

Appendix 2: Injury Allowance – Frequently Asked Questions for Employers

What is Injury Allowance?

Injury Allowance is a top-up payment and tops up sick pay, or reduced earnings when on a phased return to work, to 85 per cent of pay:

- for those covered by the *NHS terms and conditions of service handbook*, pay is as defined in paragraph 14.4 and paragraphs 14.4 and 14.5 in Section 14(a) (England)
- for those staff not covered by the Agenda for Change pay arrangements, it is as defined in their contractual sick pay arrangements.

Who is eligible for Injury Allowance?

NHS employees covered by the provisions contained within the NHS terms and conditions of service handbook or by reference within other national or local NHS employment contracts. In respect of employees not covered by the NHS terms and conditions of service handbook or who are no longer working for an NHS employer, the term 'NHS employment' refers to employment with an employer that provides for Injury Allowance within their employment contracts.

When is Injury Allowance payable?

Injury Allowance is payable when an employee is on authorised sickness absence or on a phased return to work with reduced pay or no pay due to an injury, disease or other health condition that is wholly or mainly attributable to their NHS employment.

What does “wholly or mainly attributable to their NHS employment mean?”

"Wholly" means "totally" and "mainly" means "for the most part". "Attributable" is defined in case law as a contributory causal connection; it need not be the sole, dominant, direct or proximate cause and effect.

However, the injury, disease or other health condition must have been sustained or contracted in the discharge of the employee's duties of employment or an injury that is not sustained on duty but is connected with or arising from the employee's employment

Situations where Injury Allowance may be considered

Please refer to Injury Allowance Guide for Employers

Are there any circumstances where Injury Allowance cannot be considered?

Please refer to Injury Allowance Guide for Employers

When is Injury Allowance unlikely to be payable?

Injury Allowance is unlikely to meet the wholly and mainly attribution test in the following circumstances:

- where the injury or disease is attributable to some other cause, for example the natural progression of a pre-existing condition, normal wear and tear or a non-work related injury, condition or disease

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- where a person suffers from a pre-existing or non-work related condition (injury or disease) unless there is some new work related cause and effect over and above the original problem

Who makes the decision about entitlement to Injury Allowance?

The Workforce Business Partner or Nominated Deputy is responsible for determining entitlement for Injury Allowance and must decide if the injury, disease or other health condition is wholly or mainly attributable to the employee's NHS duties of employment. Decisions on payment should take into account individual's sick pay entitlements to enable the timely payment of the Injury Allowance.

How will the decisions be made?

The Workforce Business Partner or Nominated Deputy will make the overall decision. This will be made following medical advice from the Occupational Health department which will help the Workforce Business Partner or Nominated Deputy decide if the injury, disease or other health condition is wholly or mainly attributable to the person's NHS employment. The civil burden of proof is based on the balance of probability which is defined as more likely than not and should be used to decide if the injury or disease is wholly or mainly attributable to the person's NHS employment.

The line managers will need to follow the absence management procedures during any period of absence. Line managers should monitor absences in terms of length of absence and individual pay levels to enable the timely payment of this top-up allowance to eligible staff.

How should a claim be processed?

The line manager should manage the process in line with the absence management process. Further medical information should be gained from the Occupational Health department to determine whether an absence is wholly and mainly attributable to the duties of employment and if eligible, when any payment of Injury Allowance would commence. If agreement is reached to pay Injury Allowance the line manager should complete the Injury Allowance Application Claim Form with relevant details. The Workforce Business Partner or Nominated Deputy will approve or reject the application. The line manager forwards the Injury Allowance Application Claim Form to the Payroll department for them to action accordingly.

What information does an employee need to provide?

Employees should provide all relevant information in line with normal absence management procedures. This includes medical evidence, that is in their possession or that can be reasonably obtained, to enable the employer to determine the claim.

What information may the Workforce Business Partner or Nominated Deputy need to determine eligibility as part of the decision making process?

The Workforce Business Partner or Nominated Deputy will want to make robust decisions

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based on all available evidence and this may include:

- details of the injury sustained or the disease contracted (that is, the condition) by the employee
- how it is connected to their NHS employment (that is, what caused it).

To support their decision making the line manager may find it useful to obtain copies of the following:

- accident report(s)
- occupational health department notes and records
- job description, including details of the location of work, duties of employment and training records, etc.
- sick leave record
- a full statement of events from the employee explaining what injury/disease they are claiming for and the circumstances leading to the claim
- appropriate medical advice, for example, from occupational health service.

The Workforce Business Partner or Nominated Deputy may also find it helpful to obtain additional supporting and corroborating evidence, for example witness statements, DWP benefit statements, copies of any relevant letters and correspondence relating to any other medical advice received.

What about corroboration?

It is important to obtain appropriate and supportive corroborative evidence before making a decision about Injury Allowance.

a) What constitutes corroborative evidence?

Corroborative evidence can take many forms – see examples below.

Injury at work:

- An injury, physical, psychological or both, as a result of an incident at work, should be recorded in the accident book or by some method of workplace recording, and countersigned by a manager. If the incident has been deemed to be serious enough there may also be a form completed for the Health and Safety Executive (HSE) under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR) requirements which may also be available.
- Information related to DWP benefit claims.
- If there was an accident at work, but it was not entered in the accident book, but was witnessed by a colleague, a statement from that witness could be helpful by way of corroboration.

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- If there is doubt about the date of an accident at work and it was not recorded or witnessed but the person attended their GP, the GP may be able to confirm that attendance and the date from the notes.
- If the person attended A&E, the GP may have been sent a discharge summary. The person may be able to get a copy, or, with consent, may be able to request the A&E records or GP records.
- If the person attended occupational health following the injury, they may be able to help with dates and details.
- If the person has sought compensation through a lawyer and has evidence, such as expert medical reports, or details of judgements and outcomes, which may be helpful relating to this, then it will be useful to have these. The person should be aware that it is not necessary to prove that the employer was negligent to get Injury Allowance; it is a no-fault scheme.
- If the person has already been awarded Injury Allowance for a previous episode of absence and has any relevant documents about it, it may be useful to submit these.

b) Diseases/other health conditions contracted through work

The following examples show different ways to corroborate that the person may have contracted a disease or condition through work.

- If the person has contracted a notifiable infectious disease such as hepatitis or tuberculosis, there will be documentation from GP, occupational health and/or public health departments confirming this, copies of which the employee may be able to submit, or give consent to obtain.
- If the person has contracted an occupational disease, which is on the list for reporting to the HSE under Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR), the occupational health department will be able to give documentation confirming this, or the applicant give consent for these to be accessed.

What if there is more than one cause of the injury, disease or other health condition?

If both employment and external factors are involved it is necessary to consider their relative importance. In such cases Injury Allowance is only payable if, on the balance of probabilities, the injury, disease or other health condition is wholly or mainly attributable to their NHS duties of employment. The Workforce Business Partner/Nominated Deputy/line managers may also wish to seek specific advice from the Occupational Health department.

Is there any qualifying period for Injury Allowance?

No. Payment of Injury Allowance is not dependent on length of service. This means that all employees are covered from their first day of employment.

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How is Injury Allowance calculated?

Injury Allowance is a top-up payment. It tops up sick pay or earnings when on a phased return to work, and certain other income (as specified below) to 85 per cent of pay as defined in appropriate contractual documentation i.e. *as noted in paragraph 14.4 of the NHS terms and conditions of service handbook*, or as specified in their separate contractual sick pay arrangements.

Specified income:

- contributory state benefits received for loss of earnings, for example, Job Seekers Allowance, Employment and Support Allowance, at the rate they are actually received by the employee
- sick pay, including Statutory Sick Pay (SSP)
- any earnings when on a phased return to work on reduced pay.

Any other benefits or payments received should be ignored.

Is an employee required to claim relevant contributory state benefits?

Yes. Employees are required to claim any contributory state benefits they may be entitled to and must inform the Trust immediately on receipt of such benefits. Where timely notification is not provided any overpayment of Injury Allowance that arises as a result must be recovered from the employee.

What if the Trust makes an overpayment?

The Trust will require repayment when an overpayment is made. Where the Trust has made an accidental overpayment, the statutory position is that the Trust can recover this by deducting the overpayment from future wages or salary. This is covered in *section 14 of the Employment Rights Act 1996*, which provides that protection from deductions from wages does not apply to an overpayment of wages or employment-related expenses. The Trust should take into account the period of time the over payment was made when agreeing the programme of repayments.

What about tax and National Insurance contributions?

Injury Allowance is subject to income tax and National Insurance contributions but is not subject to NHS Pension Scheme contribution deductions.

What about people who are on a phased return to work?

Eligible employees who agree a phased return to work programme with the Trust may receive the Injury Allowance as a pay top-up if their pay is reduced during this approved period of rehabilitation.

- These arrangements have been constructed to remove any negative incentives to remain off work. (*refer to Annex Z NHS terms & conditions for further information*)

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How long is Injury Allowance payable for?

Injury Allowance is payable for a period of up to 12 months per episode, subject to local absence management, return to work and rehabilitation policies.

The intention is for the injury allowance to be a flexible payment that supports staff when they are off sick and on return to work. As such it can be paid for a maximum of 12 months per episode, for example, during sickness absence on half or no pay and during any agreed phased return to work after pay has been reduced, with an episode remaining linked to the original injury.

Where an injury, disease or other health condition is exacerbated by a further injury, disease or other health condition that is wholly or mainly attributable to their NHS employment (which may not on its own have led to a period of sickness absence) then a new episode may commence.

What about pay protection?

Eligible employees who have to change jobs permanently to a position on lower pay due to a work related injury, disease or other health condition, are entitled to receive a period of protected pay that is the same as any local provision for pay protection during organisational change.

What happens if a person disagrees with the decision for Injury Allowance?

If a person disagrees with the outcome of a decision about Injury Allowance, it should be handled under the Trust's Grievance Procedures.

How will the Injury Allowance apply to staff with more than one contract of employment?

Some staff may have more than one contract of employment and these contracts can vary from standard whole time equivalent contracts of employments to zero hours contracts covering bank staff, with differing terms and conditions of service being applied to each.

It is recognised that an employee who suffers a work related injury under one contract of employment may result in a period of absence in another. The Workforce Business Partner or Nominated Deputy will therefore need to consider the interaction between the various contracts where a member of staff meets the eligibility criteria for Injury Allowance, seeking legal advice as necessary. It would seem reasonable to apply a similar approach as is adopted locally in respect of payment of sick pay entitlements.

The Trust will also need to be aware that Injury Allowance may be payable for an injury that is not sustained on duty but is connected with or arising from the employee's employment