



Feidhmeannacht na Seirbhíse Sláinte
Health Service Executive

Public Service Sick Leave Scheme

Critical Illness Protocol Managerial Discretion Guidelines for the Health Service

April 2018



Seirbhís Sláinte
Níos Fearr
á Forbairt

Building a
Better Health
Service

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Critical Illness Protocol – Managerial Discretion Guidelines

In these guidelines the abbreviation “CIP” is used to describe extended paid sick leave that may be granted under this Critical Illness Protocol. The Critical Illness Protocol was introduced which provides the basis for access to 6 months on full pay and 6 months on half pay (subject to an overall limit of 1 year (365 days) in a 4 year rolling period) in the event that a staff member is diagnosed with a critical illness or serious physical injury.

Part 1: Purpose and aim of these guidelines

To assist decision makers (managers) who are making a decision in respect of granting CIP on the basis of managerial discretion for “exceptional circumstances”.

The decision on whether any exceptional circumstances warrant extended paid sick leave is a matter to be determined by the manager after consideration of all the relevant circumstances. The guidelines are to assist managers in making a fair and reasonable decision. These relevant considerations are set out in these guidelines (see b, CIP on the basis of managerial discretion below)

1.1 Background and context

The granting of extended paid sick leave is governed by:

1. The Public Service Management (Sick Leave) Regulations 2014¹ (the “Regulations”),
2. Appropriate circulars and analogous documents as issued by sectoral management across the public service.

HSE HR Circular 005/2014 sets out the ‘Arrangements for paid sick leave’ for the health service and the Critical Illness Protocol (Appendix to the Circular) set out the procedures for providing CIP arising from paragraph 4.2 of the Circular.

1.2 Circumstances for the granting of extended sick leave under the CIP

Extended paid sick leave for a critical physical or psychiatric illness serious injury or serious medical condition may be granted in two circumstances:

a) CIP on the basis of medical certification

CIP on the basis of medical certification is granted by the manager in cases where the occupational physician has certified that the individual is suffering from a critical illness, serious injury or serious medical condition. While the decision to grant is still the decision of the manager, this decision is based upon the occupational physician's opinion based on a number of medical criteria (See Appendix 1).

b). CIP on the basis of managerial discretion

The grounds for granting CIP on the basis of medical certification are quite narrow and there will be cases which involve quite serious illnesses, injuries or conditions, which may deserve CIP, but do not fall within the narrow criteria.

¹ <http://www.irishstatutebook.ie/eli/2014/si/124/made/en/pdf>

In such cases, managers are allowed to exercise discretion and grant CIP after an analysis of the information provided and the circumstances of the case. This is generally intended to cover "nearly there" cases i.e. a case that involves what would generally be considered a significant illness, injury or condition but does not qualify under the strict criteria. For example, a serious operation, with an extended recovery time, but which does not involve a stay in hospital of the length required.

It is intended that the granting of CIP on the basis on managerial discretion will only be warranted in serious and/or exceptional cases. An employee has ordinary paid sick leave available (at full and half pay) and the granting of CIP should be awarded where exceptional circumstances warrant it.

This decision is the manager's decision, but the manager can seek guidance from the occupational physician on medical issues, within the boundaries of medical confidentiality.

1.3 Appeal of the CIP managerial decision based on discretion

The managerial decision to award or refuse CIP based on discretion can be appealed and the manager should inform the employee about their rights in this regard. If the decision is being appealed the Health Sector Grievance Procedures must be followed.

The appeal process should be both procedurally and substantively robust and this point should be clearly communicated with the relevant parties.

1.4 Reasonable Accommodation

In order to qualify for CIP, an employee must be medically unfit to return to his or her current duties or (where practicable) modified duties in the same pay grade. This emphasises that appropriate efforts should be made to accommodate employees at an early stage of the absence.

In accordance with the Employment Equality Acts 1998-2015², managers are required to give due consideration to appropriate measures which would facilitate the employee's return to work having regard to service requirements. Managers should seek advice from Occupational Health on proposed measures and engage with the employee during this process. Any appropriate enabling options should be fully explored, for example:

- Making adjustments to premises and/or working space where reasonably practicable;
- Re-allocating minor or subsidiary duties ;
- Altering working hours/reduction in hours;
- Changing the location of the work where reasonably practicable;
- Offering additional or extended training for the post;
- Acquiring relevant equipment or modifying existing equipment

This list is not exhaustive

²http://www.lawreform.ie/fileupload/RevisedActs/WithAnnotations/EN_ACT_1998_0021.PDF (current legal definition of reasonable accommodation page 29)

1.5 Decision Maker

The decision maker is referred to as the ‘manager’ ‘throughout these Guidelines. In the health sector, each organisation is required to identify the levels of manager who will act as decision makers for approving CIP.

1.6 What must the manager establish?

The “Regulations” provide that in order to grant CIP on the basis of “exceptional circumstances” the following must be established:

- That there are “exceptional circumstances”; and
- That those exceptional circumstances relate to the illness, injury or condition of the public servant; and
- That those exceptional circumstances warrant the granting of the extended paid sick leave.

Part 2: What Should The Manager Consider

The manager should consider the normal meaning of the word “exceptional”, meaning “unusual” or “not typical”. Is this a normal and typical illness, injury or condition or is it an unusual and/or not typical illness, injury or condition although not necessarily rare.

2.1 Three sources of Information

When determining if there are “exceptional circumstances” which would warrant the award CIP granted on the basis of managerial discretion the Manager should consider the following three sources of information to inform the decision making process to award CIP.



The Occupational Physicians Report

When making a decision the manager should consider the report provided by the occupational physician from the employer's occupational health service. Section 38 agencies in the health service which engage external providers for occupational health services should inform their occupational health provider of the revised CIP and additional occupational health requirements under these Guidelines.

The occupational physician advises whether the medical criteria for CIP are met in any given case. The occupational physician's opinion can also be sought on whether there are any medical considerations that should be considered when the manager is considering granting CIP as a result of managerial discretion.

If the illness, injury or condition does not have any of the characteristics required for CIP awarded on the basis of medical certification, then the manager should consider if there is any other information that would amount to exceptional circumstances related to an illness, injury or condition of the employee.

The occupational physician should provide additional medical information they are aware of and consider relevant, within the boundaries of medical confidentiality. Examples include:

- a) Standard recovery times for the condition where these exist having regard to the nature of the work (e.g. elective surgical procedures);
- b) Presence of additional medical conditions where relevant;
- c) Presence of medical complications;
- d) Any other information they consider relevant to assisting management in making a decision to award extended sick pay under management discretion e.g. a hospital inpatient stay is close to the 10 day threshold.

It may be helpful in selected cases for the manager to liaise with the occupational physician, within the boundaries of medical confidentiality.

Relevant Information from the Individual

The manager should consider whether further information may be required in relation to the individual and may wish to contact the employee to make sure that they are aware of all of the circumstances that may amount to "exceptional circumstances".

The manager should consider:

- e) whether the medical criteria set out in Box 1 are close to being met, or whether there are any other factors related to the illness, injury or condition that should be viewed as "exceptional";
- f) the severity of the illness, injury or condition.

The manager should not consider the financial position of the employee concerned or the person's performance at work.

Consider relevant Human Resources information and professional judgement

The manager should consider any relevant HR information or other sources of professional judgment. Examples include:

- g) the length of any absence to date related to this illness, injury or condition, it should be noted that this information cannot be used to treat an application any less favorably
- h) the willingness of the individual to engage with the workplace & workplace rehabilitation measures
- i) the approach taken by the manager in other cases and the need for consistency of approach; and
- j) whether a grant or refusal would be reasonable taking into account any information provided that could be viewed as exceptional circumstances.

The manager may wish to seek the view of the employee's line manager in respect of the matters outlined in the occupational physician's report. If the manager does so, the manager should take a note of the line manager's opinion, which should be sent to the line manager and copied to the employee. The employee should be given the opportunity to provide observations about the line manager's opinion, and any such observations should be considered by the manager before he or she makes a decision.

2.2 Inform the employee of the decision

The manager should communicate his or her decision to the employee in writing, briefly summarising the matters that he or she has considered. These reasons should demonstrate that the manager has considered all relevant considerations and has not been influenced by irrelevant considerations. If the manager's decision is to refuse the employee's application, the manager should inform the employee that this decision may be appealed under the Grievance Procedure and the appropriate stages to invoke about the right to appeal, and should explain when and how the public servant may make an appeal.

Part 3: Key Issues for Consideration

3.1 Conflict of interest

The manager should ensure that he or she does not have any conflict of interest when considering the matter. They should consider whether the employee is a close friend or relative or, alternatively, whether the employee has raised a grievance or some other form of complaint against them. The manager should consider whether it is appropriate in all the circumstances for the manager to make the determination (although in some cases the manager may be required to make the determination because the manager is the only person who has authority to do so).

3.2 Record keeping

The manager should ensure that all records relating to the application for CIP are maintained in a confidential and secure manner.

APPENDIX 1:

CRITICAL ILLNESS PROTOCOL – CRITERIA FOR AWARD OF EXTENDED PAID SICK LEAVE

1. Introduction

- 1.1 It is recognised that public service bodies, as employers, need to continue to provide support for their employees who may be incapacitated as a result of critical illness or serious physical injury. Therefore when an individual becomes incapacitated as a result of critical illness or serious physical injury, and has supporting medical evidence for an extended period of sick leave, the individual may, on an exceptional basis, be granted paid sick leave extended as follows:
- A maximum of 183 days on full pay in the previous rolling one-year period.
 - Followed by a maximum of 182 days on half pay in the previous rolling one-year period.
 - Subject to a maximum of 365 days paid sick leave in the previous rolling four-year period.
- 1.2 The granting of exceptional extended paid sick leave is a decision of management having considered the occupational medical advice.
- 1.3 These arrangements will exclude individuals whose illness relates to an occupational injury/illness and who have access to an occupational injury/illness scheme.

2. Criteria For Award Of Extended Paid Sick Leave

- 2.1 In determining whether an individual may be granted access to exceptional extended paid sick leave the following criteria apply:
- 2.1.1 The employee should ordinarily be under the current or recent clinical care of a consultant either as an inpatient or outpatient. This excludes employees attending primarily for report preparation or medico legal purposes.
- 2.1.2 The case must be referred by the employer to its Occupational Health Service for medical advice.
- 2.1.3 The responsibility lies with the employee to furnish any treating doctor's medical reports requested within an appropriate time-frame to avail of the exceptional extended paid sick leave. A treating consultant's specialism must be appropriate to the critical illness for which the employee is making a claim.
- 2.1.4 The Occupational Physician, from the employer's Occupational Health Service, will advise whether, in their opinion, the following criteria are met:
- i. The employee is medically unfit to return to his or her current duties or (where practicable) modified duties in the same pay grade

- ii. The nature of this medical condition has **at least one** of the following characteristics:
- (a) Acute life threatening physical illness
 - (b) Chronic progressive illness, with well-established potential to reduce life expectancy
 - (c) Major physical trauma ordinarily requiring corrective acute operative surgical treatment
 - (d) In-patient or day hospital care of ten consecutive days or greater³.

2.1.5 The Occupational Physician will consider the information provided by the treating doctor, and may confer with them with consent if they feel this would be helpful. It is not an absolute requirement that a definitive final diagnosis has been made. The Occupational Physician may accept a presumptive diagnosis on a case by case basis.

3 Decision To Award

3.1 The decision on whether to award extended paid sick leave is a management decision. Whilst management must primarily consider the Occupational Medical advice, management should consider all the circumstances of the case.

3.2 Thus, although an employee may not meet the medical criteria outlined above, management may still make a decision to award in exceptional circumstances.

3.3 In exercising this discretion management must demonstrate the reasons why they are awarding an extended period of paid sick leave although the individual does not meet the requirements set out at 2.1.4 (ii) above.

In this regard management should establish the following:

- That there are exceptional circumstances; and
- That those exceptional circumstances relate to the illness, injury or condition of the person; and
- That those exceptional circumstances warrant the granting of the extended paid sick leave.

3.4 When determining if there are exceptional circumstances which would warrant the award of CIP granted on the basis of managerial discretion, the Manager should consider the following three sources of information to inform the decision making process to award CIP.

- The Occupational Physicians Report
- Relevant Information from the Individual
- Relevant HR Information

4. Appeal of the Medical Decision

4.1 The advice of the Occupational Physician may be appealed to either a single appeal Specialist Occupational Physician or a panel of Specialist Occupational Physicians. This can be decided on a sector by sector basis as to which is the most appropriate approach. This appeal will ordinarily be a file only review.

³ In the case of pregnancy-related or assisted pregnancy-related illness, the requirement for hospitalisation of ten consecutive days will be reduced to two or more consecutive days of in-patient hospital / clinic care.

4.2 In the case of an appeal to a single Specialist Occupational Physician, an individual may arrange to meet with the Specialist Occupational Physician on the basis of an appropriate cost sharing arrangement to be determined within each sector.

4.3 The final decision on any appeal lies with the employer, having considered the medical advice.

5 Appeal Of The Management Decision

5.1 The mechanism for appeal of the management decision will be decided on a sector by sector basis with access given to those appeal mechanisms which are already in place in each sector. For example, the management decision may be appealed using the Grievance Procedure in the Civil Service.

5.2 Should there be a delay⁴ in the employer referring an employee to the Occupational Health Service of the organisation, or a delay⁵ in being seen by this Occupational Health Service, there will be no financial loss to the employee if they are later awarded the exceptional extended paid sick leave. Where, in these circumstances, an employee moves on to half pay and it is later found that access to exceptional extended paid sick leave should have been granted, pay will be restored appropriately.

6 Return To Work

6.1 There will be no financial loss to an employee in circumstances where the employee has fully engaged with the process around the management of sick leave and their own consultant has certified fitness to return to work, but the employee has not been able to return to work because there is a delay in the employer referring the employee to the Occupational Health Service of the organisation, or a delay in being seen by this Occupational Health Service. Pay will be restored appropriately.

7 Temporary Rehabilitation Remuneration

7.1 In advance of the termination of the payment of Temporary Rehabilitation Remuneration (TRR), following payment of paid sick leave and TRR for a period not exceeding two years, local management shall secure expert specialist occupational health advice on whether there is any reasonable prospect of the employee returning to work within a foreseeable timeframe. Where a reasonable prospect of return to work is confirmed by the Occupational Health Specialist the payment of TRR may be continued subject to review at six-monthly intervals for a further period not exceeding two years.

⁴ Where the delay is of a duration in excess of the period of time currently allowed for a referral to an Occupational Physician.

⁵ Where the delay is of a duration in excess of the normal waiting time to be seen by an Occupational Physician.

Definitions

Current or recent Clinical Care

This means that the employee has received medical investigations and treatment ordinarily under the direct care / supervision of a hospital consultant. They may be either a hospital inpatient or outpatient. It excludes referrals that in the opinion of the Occupational Physician are primarily for report preparation purposes/medico-legal purposes.

Hospital Consultant

This is a medical doctor who is on the relevant specialist register, and holds a HSE / Voluntary Hospital / NHS hospital consultant appointment or has admission rights to a recognised private hospital.

Occupational Physician

This is a medical doctor registered with the Irish Medical Council who has a postgraduate qualification in Occupational Medicine / Occupational Health, or who is on a specialist training scheme in Occupational Medicine.

Specialist Occupational Physician

This is a medical doctor registered with the Irish Medical Council in the specialist division of Occupational Medicine.

Limitation of Life Expectancy

This refers to the condition and not the individual person. It must be well established in the peer reviewed medical literature that the medical condition results in a reduction of life expectancy.