

**Health is everyone's business**  
**Proposals to reduce ill**  
**health-related job loss**  
**consultation: Citizens Advice**  
**response**

The logo for Citizens Advice, featuring the words "citizens advice" in white lowercase text inside a dark blue speech bubble shape.

**citizens  
advice**

## Summary

Citizens Advice gives people the knowledge and confidence they need to find their way forward - whoever they are, and whatever their problem. Our network of independent charities offers confidential advice online, over the phone, and in person, for free. Last year we helped 2.6 million people in person, by phone, email or webchat. Our advice website had over 25 million visits, with 34 million pages viewed.

In 2018/19, we helped almost 140,000 people with 220,000 issues relating to employment, including 17,000 issues around entitlement to sick pay and 14,000 of these relating to Statutory Sick Pay (SSP) specifically. Millions more have accessed our employment advice online. We have therefore focussed our response on issues relating to employment rights, particularly your proposals to extend and increase the flexibility of SSP.

We have a detailed understanding of how the labour market is changing, the implications this has on the lives of workers and their experience of SSP. The real-time data we receive from our clients helps us to identify emerging issues, understand what is causing them and make recommendations on how to fix those problems.

Our principal concern regards the enforcement of SSP. Rights are only as good as the ability to enforce them. Unfortunately, our evidence shows that employers can avoid payment of SSP in several ways:

- Calculating entitlement to SSP based on minimum contractual hours rather than hours worked over the last 8 weeks leading up to the period of sickness.
- Bogus self-employment: our research indicates that up to 460,000 workers may be falsely self-employed.<sup>1</sup>
- Removing people from rotas so that it appears they are not employees and therefore not eligible for SSP. Our evidence shows that this is a particular risk for people with fluctuating hours - either because they have a zero hour contract, variable shifts or few set hours and rely on paid overtime.

There is therefore a clear need to improve the enforcement of SSP, to ensure that all those that are eligible receive it. This could also reduce the pressure on the state: we see some employers telling their employees they are not entitled to SSP, requiring the employee to claim benefits instead.

We support the Government's proposals to enhance the existing HMRC dispute resolution service with proactive, public enforcement of people's rights. **We recommend this is included within the Government's proposed Single Enforcement Body.**

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<sup>1</sup> Citizens Advice, *Neither One Thing nor the Other how reducing bogus self-employment could benefit workers, business and the Exchequer* (2015)

To help ensure everyone who is currently falsely self-employed receives the SSP they are entitled to, we also recommend that the Government consider a statutory definition of self-employment. While we recognise this falls outside this consultation's current remit, it would greatly extend SSP protections, helping meet the government's objective of reducing illness related job loss.

**We also welcome the government's proposals to reform and extend SSP regulations.** In particular, we welcome the proposals to offer flexible phased returns, reform how the regulations define SSP qualifying days, and expand the eligibility for SSP to extend protection to those on the lowest incomes earning below the Lower Earnings Limit (LEL).

This response draws on our public research and data gathered through our network of local Citizens Advice offices throughout the country.

We have offered responses to Questions 17, 18, 19, 22, 23 and 24.

## Chapter two: a clear legal framework for employers

### Phased return to work

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

People's right to sick pay during a phased return needs to be clearer and more flexible. We welcome the government's recommendation to introduce flexible phased return to enable employees to return to work working the hours and days that would benefit them, receiving part of their wages and part SSP.

These proposals reflect a welcome recognition that fitness to work is not binary and will enable people to make progress towards returning to work in a more flexible manner. Returning to work on a phased basis without having to sacrifice SSP will help people achieve a more steady income as they return to work. Our research shows how highly people value this: 84% of people found a steady income helps them cope with stress.<sup>2</sup>

We note that the government does not plan to legislate for how a phased return to work is requested, or how decisions are made. Given employers are responsible for paying SSP, they may often not have the right incentives to consider these requests in a way that will help workers return to work. The proposals to provide targeted SSP rebates to certain SMEs may help alleviate this incentive problem, but is unlikely to ameliorate it entirely.

To address this, we therefore recommend that the government goes further and considers requiring employers to consider reasonable requests for phased returns and how to implement them. This could help encourage employers who are not eligible for the proposed targeted SSP rebate to enable phased returns for their employees.

We also recommend that the government provide guidance to employers on how to achieve this. In particular, we think this guidance should:

- Encourage employers to have an explicit policy on phased returns in their sickness policy and in employee terms and conditions.
- Include different models of a good phased return, with different examples covering physical health and mental health.
- Include provisions on how phased returns can interact with the Equality Act. Our advisors often find that (for example) both employees and employers are unaware of employers' duties under the Equality Act and employees can lack the confidence to ask even when they are aware. Better guidance could help address this.

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<sup>2</sup> Citizens Advice, [The importance of income security](#), June 2016

*Q18. Would the removal of rules requiring identification of specific qualifying days help simplify SSP eligibility?*

**Yes.**

We agree with the government's recommendation that every day should be treated as a qualifying day (apart from the days where no employee is required to work). SSP is paid on the fourth qualifying day of sickness. The first three days are 'waiting days'.

Qualifying days are used by employers to work out which days of the week employees should be paid SSP and are normally an employee's contracted working days. However, where an employee works shifts, has a zero hour contract or an irregular working pattern, the employee and employer may agree which days are considered as qualifying days. The lack of clarity on qualifying days can lead to non-traditional workers being unclear about their rights and entitlements and to some employers manipulating the rules about qualifying days to avoid paying SSP.

We support the recommendation for waiting days to be calculated using the number of days a week that an employee normally works, rather than the specific days of the week they work.

We recommend that the government consider further amendments to how SSP qualification is calculated. Firstly, the government should consider whether the current 8 week averaging period is fit for purpose, as this may not be a long enough period to reflect typical working hours for all workers. For example, workers may have temporary seasonal 'quiet periods' that don't reflect their hours over the majority of the year.

Secondly, using averaging to calculate SSP eligibility could put some workers at a disadvantage, as they will not necessarily have a record of their hours so will not always be in a position to challenge their employer. This could be a particular problem for workers who are not legally entitled to payslips. The government should consider requiring firms to provide employees with a summary of the data used to calculate their eligibility for SSP, if they find that employees are not eligible.

It would also be useful to clarify 'proof of incapacity' rules. Some of our advisers find that pressure on GPs means that it can be difficult to obtain timely certification after 7 days or where sickness absence is intermittent and certification is required for SSP purposes.

## **Widening eligibility**

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

- **Yes.**

We strongly welcome the government's recommendation on widening the eligibility for SSP to extend protection to those on the lowest incomes, earning below the Lower Earnings Level (LEL). Sick pay has long been a fundamental component of the UK's employment protections. But there have been drastic changes to the way we work in recent years, with growing numbers of people that are self-employed, on zero hour contracts or other non-standard contracts, which has complicated its eligibility.

SSP is currently set at 80% of the LEL and the government proposes that for those earning less than the LEL, it be set at 80% of their weekly wage. We agree that the SSP would need to be set at an appropriate level for people earning below the LEL. A major advantage of the proposal to extend SSP to those earning below the LEL is that people working multiple low paid jobs will be eligible for support. It will also improve the position of workers on zero hours contracts. However, SSP is also paid at a very low rate. The government should review whether the current rate is adequate to provide income security to those that need it most.

We recognise that this change could increase firms' costs and increase administrative complexity to some degree. We therefore support the government's intention to provide a targeted rebate for SMEs, to help them recoup some of the costs of delivering SSP.

The current proposals will not help the estimated 460,000 people who are falsely self-employed<sup>3</sup> - that is, people who are treated as self-employed by a business but their duties and obligations meet the legal definition of a worker. Employers will continue to be able to deny these people SSP they are entitled to.

Part of the solution to this problem is better, more joined up public enforcement - of SSP in general, as we describe below, and of workers' rights in general.

However, we also recommend that the government introduce a statutory definition of self employment. There is currently confusion around the legal definition of self-employment. While extending SSP to those earning below the LEL is welcome, protection must be extended to those that are bogusly self-employed. Citizens Advice research found 1 in 10 self-employed people are likely to be bogusly self employed.<sup>4</sup> Recent high-profile court cases point to ongoing and costly debates over the rights people in work should be entitled to.<sup>5</sup>

This gap in legislation means people miss out on SSP. While we recognise this falls outside this consultation's current remit, it would greatly extend SSP protections, helping meet the government's objective of reducing illness related job loss.

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<sup>3</sup> Citizens Advice, [Neither one thing nor the other](#), August 2015, p4

<sup>4</sup> Citizens Advice, [Neither one thing nor the other](#), August 2015

<sup>5</sup> The Guardian, [Uber loses appeal over driver employment rights](#), Dec 2018

Clearly, this proposals do not extend to the genuinely self-employed. However, with only 9% of self-employed people purchasing income protection insurance to support them during periods of illness,<sup>6</sup> what type of support should be made available for self-employed people deserves separate review and consideration.

#### Case study

When Gary became sick he discussed SSP with his employer who told him that he is not eligible as he is self-employed. Gary is an employee as he receives set hours, is subject to his employer's policies and receives some holiday pay. He was unable to afford to pay for essentials and relied on foodbanks. He is now in receipt of Universal Credit whilst he takes action against his employer.

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

- **No.**

The Taylor Review recommended that SSP should be accrued, similar to holiday pay. However, as current entitlement to SSP starts from day one of employment, accruing SSP over time would reduce new workers' ability to take sick leave. It would leave individuals without any income while they are recovering from illness. It could also be more difficult for people in insecure work to accrue entitlement to SSP, depending on how accrual was calculated.

Further, we agree with the government that accruing SSP could have the unintended consequence of deterring employees, particularly disabled people or people with long-term health conditions, from moving employer. If SSP was accrued, it would add a further administrative burden for employers as they will need to administer calculations of SSP. SSP is a system designed to support people when they are sick. It is paid at a very low rate and requires evidence of sickness, which means there is a much weaker case for accruing than there is for holiday pay.

## Compliance and enforcement

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

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

Good enforcement of SSP is critical to the delivery of a fair system that meets workers' needs. SSP is the most common pay and entitlements problem people come to us with and we see many employers that make mistakes and many that avoiding their responsibilities. While many employers obey the law, our evidence shows that far too many still fail to fulfill their basic legal obligations.

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<sup>6</sup> [Going it alone, moving on up: supporting self-employment in the UK](#), FSB, April 2016

In 2018/19, we dealt with over 14,000 issues specifically related to SSP. This has increased by over 15% compared to 2015/16, reflecting - we believe - an increasing number of people employed in non-traditional and precarious employment.<sup>7</sup> A shift towards non-traditional work can create confusion around rights and entitlements, as well as new challenges for established models of proactively providing sick pay.<sup>8</sup>

We therefore strongly support the Government's proposals to enhance the existing HMRC dispute resolution service with proactive, public enforcement of people's rights. Rights are only as strong as the ability to enforce them: the potential harm to workers requires a robust enforcement response. The government must provide clear routes for people to enforce their right to SSP.

Better enforcement could also reduce pressure on the state. Over the last year we have seen many cases where agencies have avoided paying SSP. They have either ended agency worker's contracts, or where employers insist that their employees were earning below the LEL when they weren't. In each case, this can require people to claim benefits when their employer should be responsible instead.

We believe that more effective enforcement of SSP should happen as soon as possible. But we also think the fragmented, siloed approach to enforcing people's rights has led to a less effective enforcement regime than could be achieved by bringing powers and expertise into a single body. The existing redress landscape is complicated and lacks clarity. The fragmented nature of the current system makes it difficult for both workers and employers to know where to go for help.

As we explain more comprehensively in our response to the government consultation on creating a Single Enforcement Body, this enforcement body would significantly improve the current system. The body would be able to proactively identify and target potential rogue employers and use government money more efficiently giving employees for the first time, one clear place to check their rights and report problems.

We think establishing this body would help meet the government's aim of reducing health related job loss. Ensuring enforcing sick pay is part of its remit is critical to its success. It would, for example, provide intelligence about employers who are not fulfilling multiple rights, such as (for instance) not respecting agency workers' rights and refusing to pay SSP.

For more information please see our response to the government's consultation on a new single [enforcement body for employment rights](#).

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<sup>7</sup> Citizens Advice, [Sharp Practices at Work. Sick Pay](#), February 2017

<sup>8</sup> Ibid



## **Informing employees of their rights**

*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?*

We agree that providing employees with the SSP1 form early will improve communications and publicity around rights and obligations to provide and receive SSP for both employees and employers. This notification should contain an explanation of the employee's right to request a phased return, other adjustments and their potential eligibility for benefits if they are still unable to work. A four week window would be a good way to minimise disruption in the worker's income should they need to make a benefits claim.

## **We help people find a way forward**

Citizens Advice provides free, confidential and independent advice to help people overcome their problems. We advocate for our clients and consumers on the issues that matter to them. We value diversity, champion equality and challenge discrimination. We're here for everyone.



**[citizensadvice.org.uk](https://citizensadvice.org.uk)**

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