Statutory Sick Pay Changes

Two changes relating to statutory sick pay came into effect on 6 April 2014: abolition of the Percentage Threshold Scheme; and abolition of record-keeping obligations. Johanna Johnson at White & Case LLP considers the requirements for employers going forwards.

The Percentage Threshold Scheme

The Percentage Threshold Scheme ("the Scheme") enabled employers to reclaim statutory sick pay ("SSP") from HM Revenue & Customs where the total SSP paid in a month exceeded 13% of the employer's Class 1 National Insurance contributions for that month. The main reasons for the abolition of the Scheme are understood to be cost and lack of effectiveness. An independent report published in 2011 estimated that the cost of the Scheme was some £50 million per year, and it was noted that the Scheme did nothing to incentivise employers to reduce or minimise employee absence rates (indeed, it could be said to reward employers with high absence rates).

It is intended that the cost savings associated with the abolition of the Scheme will be used to fund the new Health and Work Service which is expected to be functional from 2015. This service will offer non-compulsory medical assessments and treatment plans for employees, and it is hoped that the service will provide an increased opportunity for active management of employees with long-term sickness and ultimately support a faster return to work.

Small businesses, which do not generally have occupational health services, and for whom the cost of supporting employees with long-term sickness can be significant, are expected to particularly benefit from the new Health and Work Service. Unless, however, the new service is effective in supporting faster returns to work, small businesses are most likely to feel the loss of the Percentage Threshold Scheme and its more direct financial support.

The Scheme was brought to an end by the Statutory Sick Pay Threshold (Revocations, Transitional and Saving Provisions) (Great Britain and Northern Ireland) Order 2014 (SI 2014/897), which came into force on 6 April 2014. However, transitional provisions allow the Scheme to continue to have effect until **5 April 2016** and employers may continue to recover SSP (whether paid before, on or after 6 April 2014) in respect of any day of incapacity for work falling before 6 April 2014.

Record-keeping obligations

Records of SSP were needed to support claims made for reimbursement under the Percentage Threshold Scheme. Regulation 13 of the Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) required employers to keep specified records of dates of sickness and SSP payments for at least three years after the end of the tax year to which they related. With the abolition of the Scheme, this requirement has been revoked by the Statutory Sick Pay (Maintenance of Records) (Revocation) Regulations 2014 (SI 2014/55). The obligation to keep these records ceased on 6 April 2014.

However, employers should not be too hasty in doing away with keeping records of employee sickness and SSP. The revocation of regulation 13 simply means that an employer is now free to keep whatever records are required to meet its business needs. A business may need records of employee sickness and SSP for a number of reasons, from absence management (both on an individual basis and business-wide) to defending claims such as disability discrimination and equal pay. Such records may also prove useful when applying selection criteria in redundancy situations or assessing business costs.

Acknowledging the various business needs for retaining sickness and SSP records is, however, only one step in developing an appropriate retention policy for an employer. As is acknowledged in the Information Commissioner's Employment Practices Code, there is some tension between an employer's need to keep records and an employee's right to respect for his private life. An employer will also need to be aware of its obligations under the Data Protection Act 1998 ("DPA 1998"), which provides that personal data should not be kept for longer than is necessary for the purpose for which it is processed.

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With the removal of the statutory requirement to retain sickness and SSP records for a set period, it is now the responsibility of the employer to develop a proportionate retention policy having regard to DPA 1998 and guidance offered by the Information Commissioner. It will be appropriate to keep such records as required for a particular purpose (and the records should not be kept longer than is necessary for that purpose). It will also be appropriate to retain sickness and SSP records to protect against legal risk. In this regard, employers may wish to retain such records for up to six years after the termination of an employee's employment as these may be relevant to a tribunal or High Court claim.

As a final point on retention policy, where a workforce is unionised or subject to a works council, any policy on retention of sickness and SSP records may need to be agreed with the union/works council.

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