

EXPLANATORY MEMORANDUM TO
THE STATUTORY SICK PAY (CORONAVIRUS) (SUSPENSION OF WAITING
DAYS) (SAVING PROVISION) REGULATIONS 2022

2022 No. 381

1. Introduction

- 1.1 This explanatory memorandum has been prepared by the Department for Work and Pensions and is laid before Parliament by Command of Her Majesty.
- 1.2 This memorandum contains information for the Joint Committee on Statutory Instruments.

2. Purpose of the instrument

- 2.1 This instrument makes a saving provision following the expiry of section 40 of the Coronavirus Act 2020 at midnight on 24 March 2022. It makes provision for the disapplying of waiting days to continue in relation to periods of incapacity for work due to sickness from coronavirus that commence on or before 24 March 2022.

3. Matters of special interest to Parliament

Matters of special interest to the Joint Committee on Statutory Instruments

- 3.1 The Secretary of State makes these Regulations in exercise of the powers conferred by section 89(3) of the Coronavirus Act 2020.
- 3.2 These Regulations will come into force the day after they are made. The saving provision makes modifications to the saved legislation and those modifications result from the Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2022. As such, these Regulations could not be made until those Regulations were made, and, as noted in the explanatory memorandum for those Regulations, it was not possible to comply with the 21-day rule in that case due to the requirement to consult with the Social Security Advisory Committee. These Regulations have been made as soon as possible after the making of the Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2022.

4. Extent and Territorial Application

- 4.1 The territorial extent of this instrument is England, Wales and Scotland ONLY.

5. European Convention on Human Rights

- 5.1 As the instrument is subject to no procedure, no statement is required.

6. Legislative Context

- 6.1 SSP is paid by employers to employees who are incapable of work due to sickness. It is paid at a flat rate of £96.35 for up to 28 weeks. To be eligible for SSP, an individual must: be classed as an employee and have done some work for their employer; have been ill, or (deemed to be) incapable of work, for at least 4 days in a row (including non-working days); earn an average of at least £120 per week; and tell their employer

that they are sick before the employer’s deadline, or within 7 days if the employer has not set a deadline.

- 6.2 Powers under section 151(4) of the Social Security Contributions and Benefits Act 1992 (“the 1992 Act”) provide that regulations may be made which deem an employee to be incapable of work, meaning that they can potentially then be eligible for SSP. As part of the government’s response to the pandemic, deeming regulations were made to reflect public health advice so that individuals may be eligible for SSP if they are unable to work because they are staying at home and self-isolating because:
- (a) They have symptoms of coronavirus or have tested positive for coronavirus;
 - (b) They live with, or are in a linked or extended household with, someone who has symptoms or has tested positive for coronavirus;
 - (c) They have been informed that they have had contact with a person who was, at the time of the contact, infected with coronavirus;
 - (d) They are shielding in accordance with public health guidance;
 - (e) They are due to undergo planned or elective surgical or other hospital procedure.
- 6.3 Those provisions, which deem an employee to be incapable of work under the circumstances set out above, will be revoked on 24 March. SSP rules around eligibility criteria will revert to those which were in place before the pandemic, meaning that, to be eligible for SSP, an individual must be sick or incapable of work.
- 6.4 Under section 155(1) of the Social Security Contributions and Benefits Act 1992, SSP is not payable for the first 3 qualifying days of a period of incapacity for work. These first 3 days are known as ‘waiting days’. Powers under section 40 of the Coronavirus Act 2020 provide that regulations may be made which disapply waiting days where an employee’s incapacity for work is related to coronavirus, meaning SSP is payable from the first qualifying day of a period of incapacity. As part of the government’s response to the pandemic, regulation 2 of the Statutory Sick Pay (Coronavirus) (Suspension of Waiting Days and General Amendment) Regulations 2020/374 (“the 2020 Regulations”) provides that waiting days are suspended where an employee’s absence is related to coronavirus. As those Regulations were made under powers contained in a temporary provision in the Coronavirus Act, which will expire at midnight on 24 March 2022, these Regulations will no longer have legal effect once that power expires.
- 6.5 This instrument makes saving provision relating to the expiry of the powers in section 40 of the Coronavirus Act 2020. It provides that where a period of incapacity for work is related to coronavirus and has commenced on or before 24 March 2022 (that is to say, whilst s40 was in force) waiting days will continue to be suspended in relation to that period of incapacity. This means that an employee who is sick due to coronavirus at the expiry of the Coronavirus Act 2020 will receive SSP for every qualifying day. Due to the revoking of the deeming provisions within the Statutory Sick Pay (General) Regulations 1982, as set out above, the only periods of incapacity which relate to coronavirus which will continue beyond 24 March will be those where the individual is actually sick and incapable of work due to coronavirus. This will mean that after 24 March, people who are asymptomatic, or have only very mild symptoms, will no longer be eligible for SSP even where they have tested positive. People will only be eligible for SSP on the basis of coronavirus where they are actually sick and

incapable of work as a result of infection. Regulation 2(3) modifies regulation 2 of the 2020 Regulations to reflect the revoking of these deeming provisions.

- 6.6 It is intended that this provision should ensure that employers and employees are clear about how waiting days operate where a period of incapacity has commenced prior to the expiry of s40 and to avoid a situation whereby the requirement to serve waiting days applies to some, but not all, of the first 3 qualifying days of a period of incapacity.

7. Policy background

What is being done and why?

- 7.1 As part of the response to the pandemic, the government made temporary changes to SSP to support compliance with public health advice on self-isolation. This has included where the public health advice has been set out in both guidance and, later, in regulations. These changes extended SSP eligibility to individuals who were self-isolating but would not otherwise have been considered sick or incapable of work, including where they had no, or very mild, symptoms, or were following guidance on household isolation or shielding. Regulations were also made to disapply waiting days for periods of incapacity for work relating to coronavirus. The other qualifying criteria continued to apply.
- 7.2 The changes made to SSP have been linked to the Coronavirus Act: either directly, because they were made under powers taken in that Act or, where they were made under existing powers, indirectly, because Ministers stated that the regulations would be reviewed in line with any revision of the Coronavirus Act.

Explanations

- 7.3 On 21 February, the Prime Minister announced that the government would expire all remaining temporary provisions of the Coronavirus Act, with the majority of these expiring on 24 March 2022, including the SSP provisions. This will mean that SSP will, except where this saving provision applies, return to being payable from the fourth day of work missed due to sickness absence.
- 7.4 Employment law, including SSP, is a reserved matter and so decisions taken on SSP are made by UK Government and have effect across Great Britain.

8. European Union Withdrawal and Future Relationship

- 8.1 This instrument does not relate to withdrawal from the European Union / trigger the statement requirements under the European Union (Withdrawal) Act.

9. Consolidation

- 9.1 Consolidation is not being done as this does not apply.

10. Consultation outcome

- 10.1 This is a minor saving provision which is expected to have minimal impact and so no consultation has been conducted given the need to make the provision before the expiry of section 40.

11. Guidance

- 11.1 Guidance is available on GOV.UK for individuals and employers to understand how to comply with SSP regulations.

12. Impact

- 12.1 We have not assessed the impact on business, charities or voluntary bodies because of the urgent need to make the instrument in advance of the expiry of section 40 of the Coronavirus Act 2020 but no significant impact is foreseen.
- 12.2 We have not assessed the impact on the public sector because of the urgent need to make the instrument in advance of the expiry of section 40 of the Coronavirus Act 2020 but no significant impact is foreseen.
- 12.3 A full Impact Assessment has not been prepared for this instrument because of the urgent need to make the instrument the urgent need to make and lay the instrument in advance of the expiry of section 40 of the Coronavirus Act 2020 but no significant impact is foreseen.

13. Regulating small business

- 13.1 The legislation applies to activities that are undertaken by small businesses.
- 13.2 No specific action is proposed to minimise regulatory burdens on small businesses.
- 13.3 Given the advance notice that has been given of plans to make regulations, no consultation has been conducted.

14. Monitoring & review

- 14.1 As these Regulations provide saving provision, which will only have practical effect for a short time, they will not be reviewed.

15. Contact

- 15.1 Rachel Nicholls at the Department for Work and Pensions Email: rachel.nicholls@dwp.gov.uk can be contacted with any queries regarding the instrument.
- 15.2 Keith Roberts, Deputy Director at the Department for Work and Pensions, can confirm that this Explanatory Memorandum meets the required standard.
- 15.3 Secretary of State for the Department for Work and Pensions can confirm that this Explanatory Memorandum meets the required standard.