours or days or reduced working hours (perhaps two of the most common enablers of employment amongst adults with disabilities) may be more difficult (or even impossible) to manage in such work.
- 3.9 We therefore observe that reversing the trend towards 'flexible' (yet often one-sided) forms of working, is probably the only definitive way of bringing about sustainable improvements for many vulnerable workers, including disabled people and those with long-term health conditions. However, we appreciate that factors like the economic landscape, the government's strategy of labour market deregulation, and commercial interests and competitive pressures make this a challenging objective.
- 3.10 Nevertheless, the government are consulting on quite a narrow set of proposals here and it seems like this is a missed opportunity to open up an important debate in this area.

#### **4 Question 16 – Do you think the current SSP system works to prompt employers to support an employee's return to work?**

- 4.1 We do not think so – even though the cost of SSP is now fully funded by the employer, this does not always work to prompt employers to support an employee's return to work.
- 4.2 For a start, it is important to realise that not all sickness absences are down to potentially manageable conditions, like stress or back pain, etc. An employee could have cancer, for example or could have flu (contagious) or could be merely malingering. Employers may have some influence over some of the factors that determine sickness absence – but not all.
- 4.3 Many small and micro employers would feel uncomfortable asking questions about the employee's condition (to understand whether it is something that they could support an employee with). They may worry that they are prying, or could be seen to be bullying or harassing an employee at a time when they are vulnerable.
- 4.4 Moreover, employers have no 'right' to access an employee's medical records, no 'right' to ask questions about when the employee might return to work and may lack the knowledge or expertise about how best to support an employee to return to work, depending on their

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<sup>1</sup> [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/632074/labour-market-enforcement-strategy-2018-19-summary-of-issues.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/632074/labour-market-enforcement-strategy-2018-19-summary-of-issues.pdf) (page 3)

condition. Even where an employer thinks that their employee might return to work soon, sickness absence may often be 'allowed' to continue, because they are unsure of how to deal with situation.

- 4.5 One of the aims of the Fit for Work programme was to support small and micro employers without a dedicated HR function, to address some of the issues and barriers above.
- 4.6 Under the Fit for Work assessment service,<sup>1</sup> a free occupational health assessment was available for employees at risk of long-term sickness absence (four weeks or more) to identify supportive action to help them return and remain in work. It is therefore a shame that the assessment service was withdrawn recently (leaving just a generic information service), without really being given a chance to work.
- 4.7 We understand that this was due to low referral rates, but we really didn't see much evidence of government promoting the benefits of the scheme with employers. The fact that savings from the abolition of the PTS (see question 25) were supposed to be used to fund the scheme,<sup>2</sup> makes this even more disappointing.
- 4.8 We recommend that the Fit for Work assessment service (or something like it) is reinstated (and promoted) by the government. Awareness raising should also include the £500 tax exemption, available for medical treatments or health-related interventions recommended by the Fit for Work service (or other employer-arranged occupational health service), such as counselling or physiotherapy.<sup>3</sup>
- 4.9 In particular, employers should be made aware that the tax exemption still applies where the employer reimburses the employees expenses – there is no requirement for the employer to arrange the treatment, which is helpful.

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<sup>1</sup> As described in our news piece trying to promote the service:

<https://disabilitytaxguide.org.uk/news/item/has-your-pa-been-on-long-term-sick-leave-can-the-fit-for-work-service-help>

<sup>2</sup> See:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/362480/fit-for-work.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/362480/fit-for-work.pdf)

<sup>3</sup> See <https://www.gov.uk/hmrc-internal-manuals/employment-income-manual/eim21774> as small and micro employers probably will not have their own occupational health service, the tax exemption is currently only the privilege of employees of large employers who can arrange the required occupational health service, which does not seem fair or equitable somehow.

- 4.10 We state for the record that other useful tax exemptions are also available which could help prevent sickness in the workplace in the first place— e.g. the trivial benefit exemption which could cover a flu vaccination.<sup>1</sup> We wonder how many employers are aware of this.

**5 Question 17 – What support would make it easier to provide phased returns to work during a period of sickness absence?**

- 5.1 We can see the benefits of allowing an employee to work fewer hours or days per week than normal as part of a phased return to work after a long period of absence. Indeed, it is our understanding that the current rules can sometimes allow a return to work involving fewer days than normal (but not fewer hours than normal).<sup>2</sup>
- 5.2 Clearly the proposals could lead to a system that is even more complex for small and micro employers to understand and navigate and/or to employees trying to game the system (for example, by moonlighting).
- 5.3 Changes would therefore need to be accompanied by employer guidance on how to implement a phased return to work. Safeguards against abuse of the system should be developed – for example that a phased return to work should only be considered if it has been recommended by a GP or other health care professional (e.g. through a Fit for Work adviser).
- 5.4 In terms of how SSP might work in these situations, we agree that an online calculator should be created on GOV.UK to help employers calculate what they would pay their employee during a phased return to work. In order to help them comply with their obligations, this calculator should be programmed to deal with casual, temporary, or part-time working arrangements (unlike the current SSP calculator,<sup>3</sup> which tells you to calculate SSP manually if you indicate that your employee has an irregular work schedule).<sup>4</sup>

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<sup>1</sup> As explained in our news piece: <https://disabilitytaxguide.org.uk/news/item/flu-jab-for-your-pa-can-be-covered-by-trivial-benefit-exemption>

<sup>2</sup> The current problem seems to be that while people may be entitled to SSP for the days they do not work due to sickness, the non-worked days must form a Period of Incapacity for Work (which must be a minimum of four days long, but can include Saturdays and Sundays even though these are not work days). Depending on the phased return working patterns, this may not work. There is also no provision within the current rules to allow an employer to work fewer hours than normal (as you cannot count a day as a sick day if an employee has worked for a minute or more).

<sup>3</sup> <https://www.gov.uk/calculate-statutory-sick-pay>

<sup>4</sup> It seems that calculating phased return SSP manually could be fraught with difficulties – leaving employers virtually certain to make errors and potentially even facing financial penalties for getting things wrong.

- 5.5 HMRC's Basic PAYE Tools, HMRC's free payroll program used widely by small and micro employers, should also contain a calculator and should be programmed to record phased return to work SSP, as it currently does with ordinary SSP.<sup>1</sup>

**6 Question 18 – Would the removal of rules requiring identification of specific qualifying days help simplify SSP eligibility?**

- 6.1 We can see that the problem of having to identify/nominate specific qualifying days for which SSP is paid (and that are treated as waiting days) can be unfair to some workers in non-standard forms of work. The qualifying days identified/nominated for payment of SSP can clash with the actual days of sickness, leaving the worker without the safety net of any SSP.
- 6.2 Unfortunately, we do not really understand what is being proposed to counter this. It would be helpful if further clarification could be given before any decisions are made. We suggest that some further, more nuanced, examples are prepared to illustrate how the government's proposals would work in practice, in order that stakeholders can comment comprehensively (for example, how much would be payable and when, if the person returned to work part way through the second week?).
- 6.3 It goes without saying that any new rules would need to be accompanied by awareness raising activities and detailed new information (including worded examples) about sick pay for workers in non-standard forms of work, which will help workers to understand their rights and employers to understand their legal obligations.

**7 Question 19 – Do you agree that SSP should be extended to include employees earning below the LEL?**

- 7.1 Yes – the current system can cause problems for the very low-paid or those with irregular earnings, such as part-time or casual workers – many will just not work enough hours to meet the earnings criteria. There also seem to be problems in how average weekly earnings are calculated by HMRC, meaning that even people actually earning over £118 each week may not qualify.<sup>2</sup>
- 7.2 However, such workers may well be on welfare benefits such as UC or have more than one job. We recommend work is done to ensure that there are no unintended consequences and that all interactions with benefits such as UC have been considered before making a decision on how best to move forward.

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<sup>1</sup> Using the SSP2 link from the menu on the left of the screen in BPT

<sup>2</sup> See an example: <http://forums.moneysavingexpert.com/showthread.php?t=5787490>



- 7.3 It is worth noting that even with this extension, SSP will still be unavailable to much of the working population – i.e. those treated as self-employed for tax purposes (even if they are ‘workers’ for employment law purposes<sup>1</sup>).
- 7.4 Not being paid under the Pay As You Earn system (as is the case, if you are self-employed) means that there is no secondary contributor (someone who is liable to pay Class 1 secondary National Insurance contributions (NIC)). Secondary contributors are responsible for administering and part-financing statutory payments under the Social Security Contributions and Benefits Act 1992. If there is no secondary contributor, then it follows that the worker cannot be entitled to SSP or any other statutory payments for that matter, e.g. Statutory Maternity Pay, etc.
- 7.5 A lot of commentary that we have seen,<sup>2</sup> alludes that SSP is a ‘worker’ right, which is worrying and potentially dangerous. We think it would be helpful and intuitive if sick pay was also made expressly a ‘worker’ employment law right rather than one reliant on there being a secondary contributor (that is, someone that is liable to employers’ National Insurance).

**8 Question 20 – 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?**

- 8.1 Obviously paying people the full rate of SSP could act as a disincentive to returning to work where it is above their weekly earnings.
- 8.2 Saying that, 80% of earnings could still be seen as very generous when you consider that the current rate of SSP equates to less than 20% for those on average weekly wages.<sup>3</sup> There is a potential equity issue here as between lower-paid workers and those on higher wages because those earning below the LEL would be much better off proportionately.
- 8.3 In general, we note that the rules benefit part-time workers over full-time workers anyway. Somebody who normally works two days a week will receive the same amount of SSP as

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<sup>1</sup> If a person performs work personally, outside of their own business or profession, then they are ‘workers’ for most employment law purposes. Their work will have many of the characteristics of self-employment (e.g. they decide when they work and use their own tools), but they will often have less autonomy than genuinely self-employed people and may derive all or most of their income from the business that they work for. These include what we might call ‘dependent’ self-employed people and could include those who work in the gig economy.

<sup>2</sup> For example: <https://www.independent.co.uk/news/business/analysis-and-features/uber-court-defeat-prices-customers-surge-drivers-full-rights-employees-ride-sharing-app-a8048051.html>

<sup>3</sup> Approx £500 per week:  
<https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/averageweeklyearningsingreatbritain/july2019>

someone who works five days a week (after waiting days).<sup>1</sup> Moreover, the person working two days a week may well have another job, meaning they are potentially able to claim SSP from both employers.

- 8.4 Similarly, someone who normally works four hours a day over five days is currently paid the same SSP as someone who normally works eight hours a day over five days. It is not hard to see that this could cause difficulty and resentment for those in full-time work.
- 8.5 In our view, it is time for a wholesale review of the way SSP is calculated for those in part-time work so that it achieves a better balance between ensuring employees receive a regular income from their employer when they are sick and unable to work, while ensuring that the incentive to work remains.

## **9 Question 21 – Do you agree that rights to SSP should be accrued over time?**

- 9.1 Currently there is no length of service requirement for entitlement to SSP as there is for the other statutory payments. The only service test is that the employee has done **some** work for the employer, e.g. a new employee sent home sick after only working for two hours on his first day would potentially be entitled to SSP (providing the other qualifying criteria are met, such as there being a four-day Period of Incapacity for Work).
- 9.2 No doubt the government considers that requiring employers to pay SSP from the first day will encourage more careful management of absence. However, given our comments in answer to question 16, we do not think that this logic necessarily follows.
- 9.3 As such, it does not seem fair that an employer, who has only been someone's employer for two hours, could potentially be liable to pay £2,639<sup>2</sup> in SSP, plus face the costs and burdens of potentially having to find a replacement worker for a time. The effects of this could potentially be catastrophic for a small or micro employer – they need some special help.
- 9.4 On the other hand, making SSP a right that accrues over time could adversely affect employees if they are genuinely sick and/or result in more cases of presenteeism. It must be acknowledged that occupational sick pay schemes are unlikely to cover the low-paid employees with which we are concerned – they must rely on SSP.
- 9.5 A fair way forward perhaps, is that in cases where a person who has worked less than, say eight weeks (when the employment 'relationship' is still in its early stages), the obligation to pay SSP should be shifted to the state, potentially in the form of an employer rebate (over and above the SME rebate discussed later).

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<sup>1</sup> <https://www.gov.uk/guidance/statutory-sick-pay-manually-calculate-your-employees-payments>

<sup>2</sup> £94.25 x 28 weeks

**10 Question 22 – Should the government take a more robust approach to fining employers who fail to meet their SSP obligations?**

- 10.1 Yes – however, rather than just increase fines to tackle non-compliance, we think a good first step would be for HMRC to use the penalty powers that they already have.<sup>1</sup>
- 10.2 £3,000 is a significant sum of money for a small employer, however we have been unable to find any data or statistics with regards to how often £3,000 penalties have been levied. Perhaps part of the current problem with non-payment of SSP, is that employers have little fear of any action being taken against them.
- 10.3 Obviously, hefty fines should be reserved for those employers who deliberately and flagrantly break the rules, such as by:<sup>2</sup>
- cancelling people’s shifts after they call in sick, so that it looks like they are not meant to be working;
  - reducing people’s wages and downplaying their working hours so they do not meet the earnings threshold;
  - saying that they need a GP note as evidence they are ill for even a few days off, even though people can self-certify for up to seven days;
  - refusing to fill in a HMRC sick pay form, which would make employers explain their reasons for not paying; or
  - dismissing people rather than paying them.
- 10.4 Not only should HMRC use the powers they have in these cases, but they should not be afraid to divulge details of how they have used them, in the same way perhaps, that The Pensions Regulator set out cases and the powers they have used in a particular quarter, relating to automatic enrolment and associated employer duties.<sup>3</sup>
- 10.5 This would send out a strong message and help to act as a disincentive to employers considering similar tactics. (The government, should, however, recognise that some of this type of behaviour will be down to the abolition of the PTS – so there has to be some joint responsibility here.)
- 10.6 The government should also appreciate that many cases of non-payment of SSP will be down to employer ignorance or them making a genuine mistake as it is an extremely complicated system

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<sup>1</sup> <https://www.gov.uk/government/publications/statutory-pay-employer-penalties/statutory-pay-employer-penalties>

<sup>2</sup> <https://www.citizensadvice.org.uk/about-us/how-citizens-advice-works/media/press-releases/employers-tricking-people-out-of-sick-pay-says-citizens-advice/>

<sup>3</sup> <https://www.thepensionsregulator.gov.uk/en/document-library/enforcement-activity/enforcement-bulletins>

to administer if a business has no HR or payroll expertise to call upon. These employers should be supported to be compliant through awareness raising and education, rather than being penalised with a fine.

**11 Question 23 – Do you think that the enforcement approach for SSP should mirror National Minimum Wage (NMW) enforcement?**

- 11.1 Given the limitations of the disputes process (i.e. that it relies on workers reporting their treatment to the authorities) we support the idea that sick pay should be proactively enforced. As sick pay is taxable as normal income, this in turn will raise Exchequer receipts to help pay for this provision.
- 11.2 When it comes to enforcement ‘best practice’, while it is true that HMRC respond to 100% of worker complaints and also conduct proactive, targeted enforcement of ‘at risk’ employers, we are not sure that the enforcement approach should ‘mirror’ the NMW approach, as it is far from perfect. Minimum wage underpayment still seems to be a huge issue – we question, for example, whether HMRC are making sufficient and appropriate use of the tools they have, to make them an effective deterrent.
- 11.3 HMRC’s NMW team also still seem to be largely focused on ‘lower-hanging fruit’ within an employment setting, rather than the more complex and serious breaches of minimum wage – for example those that go hand-in-hand with false ‘self-employment’.<sup>1</sup> This is an important point for the government to consider because false self-employment (treating a worker as self-employed when the true nature of his/her engagement is that of employment, to avoid having to pay employer NIC and operate PAYE, etc.) will also be working to deny workers SSP.
- 11.4 We think that agency workers face a uniquely tough time in securing SSP because they work in an industry in which avoidance behaviour seems to be widespread,<sup>2</sup> so any enforcement work should tackle this sector as a priority. Indeed, we continue to hear of problems with agency workers in umbrella companies. Here is one of the most recent queries that we have received to our website:
- ‘Hi, the Umbrella Company I am with make charges to process statutory payments such as my holiday pay or if I qualify for SSP. Are you able to clarify if they are allowed to do this?’*
- 11.5 In this case, it is unclear whether these deductions are being made from gross pay (in which case they may well be ‘unauthorised deductions’) or whether they are wrapped up in the umbrella

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<sup>1</sup> See Director of Labour Market Enforcement’s comments on page 5 of executive summary:

<https://www.gov.uk/government/publications/labour-market-enforcement-strategy-2019-to-2020>

<sup>2</sup> We explain further in our consultation submission: <https://www.litrg.org.uk/sites/default/files/180508-LITRG-response-Agency-workers-FINAL.pdf>

company margin and are coming off the calculation before gross pay is arrived at. Whichever the case, we think such practices need to be investigated further.

**12 Question 24 – Do you support the SSP1 form being given to employees 4 weeks before the end of SSP to help inform them of their options?**

- 12.1 Yes we agree – if the notification of the end of an employee’s SSP could be provided earlier than it currently is, it could be used as a prompt to the employee to consider their options. It seems to us that there is an obligation on government to ensure that employees whose SSP is about to stop are made aware that they may be entitled to additional support from the government. They should be advised to consult an adviser at a local welfare rights organisation, such as Citizens Advice, where they will be able to go through their full circumstances and do a full benefits check to identify any other options which may be available to help them financially.
- 12.2 We also agree that to provide clarity for employees of their rights, *specific* details of their eligibility for SSP (and/or other contractual entitlement) should be made available as part of a day one written statement. It is not enough that workers are directed to GOV.UK to look for information (as is often the case now, given the written statement only needs to say where information on sick pay can be found<sup>1</sup>), as often the guidance is so oversimplified as to be unhelpful, particularly for temporary workers, agency and casual workers.<sup>2</sup>
- 12.3 In addition, it should be remembered that even if workers are aware of their sick pay rights, they might not know how to secure them. So, the day one statement should inform employees of where to go in the event of problems with SSP.
- 12.4 Incidentally, we suggest that making sure that employees realise exactly how much SSP they may receive and when, may help cut down on people taking unnecessary sick days (we understand for example that some employees may actually think that sick pay is more generous than it is<sup>3</sup>). In a similar vein, it should also be made clear that SSP is coming out of their employer’s pocket, not the government’s (the word ‘statutory’ currently possibly leads employee to think that it is a government-funded payment like statutory maternity pay, etc.).

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<sup>1</sup> <https://www.gov.uk/employment-contracts-and-conditions/written-statement-of-employment-particulars>

<sup>2</sup> Of note is the fact that the GOV.UK page on ‘worker’ rights (<https://www.gov.uk/employment-status/worker>) simply says that ‘workers’ *may* be entitled to statutory payments, which is less than helpful to a worker who is trying to research and fully understand their position.

<sup>3</sup> <https://www.personneltoday.com/hr/three-common-misconceptions-sick-pay/>

**13 Question 25 – How could a rebate of SSP be designed to help employers manage sickness absence effectively and support their employees to return to work?**

- 13.1 To start with, we would like to say that the previous rebate scheme – the PTS – was not underused as stated in the consultation; in fact, our understanding is that it was well used amongst those that it was designed to benefit – small and micro employers.
- 13.2 The PTS was also not administratively complex – many employers used payroll software or other online tools/calculators which took care of the calculations for them and the record keeping requirements were not overly burdensome, as many of the records needed for the PTS were necessary for other reasons anyway. Even if there was any complexity, this was no doubt outweighed by the fact it allowed small employers to mitigate their losses due to sickness.
- 13.3 This is an extract from our news article at the time:<sup>1</sup>

*‘The only employee of a small business usually works 7 hours a day Monday to Friday at £6.31 an hour. The employee’s gross weekly pay is £220.85, meaning the employee NIC is £8.62 and employer NIC is £10.05 = totaling £18.67 NIC per week. That employee is off sick for one week in January and they get paid SSP of £34.68 by the employer (weekly amount of £86.70 prorated with the first three days unpaid). If the combined NIC in January is £56.01 (£18.67 x the three weeks the employee was working in January) then the employer could recover £27.39 of the SSP from the government (the amount by which the SSP paid exceeds 13% of the NICs in that month).*

***The impact on small businesses***

*This ability to claim such a reimbursement will end at the end of the 2013/14 tax year. Even though the amounts may be small, to a small business it could make a real difference.*

***Care and support employers***

*One group which we are particularly concerned about is care and support employers. By taking on a personal assistant (carer) to help them live independently they become an ‘employer’ and therefore responsible for paying SSP, as any other employer would, when their carer is off work through illness. The difference is that care and support employers are not running a business to make a profit, they are often using money from other parts of Government to pay for the care in the first place or they are using their own money to do so.*

*Assume the employee in the example above was a carer working for a care and support employer. If this employee was off sick not just for one week, but for a whole month, or even the full 28 weeks, the SSP payable would be more like £2,500 – all of which would have been reclaimable under the PTS if that was the only employee and there was no other employee or employer NIC going through the payroll while the carer was off. This would very likely be the*

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<sup>1</sup> <https://www.litrg.org.uk/latest-news/news/140326-double-blow-care-and-support-employers>

*case where an agency care worker was taken on as an interim replacement, as the agency would process that worker's pay and deductions.'*

- 13.4 In a nutshell, many of the justifications given for ending the PTS, were in our view wrong and misleading. As described in our answer to question 16, removing it has probably not prompted employers to better support sick employees. Indeed, in our view, the abolition of the PTS has probably led to some of the abusive cost saving practices described in our answer to question 22.
- 13.5 We are therefore pleased to see the government considering reintroducing some form of rebate. Our view is that attaching a rebate to fulfilling some obligations or conditions around 'best practice' will not work. Every case of employee sickness will have unique facts and circumstances – the permutations are endless – it is not clear what would be considered 'best practice' or how this would be monitored. It also strikes us that it would be very difficult to spell out 'best practice' in legislation without ambiguity. A rebate should thus, be universal to small and micro employers (ideally at a rate of 103%, to match other statutory payments, although we recognise there are no easy answers as to where this money would come from).
- 13.6 Whatever is decided, from a practical perspective, the rebate has to be easy to claim. An employer would normally recover statutory payments by withholding their tax or NIC deductions. However, many employers will only have one or two staff – and will not have enough deductions to pay or recover the statutory payment.
- 13.7 We have heard anecdotally of problems with the advanced funding system<sup>1</sup> (for example, in terms of processing times, etc.), so this should therefore be improved to avoid cash flow implications for small employers. (We can see that employees would prefer to have SSP paid to them from the same source as when working, hence we support the idea of a rebate (with improvements) rather than a government-administered payment of SSP in such cases.)
- 14 Question 26 – 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.**
- 14.1 If the intention is that the rate and duration of SSP will remain the same, it seems this question is only being asked for completeness, rather than with a view to making any changes.
- 14.2 This is a pity as the history of SSP<sup>2</sup> makes for interesting reading (of note is that support with costs for employers has gradually been whittled away – despite assurances and commitments given to them throughout).

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<sup>1</sup> <https://www.gov.uk/recover-statutory-payments/if-you-cant-afford-to-make-payments>

<sup>2</sup> <https://researchbriefings.files.parliament.uk/documents/RP93-116/RP93-116.pdf>

- 14.3 The rate has always been low – and apart from early on, has been long in duration. At some points in time, the rate has been frozen and not updated.
- 14.4 From the outset of SSP, the low rate of SSP seems to have caused concern in terms of the resulting hardship or difficulties for employees. However, it was tolerated given most employers were operating occupational sick pay schemes which were more generous than the statutory minimum.
- 14.5 These days, given the employment landscape, fewer employers will operate occupational schemes (particularly at the low-paid end of the spectrum) and it is not controversial to say that the current SSP rate (that is, the default for many employees) just will not provide anywhere near enough support to cover living costs in genuine cases of sickness.
- 14.6 Having regard to the movement of prices, apart from anything else, we therefore think that the real value of SSP should be restored. In 1983, when SSP was introduced, the rate for those with ‘higher earnings’ was £40.25 – in today’s prices (based on RPI), this would be more like £139<sup>1</sup> rather than £94.
- 14.7 We recognise that there will be challenges from employers concerned about costs, however, in conjunction with an SME rebate and the ability perhaps to pro rate a full weekly rate for part timers (see our response to question 20), an acceptable, sensible balance could be struck. This should be discussed and researched further.
- 14.8 Beyond this, it may be that the time has come for a wholesale review of SSP. A key question should be (as it is not clear to us) – who is SSP aimed at? Is it people with short-term or temporary incapacity or disabilities and long-term health issues (from this, everything else would follow). We recommend a separate call for evidence could be issued, as opposed to trying to deal with this fundamental issue in passing, to help inform the future direction of SSP.

LITRG  
3 Oct 2019

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<sup>1</sup> <https://www.hl.co.uk/tools/calculators/inflation-calculator>