



Law Society
of Scotland



Consultation Response

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

October 2019



Introduction

The Law Society of Scotland is the professional body for over 12,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

Our Employment Law and Mental Health and Disability Sub-committees welcome the opportunity to consider and respond to the Department for Work and Pensions and Department for Health and Social Care's consultation Health is everyone's business: proposals to reduce ill health-related job loss. We have the following comments to put forward for consideration.

Consultation Questions

Question 1. 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?

Agree.

We agree that there is a role for employers to support employees beyond that covered by existing disability legislation, but suggest that support for employers is required in order for this to be effective. It may be that a degree of enforcement or incentive will be required to encourage meaningful change in practice.

Question 2. 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?

This is an important issue and responses to it should be evidence based. If relevant research does not exist, it should be promoted.

Question 3. 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?

Don't know.

Although increasing access to adjustments to support an individual to remain in work would be a positive step, it is unclear how this would differ from the existing right to reasonable adjustments, and this may cause confusion. Presumably, the criteria for qualifying for adjustments would be lower than that required for the Equality Act's definition of disability, for example not necessarily long term. However, it would be necessary for both employees and employers to understand the types of situations where such a request can be made and should be granted. If a new right was introduced, it would be important to ensure that it was clear and enforceable. Grants to pay for physical modification, for example an extension of the Access to Work scheme, would be helpful.

The use of ‘work(place)’ should be clarified and emphasised: any modifications or adjustments should include transfer to another working location, including home working, where appropriate.

Question 4. If the government were to implement this new right to request work(place) modifications, who should be eligible?

Any employee who is able to demonstrate a need for a work(place) modification on health grounds

This would encourage those employees who want to work but for health reasons might struggle to do so, at least in the full capacity required by an employer. If the issue is about getting and keeping people in work, it should not be that they have to actually be absent in order to qualify for the right to make such a request.

Question 5. How long do you think an employer would need to consider and respond formally to a statutory request for a work(place) modification?

Depending on what an employer may have to consider and medical or OH advice they may have to seek, a longer period would be appropriate. Assuming that the engagement of OH is to be encouraged, it may take some time to get such a report. Eight weeks or less is unlikely to be sufficient time to do all of that and to properly consider what modifications might be appropriate. However, a much shorter time period may be appropriate for a simple modification that does not require such extensive consideration.

Consideration should be given to a shorter timescale with the ability to extend with reasons.

Question 6. Do you think that it is reasonable to expect all employers to a) consider requests made under a new 'right to request' work(place) modifications and b) to provide a written response setting out their decision to the employee?

Yes.

Provided that clear guidance and support is available to employers, it is reasonable to expect them to consider and respond to all requests. Guidance will need to be clear, including on what are acceptable reasons for refusal. In particular, it will be important for guidance to address whether and, if so, in what circumstances, cost can be a reason for refusal.

A written response is preferable to verbal.

Question 7. 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

We would suggest that it would be appropriate for employers to consider the extent of their financial or other resources and the proportionality of the request, as well as the impact that the adjustment would have on other employees, including on their workload. However, employers should be required to demonstrate that they have tested all such reasons against possibilities, including creative possibilities, for overcoming them.

Question 8. 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.

Obligations on employers to take action to support employees return to work should be balanced with expectations on employees to engage in the process, if this is consistent with medical advice. The absence of clear guidance on this type of engagement can lead to situations where employers are hesitant to

contact absent employees for fear of being seen to be harassing them while they are off sick. Often it is that concern that prevents employers from engaging with absent employees. The resulting lack of engagement can be perceived by employees as disinterest and can result in missed opportunities for support.

If the reluctance to engage is on the part of the employee, employers should be encouraged to try to ascertain the reasons, and to address them if identified. In these situations, it is likely to be helpful to employers to be able highlight that the employer does have an obligation to engage with the employee in such circumstances.

Question 9. If no, please give reasons for your answer.

Not applicable, though we refer to our comments in question 8 as to the need for reciprocal engagement when possible.

Question 10. 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?

Other.

Principle-based guidance would provide useful assistance on how to engage with employees, but clear guidelines are still required to provide employers with the confidence to act. There may be a role for a general practitioner or other relevant professional to certify that discussions around supporting a return to work can go ahead.

There should be explicit reference to the principles of the UN Convention on the Rights of Persons with Disabilities (ratified in full by the UK Government), but the principles should not be left 'floating'. Rather, practical examples and recommendations for action should be provided.

Question 11. 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.

No comment.

Question 12. 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?

Other.

We would support all of these measures, in addition to access to financial support to implement any special measures or changes, or to support a short-term return to work period where full productivity is not expected. Improving engagement with the employee's general practitioner and other medical advisors would also be welcome.

Question 13. 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.

Not applicable.

Question 14. As an employee: what further support/adjustments would you have liked to receive from your employer?

Not applicable.

Question 15. All respondents: in order for employers to provide effective return to work support, what action is needed by employees? Select all that apply.

Other.

Employees should be required, to the extent they are medically able, to engage with their employers on issues relating to return to work. This may include elements of all of the proposed actions. In addition, employees should be encouraged to facilitate communications between their medical practitioners and employers as appropriate. Access to relevant medical information will allow employers to make more informed decisions.

Question 16. All respondents: do you think the current SSP system works to prompt employers to support an employee's return to work?

Yes.

The low rates of SSP provide an incentive to support return to work. Consideration should be given to providing additional resources for small businesses who may struggle to provide a full range of support options.

Question 17. 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; and

Clearer medical or professional information on whether a phased return to work is appropriate.

We consider that a legal framework would be too prescriptive but clear guidance would be beneficial. In addition, clearer medical information from doctors or OH providers would be helpful. Employees may seek to return to work early for financial reasons which can cause employers difficulties in relation to health and safety obligations towards the employee themselves and other employees.

A specialised helpline, for example through ACAS, may also be useful.

Question 18. All respondents: would the removal of rules requiring identification of specific qualifying days help simplify SSP eligibility?

No comment.

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

Yes.

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?

Yes.

We agree that 80% is unlikely to create a disincentive to return to work. However, consideration should also be given to whether the rate is sufficiently high to disincentivise a return to work for financial reasons before it is medically appropriate.

Question 21. Do you agree that rights to SSP should be accrued over time?

No comment.

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

Yes.

These are important legal obligations for all employers, similar to maternity pay, PAYE, or minimum wage. Support should be available to employers, in particular small businesses, to understand and fulfil their obligations, but enforcement should also be robust.

Question 23. Do you think that the enforcement approach for SSP should mirror National Minimum Wage enforcement?

Yes.

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?

Yes.

Question 25. 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?

Linking a rebate of SSP to demonstrating genuine engagement (or attempts at engagement) with employees may encourage employers to take steps to support return to work. However, when establishing the standards required to qualify for a rebate, consideration should be given to what is reasonable to expect of small employers. Any rebate system would also have to be clear and not overly difficult or administratively burdensome.

Question 26. 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.

Extending the length may be appropriate in cases where there is a diagnosis or medical advice of a longer-term condition.

Question 27. 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.

In particular, the Access to Work scheme has received good feedback.

Question 28. 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.

No comment.

Question 29. 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? If no or don't know, what would be better?

No.

Making the grant the same across all employers would reduce complexity.

Question 30. All respondents: what type of support should be prioritised by any potential, targeted OH subsidy for SMEs and/or self-employed people?

No comment.

Question 31. Please give reasons and details of any other categories of support you think should be included.

No comment.

Question 32. How could the government ensure that the OH services purchased using a subsidy are of sufficient quality?

No comment.

Questions 33-40.

Not applicable. Questions 33-40 are directed at OH providers, so we have not provided a response.

Question 41. 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.

No comment.

Question 42. If applicable, what other approaches do you think would be effective? Please explain the reasons for your answer.

No comment.

Questions 43-46.

Not applicable. Questions 43-46 are directed at OH providers or employers, so we have not provided a response.

Question 47. All respondents: how could work outcomes be measured in a robust way?

No comment.

Question 48. All respondents: do you have suggestions for actions not proposed here which could improve capacity, quality and cost effectiveness in the OH market?

No comment.

Question 49. Do you need more information, advice and guidance?

No.

Question 50. If so, what content is missing?

Not applicable.

Question 51. What would you recommend as the best source of such new advice and information?

No comment.

Question 52. As an employer, where do you go for buying advice and support when purchasing, or considering purchasing, OH services?

Not applicable.

Question 53. As an employer, what additional information would you find useful when purchasing, or considering purchasing, OH services?

Not applicable.

Question 54. All respondents: do you agree with the proposal to introduce a requirement for employers to report sickness absence to government?

Yes.

Better data will prompt better regulation.

Question 55. 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?

Not applicable.

Question 56. 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?

Maybe.

The success of these proposals will be dependent on funding and support for small employers, in guidance and in financial support for additional SSP or other costs including access to good and early OH advice or meeting the cost of a GP report.

In addition, as suggested above, access to a specialised advice service, supplemented by direction towards grants and other forms of support would be helpful for employers.

Consideration should also be given to addressing the situation of employees as carers, and adjustments that may be appropriate in order to accommodate caring responsibilities. This may have a beneficial preventative effect, reducing the risk to, or at least impact of adverse impacts upon, the health of the care-giving employee. More generally, it may be helpful to consider measures aimed at prevention of ill-health as well as those to address ill-health once it arises.

For further information, please contact:

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