

Changes to Statutory Payments resulting from The Employment Equality (Age) Regulations 2006

Background:

The Employment Equality Age Regulations have been introduced as a result of EU Directive 2000/78/EC. This directive outlaws discrimination in employment & vocational training on a number of grounds including age and must be implemented by 1st December 2006.

All the Statutory Payments, Statutory Sick Pay (SSP), Statutory Maternity Pay (SMP) Statutory Paternity Pay (SPP) and Statutory Adoption Pay (SAP) are "Pay" for the purposes of this directive.

These regulations share considerable similarities with other Anti-discrimination legislation and come into force in the UK on **1st October 2006 (1.10.06)**

What do these Regulations change:

The changes to Statutory Payments are contained in Schedule 8 to the Employment Equality (Age) Regulations 2006.

There are parallel changes to the Social Security Contributions & Benefit Act 1992 (SSCBA) for SSP, SMP, SPP and SAP.

The changes:

- **Remove references to age** as a condition of entitlement i.e. being under 16 or being 65 or over
- **Redefine the term "Employee"** – by removing the requirement for a person to be 16 or over to be an employee.
- **Redefine the term "Employer"** – by extending the definition from a person who is "liable to pay NI Conts" to one who is "**liable to pay NI conts, or who would be liable to pay but for the employee being under the age 16.**"
- **Remove** the provision which results in a person "**over the age of 65**" being **excluded from entitlement to SSP.**
- **Make special provision for SSP periods falling between 1st October 2006 and 26th November 2006**, to ensure that even where the period links back to an earlier period (i.e. forms one PIW), SSP entitlement will start on or after 1.10.06 if the only reason SSP was not paid previously was because of the persons age.
- **Amend the SSP & SMP (General) Regulations**, to
 - (i) Reflect the amended definition of Employee in the SSCBA by removing the words "over the age of 16" from regulations.
 - (ii) Redefine the meaning of earnings to include employees under 16, by allowing their earnings to be taken into account as though they were "NIC able" even when NIC's would not actually be payable because of the persons` age.

What does not change as a result of these Regulations:

The following familiar areas will not change as a result of these regulations:

- All the other Qualifying conditions for Statutory Payments remain: e.g. Level of Earnings, Qualifying Periods and Periods of Entitlement etc. still apply.
- People under 16 or over 65 will need to meet all these other conditions of entitlement in order to receive payments.

- National Insurance Contributions **will not be payable** by or in respect of anyone under 16 although employees will be entitled to Statutory Payments if they meet the usual employment, earnings & conditions of entitlement.

New provisions from 1st October 2006 & Transitional Arrangements.

The aim is to remove restrictions resulting from reference to a specific age as soon as possible from 1.10.06. This will mean:

For SMP & SPP: People under 16 will be entitled to SMP & SPP if they are employed in any qualifying week that commences on or after 1.10.06 and meet the employment and earnings conditions of entitlement. In effect SMP & SPP will first be payable for people whose expected week of confinement begins on or after 14.01.2007

For SAP: Although the lower age limit is removed from the legislation. It is not envisaged that SAP will be payable to anyone under the age of 21 as this is the minimum age to adopt and this is not altered by this legislation.

For SSP: Anyone age 65 or over who is sick and unable to work on 1.10.06 will qualify for SSP – subject to meeting all the other qualifying conditions - even if they are part way through a Period of Incapacity for Work (PIW). Employers will need to look at the other qualifying conditions at the start of the PIW to determine whether SSP is payable or not.

Anyone under 16 who is sick on 1.10.06 will be treated as though their 1st day of incapacity is 1st October - even if they were sick before 1.10.06. (U16's could not have any PIW before 1.10.06 because they could not have been an employee or have an employer)

The requirement to serve 3 waiting days will apply from 1.10.06 as that is the 1st day they could qualify for SSP. [This is because SSP is not payable for the first 3 qualifying days in any period of entitlement]

There is a special provision for anyone 65 or over who is sick between 1st October 2006 and 26th November 2006, where their PIW links back to any pre 1st October 2006 PIW. This special provision enables the age condition to be removed part way through a PIW and reopens the question of entitlement for any part of the PIW that falls on or after 1.10.06. Employers will need to look at the qualifying conditions as there were at the beginning of the PIW but without the age restriction.

For people under 16, who are sick between 1st October and 26th November (8 Weeks) the 8 week linking provision would not apply to periods of sickness prior to 1.10.06 that would prevent entitlement to SSP. Days of sickness before 1.10.06 cannot give rise to days of incapacity for SSP because u16s are not employees for SSP purposes until the law changes. However if they are sick after 1st October their entitlement to SSP would be considered in the normal way, using the full SSP provision including any necessary linking of PIWs.

The following are questions that have been asked since the draft regulations were released.

Q 1 Does an employee aged 67 who becomes sick on 1st October 2006 qualify for SSP?

A *Yes - they will be entitled to SSP from 1st October providing all other entitlement conditions are met at the start of PIW and waiting days have been served.*

Q 2 If an employee aged 67 became sick on 20th September, was disallowed SSP because of her age and is still sick on 1st October does she qualify for SSP?

A *She would only qualify from 1st October 2006 if she met all the other qualifying condition at the start of the PIW. She would need to serve 3 waiting days from 1.10.06.*

Q 3 What would happen if an employee aged 67 became sick on 1st September and was disallowed SSP. He returned to work on 20th September but fell sick again on 3rd October.

A *If he satisfied all the other criteria for receiving SSP at the start of the PIW on 1st September, 3rd October would be his first day of entitlement and after serving waiting days he would be entitled to receive SSP.*

Q 4 When would SSP become payable for an employee aged under 16?

A *SSP becomes payable for any period of incapacity (PIW*) that starts on or after 1st October 2006.*

Anyone under 16 cannot have a PIW as the Law stands, because they cannot be an employee. The definitions of "Employee"; "Employer" and "Earnings" are changed by these amending regulations and removes this restriction.

For the employee in Question 2 above who became sick on 20th September and was disallowed SSP because of her age who is still sick on 1st October and is now due to be paid SSP.

Q 5 Is the employee eligible for the complete PIW or just the portion that falls after the 1st October?

A *Only the portion after 1st October becomes payable.*

Q 6 Do waiting days have to be served starting on 1 October?

A *Waiting Days will need to be served from 1.10.06. This is because there was no entitlement prior to 1.10.06 and therefore any days prior to that would not be "qualifying days".*

An employee in Question 3 above was sick on 1st September and was disallowed SSP (because of his age). He returned to work on 20th September but fell sick again on 3rd October. Despite the link to the earlier period of incapacity for work he is entitled to SSP.

Q 7 Is he eligible for just the absence after the 1st October or because of the link is the linked absence also eligible?

A *He is only eligible to SSP for any part of the PIW that falls after 1st October 2006 where he satisfies all the other qualifying criteria for receiving SSP.*

- According to the guidance 09 to 13 October is a new PIW so therefore 3 waiting days for 9-11 October and 2 days SSP due for 12th and 13th October

A . *This is correct. In this case the employee would be entitled to SSP, providing all the other qualifying conditions are met, for any period of sickness that starts on or after 1st October 2006. SSP will be payable for 2 days 12th & 13th October.*

For anyone under 16 any period of sickness that commences on or after 1st October will be a new PIW. An earlier period of sickness could not be a day of incapacity which would form part of a PIW because a person under 16 was not an "EMPLOYEE" with an "EMPLOYER" for the purposes of SSP as the law then stood. The definitions of "Employee"; "Employer" and "Earnings" are changed by these amending regulations.

Q 10 (1) For under 16s, as they were not employees for SSP purposes, is it correct to assume that even if they would have been excluded from SSP on the grounds of earnings for a linked PIW pre 1st October that link is not considered in order to exclude them during the 8 weeks post 1st October.

A1 *Yes - Under 16 year olds cannot be employees under the existing provision and therefore cannot have any days of incapacity and hence PIWs before 1st October 2006. Any period of incapacity after 1st October could not therefore link to any earlier PIW as this would not exist for SSP purposes.*

Q 10 (2). For the over 65s as they were employees but excluded on the grounds of age am I right in thinking that any other exclusion criteria such as earnings that applied at the start of a linked PIW pre 1st October would still lead them to be excluded in the transitional period.

A2 YES.

Q 11 We are now instructed that we must pay SSP from 1st October to over 65s even if this is the middle of a PIW that began pre 1st October when an employee was age barred. Given an SSP1 will have been completed and IB awarded how should employers tell DWP that SSP is now in payment and that IB should cease or will they do this automatically without notification. If not there will be an overpayment by the State.

A *IB is not payable to people over the age of 65 and any such claim to benefit would not result in payment, as IB would not be awarded. There is no risk of duplicate payments and it would not therefore be necessary for employers to inform DWP that SSP has commenced.*

People over 60 may be entitled to Pension Credit and would need to contact the Pension Service via www.pensionservice.gov.uk or www.direct.gov.uk or 0800 99 1234 for further details.

Q 12 If someone aged under 16 was sick beginning on 25th September and is 16 on 28th September and still sick on 1st October, do waiting days start to be served from the 28th or 1st October? I thought for the under 16s as there was no entitlement pre 1st October the date they turned 16 was irrelevant.

A *For the period 25th September to 27th September a person under 16 is not in a day of incapacity or within a period of incapacity because they are not an employee, and do not have an employer within the current definitions of the Act.*

On their 16th Birthday (28th September) they would become an employee with an Employer and this would be the 1st day they can be an employee with an employer and so have a day of incapacity. SSP should be considered from that date.

In this case this person would not fall under the new regulations because their entitlement to SSP should be considered from 16th Birthday as that would be their 1st possible day of incapacity if it falls before 1st October 2006.

1st October 2006 will be the first day on which a person who is under 16 can have a "day of incapacity" as an "employee" with an "employer" for SSP and so any day of incapacity on or after that day should be considered as a potential day of entitlement to SSP - subject to the other qualifying conditions.

The Employment Equality (Age) Regulations 2006 Statutory Sick Pay Supplement

- The aim of the Employment Equality Age Regulations 2006 (EEAR) is to prevent discrimination on the grounds of age.
- Schedule 11 Para 2(a) of the Social Security Contributions and Benefits Act 1992 (SSCB) – excludes an employee over the age of 65 from SSP (The SSCB Act refers to over the age of 65, in practice this means age 65 or over)
- This Age 65 or over exclusion is removed from 1.10.06 by Schedule 8 Para 13 of EEA Regs.
- A PIW remains the same PIW whether it is pre or post commencement. It is only entitlement that is changed by this provision.
- It is only the age barrier that is removed – no other circumstances of the claim will change.
- Where a PIW has been established but there is no entitlement because of age, there is a special provision which reopens entitlement to SSP within the same PIW from 1.10.06 by removing the age barrier.

This means that:

1> Where an employee aged 65 or over is sick for the first time on or after 1.10.06, SSP will be payable in the normal way. The only change is that the age exclusion no longer applies but all the other qualifying criteria remain.

2> Where an employee aged 65 or over is sick for a continuous period that starts before 1.10.06 and continues after 1.10.06 and he has been excluded from SSP on age grounds, the new special provision applies. From 1.10.06 the question of his entitlement is reopened, eligibility at the start of his PIW is reconsidered and if the qualifying criteria are met he becomes entitled to SSP from 1.10.06. SSP would be payable after he has served 3 waiting days.

3> Where an employee is aged 65 or over and is sick before 1.10.06 but returns to work in Mid September and is then sick again from early October, the two periods of sickness are within 8 weeks of each other, and will link. Again the new special provision is implemented and the age restriction no longer applies to the second period of sickness. The employer must go back to the start of the PIW and consider eligibility without the age restrictions.

HMRC Teams are aware of this guidance.

Examples

All these examples work from the premise that the Employer is 67 years or age, works a 7 day week, earns over the LEL and satisfies all the other entitlement criteria for SSP.

Example 1:

The employee is sick from 1.10.06.

PIW starts on 01.10.06.

Would become entitled to SSP from 1.10.06 - using earnings details at 1.10.06.

SSP would not be payable for first 3 days of entitlement and becomes payable from 4.10.06.

Example 2:

The Employee is sick from 25th September, returning to work on 16th October 2006.

PIW starts on 25.09.06.

Not entitled to SSP for period 25.09.06 to 30.09.06, because of age.

Becomes entitled from 1.10.06 by virtue of EEA Regs Sch 8 Para 13(1) & (2)(b)

1.10.06 to 3.10.06 are the first three days of entitlement so SSP is not payable as waiting days. [Sect 155 SSCB Act]

SSP would be payable from 4.10.06 to 15.10.06 – using earnings details at 25.09.06 (the beginning of the PIW).

Example 3:

The same employee is sick from 3.10.06 but was previously sick from 1.09.06 to 20.09.06.

PIW starts on 1.09.06.

SSP for first absence 1.09.06 to 20.09.06 is disallowed on age grounds.

As the 2nd absence is within 8 weeks of earlier PIW it links with the first and forms part of the same PIW. [Sect 152(3)]

Entitlement changes from 1.10.06, when the Age 65 or over exclusion is removed, so the question of entitlement is re-opened using pay details & qualifying criteria at 1.09.06 without the age restriction..

SSP would not be payable for first 3 days of entitlement and becomes payable from 6.10.06.

Example 4:

If the employee in Example 3 did not have earnings above the LEL at 01.09.06 (the beginning of the PIW) SSP would not be payable.

This person Would not qualify during the first part of the PIW on Age grounds and earnings, and they would not qualify during the second part of the PIW because although the age exclusion would not apply the earnings exclusion remains.

