

# Permanent Health Insurance



## Overview

**A PHI policy can be taken out by either an employer or employee to provide benefits in the event that the employee is unable to work by reason of injury or illness. This factsheet deals only with policies taken out by employers.**

The benefit usually provides for payment of around 50-75% of salary, sometimes including pension, after a defined period of sickness absence, until the employee no longer meets the definition of incapacity under the policy, he or she retires, or the employment is otherwise terminated.

Even though they are provided by employers, PHI benefits continue to remain a hotbed of legal and practical issues both when it comes to securing cover and when cover is withdrawn.

### Early application

If you find yourself on sick leave and it looks like your sick leave may be long term such that you will qualify for PHI benefits, you should make sure that your employer applies under the PHI policy as early as possible to secure payment of benefits. We often encounter situations where no application is made until just before sick pay runs out and the application process then takes many weeks to complete, meaning the individual is without pay for that period.

### Definition of incapacity

The definition of what amounts to incapacity under the policy, and

therefore entitlement to benefits, is usually contained in the PHI policy. Sometimes, the definition of incapacity is that an employee 'is unable to follow their normal occupation'. In those circumstances, what constitutes 'normal occupation' can cause difficulties, particularly where the employee's duties changed due to illness, prior to the commencement of sick leave. It can become even more complicated where the definition is that the employee 'is unable to follow any occupation' because clearly, an employee is then less likely to qualify for benefits if that definition is interpreted widely. However, the Courts have tended to lean in favour of the employee in interpreting this phrase, suggesting that it means 'no full time work that the employee can realistically do' rather than suggesting that an ability to do any work, for example on a short term project, means that they do not meet the definition.

### Mental health cases

We find that insurers are often reluctant to pay out in cases which involve mental health issues, chronic fatigue and depression. This is particularly so if the condition is work related and it appears that the employee will not recover

if he or she goes back to work for that employer. If you are hoping to or trying to claim PHI benefits and you suffer from one of these conditions, it is worth taking legal advice as regards to your position as early as possible.

### Returning to work

An employer has a duty to consider reasonable adjustments to your role if you are disabled within the meaning of the Equality Act 2010 and insurers will often be keen to ensure that the employer complies with that duty, given that they are usually keen for the employee to get back to work as quickly as possible. If you are fit enough to work therefore, it is worth considering whether to carry out a rehabilitative job, or whether going back on a staged return will assist you in returning. It can often be negotiated with the insurer that you continue to receive payment of benefits during such a period so that you do not lose out financially whilst you work towards resuming your previous role/hours. In the event that your employer dismisses you, having failed to make reasonable adjustments, then this could also amount to disability discrimination and unfair dismissal.

## Contact us:

Telephone: 0800 916 9015

Email: [enquiries@slatergordon.co.uk](mailto:enquiries@slatergordon.co.uk)

Website: [slatergordon.co.uk](http://slatergordon.co.uk)

### What if the insurer refuses to pay?

Usually a three way relationship exists between insurer, employer and employee: between the insurer and the employer under the PHI policy and between the employer and the employee under the contract of employment.

### What are the employee's options if benefits are refused?

- Gather as much medical evidence as you can to support your claim from all your treating practitioners. It may be worth obtaining a further independent expert report. Without new evidence which contradicts that of the insurer's medical expert, they are unlikely to reconsider your case. It is worth taking legal advice when considering obtaining such evidence
- Check the contract of employment to see if there is a separate obligation on your employer to pay PHI benefits to you. This is rare, but if the right is there, you may be able to claim against your employer directly
- An implied contractual duty exists on your employer to 'take all reasonable steps' to obtain the benefits under the policy, which would include claiming against the insurer 'if it became necessary to do so'. Therefore, if you have no direct right to sue the insurer, you can attempt to persuade your employer to do so on your behalf
- If your employer unreasonably refuses to take steps against the insurer, you may be able to sue the employer for breach of contract
- Check the PHI policy to see if it requires the parties to take a dispute to arbitration before issuing Court proceedings
- You can also make a complaint about the insurer to the Financial

Ombudsman Service ('FOS'). As soon as the initial decision has been received from the insurer that they will not pay benefits, you should put in an appeal to the insurer, if such a right exists. Upon receipt of the final decision or four months after submitting the appeal, whichever is the earlier, a complaint can be made to the FOS. The deadline for making a complaint is within six months of receipt of the insurer's final decision not to pay benefits. There is no fee payable for making a complaint. The maximum compensation which the FOS can award is £100,000 and legal costs will not usually be covered. Although there is no legal obligation on the insurer to comply with the FOS decision, we find that they usually do comply. Interest on the sum due should be awarded.

### Termination of employment

Usually, where an employee's employment comes to an end, so does their entitlement under the PHI policy. However, the Courts have held that an implied term exists in a contract of employment, that an employer may not lawfully dismiss an employee by reason of their sick leave, if the effect is to deprive that employee of the receipt of PHI benefits. This is the case even if the employee has not yet qualified for PHI benefits.

You may therefore be able to negotiate with your employer to leave employment with a lump sum payment in respect of your benefits in those circumstances. The employer may need to negotiate with the insurer to obtain this, or you might be able to take the policy on yourself as an individual (rather than as an employee) and retain the benefits.

You may even be able to prevent the employer from being able to

dismiss you. We have considerable experience of helping employees when issues such as those described above arise. We have often succeeded in restoring an employee's benefit without having to resort to litigation or the FOS. If you wish to take a claim against either your employer or the insurer there may be funding arrangements available. Please contact us to find out more.

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