

## **Q & A: COVID-19 (Coronavirus) and Employment Law**

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Frequently asked questions about the employment law implications of the 2019 novel coronavirus disease (COVID-19) outbreak. We will keep this resource updated as the outbreak develops. If you have a question relating to the COVID-19 outbreak which is not addressed in this note then please submit a question to your BPIF HR Adviser or the BPIF COVID – 19 helpline by emailing at [coronahelp@bpif.org.uk](mailto:coronahelp@bpif.org.uk).

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### **Statutory sick pay (SSP) and COVID-19**

#### **In what circumstances is SSP payable?**

In order to qualify for *Statutory sick pay (SSP)* an employee must be absent from work due to incapacity. Where an employee at the point they are suspended from work due to attendance restrictions as advised by the government has not been diagnosed with COVID-19 or exhibited symptoms, then it is unlikely that their absence will meet the definition of day of incapacity to be entitled to SSP in *section 151(4), Social Security Contributions and Benefits Act 1992*:

However, *regulation 2, The Statutory Sick Pay (General) Regulations 1982 (SSP Regulations)* was amended by the *Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 (Coronavirus Amendment Regulations)* to introduce a new regulation 2(1)(c), with effect from 13 March 2020. Regulation 2(1)(c) provides that a person is deemed incapable of work where he is:

”isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus disease, in accordance with guidance published by Public Health England, NHS National Services Scotland(d) or Public Health Wales(e) and effective on 12th March 2020.”

Employers should regularly check the public health guidance on self-isolation as it has changed as the pandemic has developed, and it directly affects who is entitled to SSP during self-isolation. It is possible that different advice could be given in England, Wales and Scotland.

The introduction of regulation 2 means that, in most cases, an employee who is in quarantine or self-isolation will be regarded as being incapable of working for SSP purposes.

The government has announced that it will bring forward emergency legislation temporarily making statutory sick pay payable from the first day of sickness absence

The government has also announced that small employers (with fewer than 250 employees) will be reimbursed for any SSP paid to employees in respect of the first 14 days of sickness related to COVID-19.

In the Spring 2020 Budget, the government also announced that a temporary alternative to the fit note will be introduced in the coming weeks which can be used for the duration of the COVID-19 outbreak. This system will enable people who are advised to self-isolate to obtain a notification via NHS 111 which they can use as evidence for absence from work, where necessary. This notification would meet employers’ need for evidence, whilst taking pressure away from General Practices.

## **Absence and pay: no symptoms or diagnosis**

### **Is an employer entitled to send an employee home from work to self-isolate?**

If the workplace and the nature of the role allow for remote working then this may provide the employer with an alternative to suspension for the purposes of self-isolation.

There are a range of reasons that an employer may wish to send an employee home to self-isolate. The employer may be acting out of an abundance of caution (in circumstances where government guidance does not suggest that self-isolation is required), the employee may have had contact with someone who has been infected or travelled to a country with a particularly large outbreak (which may fall within the circumstances in which the government recommends self-isolation), or they may be exhibiting symptoms.

If there is an identified risk that an employee may have been exposed to COVID-19, then it is understandable, in light of an employer's duty to protect the health and safety of other employees, that the employer would wish to keep that employee away from the workplace until the risk has passed.

From an employment law perspective, the employer should consider whether it has an express contractual right to require the employee to stay at home. If not (*as is likely to be the case because this is not a commonly seen contractual clause*) the question is then whether there is an express or implied right for the employee to attend work in these unprecedented circumstances. It would be unusual for the employer to have provided the employee with an express right to attend work regardless of circumstances, and there is no general implied term requiring an employer to provide work provided it continues to pay the employee's wages. It is therefore unlikely to be a breach of implied duties to require an employee to stay at home in these unprecedented circumstances, assuming there are reasonable and non-discriminatory grounds for concern, and the matter is dealt with appropriately, proportionately and sensitively.

Where the employee falls within the category of individuals who are being advised through public health guidance to self-isolate, or where the employee is exhibiting symptoms, then the employer may be entitled to treat the employee as on sick leave rather than suspension.

### **Where an employer sends an employee home from work to self-isolate, what pay are they entitled to?**

An employee's right to pay where their employer sends them home from work will depend upon the precise circumstances of that decision.

Where the employee is able to continue to work from home then, subject to any contractual provision to the contrary, they will continue to be entitled to their normal rate of pay.

If they are not able to do so then consideration would need to be given to the terms of the contract of employment, although most employment contracts will not provide for this type of scenario.

### **Scenario 1: Employer suspends for reason not falling within government self-isolation advice**

Where an employee is suspended by their employer on health and safety grounds, because of a possible risk of infection which does not fall within the government's self-isolation advice, it is likely that they have the right to continue to receive full pay on the basis of the employer's implied duty to pay wages. Some casual employees may have no entitlement to be provided with work and therefore have no entitlement to pay if the employer does not provide them with work due to a fear of possible infection.

Where an employee is willing and able to perform work in accordance with the contract, there is an implied term that the employer has an obligation to pay wages, unless there is a contractual right not to do so.

An employer could argue that the employee is not able to work because of the risk that they pose to colleagues. However, this does not, in itself, affect their ability to come into work and perform their duties so it would be risky to withhold pay on this basis. Withholding pay may also discourage employees from identifying a risk that they may have been infected and indirectly lead to an increased risk of infection in the workplace. An employee in these circumstances will not be entitled to SSP because they are not unfit to work and do not fall within the deemed incapacity provisions in *regulation 2(1), SSP Regulations*.

## **Scenario 2: Employer suspends for reason falling within government self-isolation advice**

Where an employer is considering suspension because an employee falls within the circumstances in which public health advice is to self-isolate then the position in terms of pay may be different. In those circumstances, an employer may direct the employee to return home and seek medical advice. If the employee falls within the category of people who have been advised in government guidance to self-isolate then they will fall within the new deemed incapacity rules for SSP. In those circumstances it is likely that the employer could treat them as being on sick leave and pay them SSP (subject to any contractual sick pay policy).

There is a specific statutory right to be paid when medically suspended, but it is currently limited to very narrow circumstances which are unlikely to apply in a pandemic. The grounds on which this right applies could be extended by the Secretary of State, but it does not currently cover infection or suspected infection with COVID-19.

## **Where an employee refuses to attend work due to fears about coronavirus, what action can the employer take and what pay are they entitled to?**

If the employee can work from home then this may well resolve the issue. If not, the employer would need to consider the current public health advice, the specific reason that the employee is concerned about attending work and whether it would be discriminatory to refuse home working, take disciplinary action, or withhold pay in light of the employee's refusal.

We consider some of the discrimination issues below relating an employee having a disability; *Where an employee refuses to attend work because they have a disability which they believe puts them at high risk of serious illness if they catch COVID-19, can an employer dismiss them, or if not, what pay are they entitled to?*

If there is no discrimination angle, and the public health advice is such that the employee could reasonably be asked to continue to attend work then it is possible that the employee could be investigated for misconduct in terms of their refusal to follow a reasonable management instruction, and their unauthorised absence.

If the absence is unauthorised then the employee would likely not be entitled to pay as they are not willing to attend work.

**Where an employee self-isolates following either a direction by a medical professional or government guidance, what pay are they entitled to?**

Where an individual self-isolates in response to either direction by a medical professional or government guidance they will be deemed incapable under the new deemed incapacity rules for SSP. They will therefore be entitled to SSP, or any contractual sick pay which may apply in this scenario.

**In what circumstances could holiday be used by workers to cover periods of absence?**

The normal rules on taking annual leave under the Working Time Regulations 1998 will continue to apply.

Workers may wish to take annual leave as an alternative to scenarios where they would otherwise be on SSP or nil pay. Workers are entitled to take statutory annual leave during sickness absence but may not be compelled by the employer to do so.

Workers who are not on sick leave can be instructed to take statutory annual leave by their employer, provided that they are given the required level of notice. An employer may give notice ordering a worker to take statutory holiday on specified dates (regulation 15(2), WTR 1998). Such notice must be at least twice the length of the period of leave that the worker is being ordered to take (regulation 15(4)(a)). There are no explicit requirements about the form that this notice must take.

**Absence and pay: symptoms or diagnosis**

**What pay is an employee entitled to where they have mild respiratory symptoms but no diagnosis of Covid-19?**

An employee in these circumstances may be treated as being on sick leave and be paid SSP or contractual sick pay. Although their mild respiratory symptoms may not have ordinarily resulted in them taking sickness absence, the fact that they have symptoms likely brings them within either the normal definition of incapacity, or the deemed incapacity provisions (if they fall within government guidance to self-isolate).

**Employer's duty of care**

**What should an employer do where an employee who is at work starts displaying symptoms?**

The government guidance from Public Health England and BEIS and the Acas guidance, advise that if the employee has not been to one of the high-risk specified areas in the last 14 days, then normal practice should continue. However, if the employee has travelled to one of the affected countries in the last 14 days, they should be removed to an area which is at least two metres away from other people. If possible, this should be a room or area where they can be isolated behind a closed door, such as a staff office. A window should be opened, if possible, for ventilation.

The guidance advises that the affected employee should call NHS 111 from their mobile, or 999 should be called if it is an emergency (if the employee is seriously ill or injured or their life is at risk) and explain which country they have returned from in the last 14 days and outline their current symptoms.

While the employee waits for advice from NHS 111 or an ambulance to arrive, they should remain at least two metres away from other people. They should avoid touching people, surfaces and objects and be advised to cover their mouth and nose with a disposable tissue when they cough or sneeze and put the tissue in a bag or pocket then throw the tissue in the bin. If they do not have any tissues available, they should cough and sneeze into the crook of their elbow.

If the employee needs to go to the bathroom while waiting for medical assistance, they should use a separate bathroom if available.

### **At what point should an employer close the workplace?**

The Acas guidance advises that if someone with COVID-19 comes into a workplace, the workplace does not necessarily have to close.

In England, the local Public Health England health protection team (HPT) will get in contact with the employer to:

- Discuss the case.
- Identify people who have been in contact with the affected person.
- Carry out a risk assessment.
- Advise on any actions or precautions to take.

A risk assessment of each setting will be undertaken by the HPT with the lead responsible person. Advice on the management of staff and members of the public will be based on this assessment.

The HPT will also be in contact with the case directly to advise on isolation and identifying other contacts and will be in touch with any contacts of the case to provide them with appropriate advice.

Advice on cleaning of communal areas such as offices or toilets will also be given by the HPT.

### **Policies and procedures**

#### **What adjustments to absence management procedures will be required in light of Covid-19 sickness absence?**

Employers should be flexible in the evidence of sickness absence they require from employees or workers. For example, an employee in self-isolation is unlikely to be able to obtain a fit note from their GP. In the Spring 2020 Budget, the government announced that a temporary alternative to the fit note will be introduced in the coming weeks which can be used for the duration of the COVID-19 outbreak. This system will enable people who are advised to self-isolate to obtain a notification via NHS 111, instead of a fit note, which they can use as evidence for absence from work.

A further issue that potentially arises is where an employee's absence (whether because of sickness or because of isolation) triggers action under their employer's absence management policy. Employers with such policies should consider informing all employees that a period of absence caused by COVID-19, whether because of infection or due to self-isolation in accordance with government guidance, will be disregarded for the purposes of the absence threshold at which formal action is taken under the policy.

Where an employer does not wish to take this action in respect of all employees, it should bear in mind that employees with some disabilities, such as auto-immune conditions, respiratory conditions or diabetes, are likely to suffer more severe symptoms (and therefore take greater time off work) if they catch the virus, or may be more likely to self-isolate due to the potential risks of catching the virus. To avoid any potential disability discrimination issues arising, employers would be advised to consider disregarding COVID-19 absence for such employees.

## **Can we change our enhanced sick pay scheme to provide that only SSP is payable in the event of absence due to Covid-19?**

In many cases, an employee's sick pay entitlement will be set out in their contract of employment, although the details of the scheme are often set out in a separate policy. It is common for the contracts of more senior employees to specify that they will be entitled to full pay for a specified period of sickness absence.

The employer should therefore first check whether the relevant employees' contracts set out a contractual entitlement to sick pay, or whether they refer to a separate sickness absence policy for details.

### **Amending employees' contractual sick pay entitlement**

Where the relevant employees' sick pay entitlement is set out in their contracts, to amend this will amount to a variation of contract. In summary, employers can only make such changes with:

- **Consent.** Employers could seek the written consent of the relevant employees to the contractual change. While employees are unlikely to agree to a change in terms that is not in their favour, they may be willing to do so where their agreement may help the employer stay in business.
- **Dismissal and re-engagement.** **Where** employees are unwilling to consent to a change in their contractual sick pay entitlement, an employer can consider dismissing them and offering them re-engagement on the revised terms. Even if the affected employees accept the new terms, they will be entitled to claim unfair dismissal in respect of the termination (assuming they have the requisite length of service) and wrongful dismissal, if the employer does not give them the required notice to terminate.
- If the employer wishes to vary the contracts of 20 or more employees, and it intends to dismiss employees who do not consent to the change in their terms, for the purposes of *section 188* of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA), those employees will be classed as dismissed by reason of redundancy. The employer will therefore have a duty to inform and consult appropriate employee representatives and notify the Secretary of State using form HR1
- Employers should also consider:
  - whether there is any relevant collective agreement in place in relation to sick pay
  - Whether the change could indirectly discriminate against a particular protected characteristic, such as disabled employees.

### **Unilaterally imposing the change**

Employees may respond to a change that is imposed on them unilaterally in a number of ways. They may "work under protest" and bring claims for breach of contract or unlawful deductions from wages (where they are only paid SSP during a period of absence). Alternatively, they may resign and claim constructive dismissal.

### **Amending a non-contractual sickness absence policy**

Where the relevant employees' contracts specify that their sick pay entitlement is set out in the employer's separate sickness absence policy, which may be amended from time to time, it will be much easier for an employer to make the change. The employer should confirm the change in writing to employees and ideally ask them to provide written acknowledgement that they have received the notification.

## High risk employees and discrimination issues

**Where an employee refuses to attend work because they have a disability which they believe puts them at high risk of serious illness if they catch COVID-19, can an employer dismiss them, or if not, what pay are they entitled to?**

People who suffer from certain health conditions are at higher risk of serious illness or death if they contract COVID-19. A requirement imposed by an employer to continue travelling to and attending work, or to not pay or to dismiss them due to their absence in this scenario, could amount to discrimination. In addition, if the reason the employee self-isolates is because of a disability that puts them into a high risk category such as an auto-immune disease or a respiratory condition, disability discrimination issues may arise.

**Indirect discrimination.** There may be a case that the employer's provision, criterion or practice (PCP) of requiring all employees to continue to attend work in a pandemic could be indirectly discriminatory against the employee and those who share the employee's disability. In such a case, the employer should consider whether the PCP can be justified as a proportionate means of achieving a legitimate aim.

**Discrimination arising from disability.** Discrimination arising from disability occurs where both:

- A treats B unfavourably because of something arising in consequence of B's disability.
- A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(Section 15, *Equality Act 2020* (EqA 2010).)

Where an employee self-isolates because of their disability and their employer treats them unfavourably because of this by not paying them or dismissing them for unauthorised absence, the employee could have a potential claim under section 15. The employer's actions would be because of "something arising in consequence" of the employee's disability (the employee's decision to self-isolate). As no comparator is required in respect of a section 15 claim, it will not necessarily be a defence for the employer to argue that it would treat all employees who decide to self-isolate without medical instruction in the same way.

The employer may, however, escape liability if it can show that:

- It did not know, and it was not reasonable for it to know, that the employee was disabled; or
- Its treatment of the employee was a proportionate means of achieving a legitimate aim of, for example, maintaining staffing levels in its workplace to meet customer demand.

**Reasonable adjustments.** An employer may be liable for a failure to make reasonable adjustments if it does not facilitate a disabled employee's request to work from home in a pandemic. However, where the employee's role is not suitable for remote working, it will not necessarily be a failure to make a reasonable adjustment for the employer to not continue to pay a disabled employee who self-isolates before seeking medical advice. The EAT has held that the purpose of reasonable adjustments is to facilitate a disabled employee to remain in work, or to return to work. The emphasis is therefore on assisting the employee to work, not to not work. Where an employer decides not to pay a disabled employee who self-isolates, it could potentially be argued that this is hindering the employee from "remaining in work" as few employees can afford to remain employed without pay for the duration of a pandemic. The EAT has, however, commented that the purpose of the legislation is not to treat disabled persons as objects of charity, and these comments were upheld by the Court of Appeal in *O'Hanlon v Commissioners for HM Revenue & Customs* [2007] IRLR 404.

Where a disabled employee refuses to attend work because of the perceived increased risk because of their disability, medical advice should be sought as soon as possible, from the employee's GP or occupational health, to confirm or clarify the potential risks and to see what adjustments, if any, should be made to assist the employee in continuing to work. Where the matter is urgent and there is insufficient time to obtain medical advice, employers may wish to err on the side of caution.

### **How should an employer deal with an employee who has severe anxiety and is afraid to attend work?**

An employer should be sympathetic to any concerns staff may have and try to resolve them to protect the health and safety of the employee.

For example, if possible, the employer could offer flexible working, or allow the employee to take holiday or unpaid leave.

An employee with severe anxiety may find their condition is exacerbated by travelling or being in public places due to the increased risk of contracting COVID-19. If their anxiety prevents them from attending work in these circumstances, it is possible that they may be regarded as on sick leave and therefore entitled to SSP or contractual sick pay.

Where an employee suffers from severe anxiety, this could amount to a disability under the EqA 2010. Medical advice should be sought as soon as possible from a specialist treating the employee, or occupational health, to determine whether the employee is disabled (if there is no recent diagnosis) and, if so, to see what adjustments, if any, should be made to assist the employee in continuing to work, such as home working or flexible hours.

### **What about other high risk employees who choose to self-isolate?**

Some employees may fall into a high risk category in relation to COVID-19 but are not disabled. The World Health Organisation (WHO) has identified that those aged over 70, or who suffer from cardiovascular disease, a respiratory condition, diabetes, an auto immune condition or who are pregnant, are at a higher risk of developing more severe symptoms.

Such employees may wish to self-isolate, even before seeking medical advice. The Acas guidance states that an employer should listen to any concerns staff may have and if they are genuine, the employer must try to resolve them to protect the health and safety of their staff. For example, if possible, the employer could offer flexible working, or allow the employee to take holiday or unpaid leave. Employers should consider whether there are any potential indirect age discrimination issues if they require all employees to be in receipt of either a fit note or written request under regulation 2(1)(b)(i) to be eligible for contractual sick pay (see above).

## **Homeworking**

### **Are we entitled to require an employee to work from home?**

If there is already an established requirement to work from home where appropriate or where instructed to do so (or in the case of a business continuity issue such as a pandemic), then there is unlikely to be an issue in applying that obligation in an effort to contain the spread of COVID-19.

If not, imposing home working would arguably constitute a variation of the contract requiring employee consent. However, where an employee is faced with either being on SSP or nil pay as an alternative, they may well be willing to consent to working from home as a way of preserving pay. There are alternative methods of changing terms and conditions of employment, but in the circumstances and given the time sensitive nature of the COVID-19 outbreak, employee consent is likely to be the most realistic means of validly imposing a home working requirement where none previously existed.

**Can we refuse to allow an employee to work from home if they will also be looking after children who have been sent home from school or nursery?**

In normal circumstances, it would not be appropriate for an employee to work from home while also providing childcare. However, as the COVID-19 outbreak escalates, employers may need to take a pragmatic approach. If all schools and nurseries close, the majority of parents in the workplace will face this issue and putting a blanket ban on working from home while also looking after children may preclude a large proportion of the workforce from performing any duties. In these unprecedented circumstances, employers may be prepared to take a more relaxed and flexible approach to homeworking and allow employees to work around their childcare responsibilities.

Employees with younger children who require constant attention may not be able to work at all while responsible for looking after those children. However, they may be able to split the childcare with the other parent, so that both parents are able to, at least, continue working part-time.

Employees in these circumstances may assert their right to time off to care for a dependant . Time off in these circumstances is unpaid, unless there is a contractual right to pay. Given that school closures could last a relatively long time, it is likely that many employees who consider that they can undertake some work while providing childcare would prefer to do so (rather than assert their statutory right to time off) if the employer is willing to allow them to work flexibly.

**Are there any home-working health and safety issues we should consider?**

Yes. An employer is responsible for an employee's welfare, health and safety, "so far as is reasonably practicable" (*section 2(1), Health and Safety at Work etc Act 1974*). Employers must conduct a suitable and sufficient risk assessment of all the work activities carried out by their employees, including homeworkers, to identify hazards and assess the degree of risk (*regulation 3, Management of Health and Safety at Work Regulations 1999 (SI 1999/3242)*).

**Travel**

**What is the position where an employee is stranded overseas on a work trip?**

If an employee is unable to travel home because they have contracted COVID-19 and are either not permitted to travel or too unwell to do so, the employer could treat them as being on sick leave in terms of pay, although most employers would likely continue to pay full pay in these circumstances. The employer would also need to consider the additional expenses incurred by the employee in terms of accommodation and subsistence and ensure that assistance is provided to make arrangements, and that the employee is reimbursed for such expenses. If medical assistance is required, the employer should ensure that the employee is able to access its business travel insurance policy, and that such other assistance as may be appropriate is provided.

If the employee is unable to travel home because they are subject to lockdown or precautionary isolation and unable to access transport home, similar considerations will apply. However, the employee should continue to receive full pay on the basis that they are only in that situation because their employer sent them overseas.

If there is a breakdown in the pre-arranged transport home (for example, due to flight cancellations), the employer should explore other options to repatriate the employee. The employer remains bound by its implied duties towards the employee, and it is likely that its ongoing responsibilities towards the employee would require the employer to make reasonable efforts to find a way for the employee to return home, at the employer's expense. The contractual position and any policy on overseas travel should also be considered.

### **What is the position where an employee is stranded overseas following a holiday?**

Where the employee is unable to travel home because they have contracted COVID-19 and are either not permitted to travel or too unwell to do so, the employer should treat them as being on sick leave in terms of pay. The employee is entitled to take annual leave if they prefer to do so, but they cannot be compelled to do so.

Where the employee is unable to travel home because they are subject to lockdown or precautionary isolation and unable to access transport, their entitlement to pay will depend upon the precise circumstances.

### **Can an employee still be required to travel to a work event within the UK?**

This will depend upon the current government and public health advice on travelling and attending events within the UK, and the nature of any objections from the particular employee. If there is no public health advice against taking this action then, in principle, employers are entitled to continue to impose such a requirement (assuming the employer is otherwise entitled to require the employee to do so).

However, the employer would need to consider whether the employee falls into one of the high-risk categories. If so, the employer should consider whether it would be putting the employee's health and safety at risk by asking them to travel to and attend the event. It should also consider whether the employee has any rights under the EqA 2010 if the reason that they are at high-risk is linked to a protected characteristic. For example, an employee who suffers from a disability which suppresses their immune system or affects their respiratory system may claim that it is indirect discrimination or discrimination arising from disability to ask them to travel in these circumstances.

The employer should consider whether attendance at the event is really necessary, even if the employee does not fall into a high-risk category, given that many employees will have understandable anxiety about long journeys on public transport and attending large events.

### **Can an employer restrict employees' travel during non-working time?**

Employers could consider instructing employees not to travel to areas where the government advice is to avoid travel in light of the coronavirus outbreak. However it is questionable whether this could be regarded as a reasonable management instruction given that it dictates what an employee can do with their leisure time, rather than how to do their job.

Even where the employer attempts to impose a new travel restriction of this sort, it is questionable whether the employee commits a disciplinary offence in contravening it, given that it is unlikely to be regarded as reasonable to restrict employees' leisure activities.

**Where an employee returns from a holiday in a high-risk area, can they be required to stay away from work?**

It is likely that an employer could require employees who return from a high-risk area to remain at home. There could be a strong health and safety argument for taking that approach.

Whether they are entitled to SSP or full pay will depend upon whether they fall within the guidance from the relevant public health authority on self-isolation. SSP is only payable under the deemed incapacity provisions for self-isolation where the employee is following public health advice from Public Health England, NHS National Service Scotland or Public Health Wales.

If the current advice is to self-isolate upon return from the country in question then the employee could be treated as sick and paid SSP (subject to contractual sick pay). If the current advice on self-isolation does not cover return from the country in question then it is likely that the employer could require the employee to remain at home, but they would remain entitled to full pay.

**Dealing with the economic impact: changing terms and lay-off**

**What action should employers be taking now?**

The action an employer should be taking will depend, to some extent, upon the nature of the workplace, the roles carried out and the demographic of the workforce, but some of the issues that employers should consider from an employment law perspective include:

- The employer should consider its contractual sick pay policy, and the practical implications on withholding pay or reducing pay to SSP. The employer will wish to balance the costs of paying full pay where they are not legal obliged to do so with the indirect costs (in terms of spreading the virus and increasing sickness absence) where employees attend work following potential exposure to the virus, or even when exhibiting symptoms of it, in order to continue receiving pay. Some employers are introducing a new right to full pay for a finite period, in circumstances where the employees would otherwise be in receipt of nil pay or SSP.
- Similarly, consideration should be given to how absence management processes and trigger points may be adjusted to reflect self-isolation and high numbers of diagnosed cases.
- Whether the infrastructure is in place to allow large numbers of employees to work from home. Is the IT system prepared for a high number of employees to work remotely? Do employees have the hardware necessary to work from home? Will additional guidance need to be issued to reduce demand on the IT systems if many people will be working remotely simultaneously?
- Some employers are physically separating the workforce into separate units in an attempt to minimise the risk of COVID-19 spreading throughout the whole workforce.
- Consider appointing a coronavirus taskforce who are responsible for keeping track of developments, updating internal guidance and communicating with workers.

- Clear communication with workers on the employer's policy on homeworking, work travel and precautionary isolation. Provide regular updates. Ensure that employees are asked to speak to their manager upon return from any overseas travel prior to attending the workplace, and that they are notified of the government's position on self-isolation as it develops, as well as the employer's position if more stringent.
- Ensure that employees have provided up to date personal details.
- Plan for mass closures of schools and nurseries. Identify business critical roles and how they can be maintained. Consider whether the business would be best served by encouraging employees to work flexibly and making that facility available, or by encouraging the use of statutory rights to time off to care for dependants, annual leave or parental leave.
- Consider what pay employees will receive if they work part-time to fit around childcare, and the benefits of acting flexibly to allow as many employees as possible to continue working
- Provide clear information to managers on how to deal with an employee who attends work displaying symptoms, or who has potentially been exposed to the virus.
- Identify any high-risk employees and consider whether there are any potential discrimination implications which mean a more cautious approach is required.
- Critically consider whether any domestic and international work travel and events are necessary. Consider whether internal meetings can be carried out through virtual meetings.
- Where travel is necessary to high risk areas, consider what protective measures should be put in place and ensure that protective equipment is sourced and ordered.
- Identify the minimum safe level of workers required to continue operating, and how that can be maintained in the worst-case scenario. Identify the point at which the business may need to cease operating temporarily and consider the employment law consequences.

**If the workplace temporarily closes due to insufficient numbers of employees being able to attend work or the impact of government restrictions, what pay are employees entitled to?**

The answer will depend upon a number of factors including the circumstances of the employees' absence. We have assumed for the purposes of this answer that the employer envisages that the closure will be temporary and that it intends to reopen once sufficient employees are able to attend, and any government restrictions allow it to do so. We have also assumed that alternative to closure (such as finding temporary cover to fill the gaps in the workforce or introducing homeworking) have not prevented the closure.

Those who are already being treated as unable to work due to either self-isolation or diagnosis with COVID-19 will remain on sick leave until they are fit to return to work. At that point, they will be treated the same as the employees who were sent home at the point of closure. Appropriate communication should take place to ensure that they are aware of their position, and any transition from sick leave to another form of leave or lay-off.

Any temporary closure of the business will be treated as the employer's decision and so, in principle, the employees will remain entitled to full pay, unless there is no contractual requirement to offer work (which may be the case for casual employees). This is on the basis that those who are not on sick leave are willing and able to work, and it is their employer's decision to temporarily close the workplace which is preventing them from performing duties.

For most employers, this will present significant economic hardship: if the business is forced to close and cut off revenue, but also required to continue paying employees then it is easy to see how this could potentially lead to permanent closures, insolvency and redundancies. The government has announced a number of measures to help businesses survive the economic hardship caused by the pandemic. However, it is likely that many will need to take action to reduce the payroll on a temporary basis. Some of the options include:

- Consulting with employees and trade unions or other representative bodies and try to agree a temporary reduction in pay and benefits for the duration of the crisis. Under normal circumstances, employees and their representatives would be unlikely to agree to such measures. However, where the alternative is closure and job losses, there may be more of an appetite to reach an agreement.
- Considering lay-off, if the employer has the contractual right to take that approach. If the employer does not have the contractual right to lay-off then it may either take the risk in doing so in breach of contract, or try to obtain consent to do so.
- Give notice to workers to take holiday. Employers are entitled to give notice to workers to take statutory annual leave, provided there is no contrary contractual right. Although this would not save the employer money in the short term, it would ensure a full workforce once the business reopens and allow full focus on rebuilding the business.
- Seek volunteers to take unpaid leave.
- Seek volunteers for voluntary redundancy.
- Consider whether there are workers and contractors whose contracts can be terminated without the risk of an unfair dismissal or redundancy payment claim.
- If the longer-term impact of the pandemic is likely to mean that a reduced headcount will be required even when the business reopens then the employer may need to consider redundancies.

If the closure leads to insolvency then the employer should seek independent advice from a professional outside of BPIF legal, our legal team are not qualified to advise upon this area of law.

### **In what circumstances should the employer consider lay-off and short-time working?**

Laying off employees means that the employer provides employees with no work (and no pay) for a period while retaining them as employees; short-time working means providing employees with less work (and less pay) for a period while retaining them as employees. These are temporary solutions to the problem of no or less work. However, if employees are laid-off or put on short-time working in circumstances where the employer does not have the contractual right to do so then the employer will be in fundamental breach of contract entitling the employee to resign and claim constructive dismissal.

Lay-off may need to be considered in the following scenarios:

- A downturn in work due to the effect of COVID-19 on suppliers and customers means that fewer employees are required on a temporary basis.
- Temporary closure of the workplace due to insufficient employees being able to work.

Short-time working may need to be considered where there is:

- A downturn in work due to the effect of COVID-19 on suppliers and customers meaning that the business does not need all employees to work their contracted hours.

Employees who are already unable to work, for example due to sickness or (arguably) medically advised self-isolation, cannot be laid-off.

### **What help for struggling employers is offered by the government?**

In the Spring 2020 Budget, the government announced several measures to help employers who are struggling with the economic consequences of COVID-19. These include business rates reliefs, a Coronavirus Business Interruption Loan Scheme, a grant scheme for small businesses, and a dedicated helpline for those who need a deferral period on their tax liabilities. If you are looking for information on support for businesses please click into the link below.

<https://www.gov.uk/government/news/coronavirus-covid-19-guidance-for-employees-employers-and-businesses>

### **Data protection issues**

#### **Do employees have the right to be notified if colleague/customer develops the virus?**

The Data Protection Act 2018 defines information about an employee's health as a "special category of personal data". This means that it can only be processed by the employer in defined and restricted circumstances.

Employees must be notified of the infection risk as soon as possible. However, the identity of the individual should not be disclosed. An employer should simply advise that an employee who has been in the workplace has been infected and that appropriate precautions should be taken.

The ICO has confirmed that it will take a pragmatic approach to enforcement in light of the pandemic. It has issued *ICO: Data protection and coronavirus: what you need to know* which confirms that employers can disclose to colleagues that an employee has contracted COVID-19 provided that they do not provide more information than is necessary in terms of naming the individual.

### **Rights of other types of workers**

#### **Where an employer decides to shut down an office and send all employees home on full pay, are its agency workers entitled to receive equivalent pay?**

Where an employer decides to exercise its discretion to pay employees in full, this will not be covered by the statutory guarantee payments regime in connection with lay-off.

Agency workers are entitled to "the same basic working and employment conditions" as employees recruited to do the same job (*regulation 5(1)*, Agency Workers Regulations 2010).

Pay is included as a "relevant terms and condition" and is defined as "any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise but excluding any payments or rewards [listed in regulation 6(3)]."

The Agency Workers Regulations guidance provides the following non-exhaustive list of pay for these purposes:

- Basic pay.

- Overtime pay.
- Shift or unsocial hours allowance or risk payments
- Payment for annual leave.
- Certain bonuses or commission payments.
- Certain vouchers or stamps with a monetary value.

There are a number of exclusions; occupational sick pay, benefits in kind and guarantee payments on lay-off are specifically excluded from the definition of “pay”.

## **Government and Acas guidance**

The COVID-19 pandemic is continually changing and the government and Acas advice for employers is being updated as the situation develops. Employers should keep track of the guidance for employers from the following sources:

- *Public Health England and BEIS: COVID-19: guidance for employees, employers and businesses* (applicable in England).
- *Welsh Government: Coronavirus (COVID-19): employers and businesses guidance* (applicable in Wales).
- *Health Protection Scotland: COVID-19: Information and Guidance for Non-Healthcare Settings* (applicable in Scotland).
- *Acas: Coronavirus: advice for employers and employees* (relevant to employers throughout the UK).
- *WHO guidance: Getting your workplace ready for COVID-19* (applicable globally).

For information on the circumstances in which individuals should self-isolate see the following sources:

- *Public Health England: COVID-19: stay at home guidance* (applicable in England).
- *Public Health Wales: Novel Coronavirus (COVID-19) - Self-isolation advice* (applicable in Wales).
- *Health Protection Scotland: Coronavirus (COVID-19) and NHS Inform: Coronavirus (COVID-19)* (applicable in Scotland).

## **Resource History**

Thomson Reuters Practical Law