

COVID-19 - Frequently Asked Questions

With the escalating situation now facing the UK and Europe in light of the spread of the Coronavirus, we have prepared the following FAQs to help employers navigate through this difficult period from an employment law perspective.

However, the fast-moving nature of the current situation and the vast number of scenarios which can arise mean that it is difficult to give 'one size fits all' advice. Therefore, we also encourage all employers to obtain legal advice on their individual arrangements and action plans.

1. Initial Steps
2. Statutory Sick Pay and Contractual Sick Pay
3. Sickness Absence Issues
4. Overseas Travel Advice
5. Emergency Lockdown
6. Employment Law Issues



1. INITIAL STEPS

What should we (employers) communicate to our employees?

Employers should maintain regular and open communication channels with employees throughout this difficult period. Employees are likely to be concerned about several issues relating to Coronavirus ranging from infection risk within the workplace to how their own employment will be affected. Employers are advised to send out regular bulletins to staff providing as much information as possible to:

Demonstrate the practical steps that the Company is taking to maintain a safe workplace and prevent the spread of the virus

Set out the procedures under which those with Coronavirus symptoms or who are required to self-quarantine should report to the Company

Set out the measures which the Company has in place for those who have Coronavirus or who are otherwise required to self-isolate in respect of matters such as sick pay and homeworking

Set out the measures that will be adopted to monitor any home working arrangements to ensure adequate productivity, e.g. if disciplinary action will be used in the event of employees abusing home-working arrangements

Set out the emergency measures which the Company may take in the event of the workplace being closed

What are the practical steps we can take to prevent infection and protect employees?

There are several practical steps open to employers.

The risk of transmission within the workplace can be reduced through basic hygiene measures such as the provision of hand sanitisers and tissues to staff and encouraging their regular use. Employers should ensure that there are clean places to wash hands with hot water and soap and encourage everyone to wash their hands regularly. Where employees are dealing regularly with the public it would be appropriate to distribute protective gloves and face masks.

Having seen the recent panic buying within stores and the trade restrictions from international countries, employers should also seek to put measures in place to ensure they can either continue to provide the hygiene measures throughout the duration of the infection, or have a back up plan (e.g. home working arrangements). While we do not encourage panic buying, business should assess their current supplies and ensure they remain sustainable or that alternative measures are put in place.

Employers may also wish to implement changes to working practices to limit employee exposure. This could include limiting non-essential travel, arranging meetings remotely via telephone or Skype, encouraging greater use of home working and/or spreading employees through-out the workplace to avoid close contact. Government guidance recommends a distance of 2 meters to avoid cross contamination, therefore businesses should consider a reallocation of staff to help achieve this.

Employers should also ensure that their personnel records are accurate and up to date. It is good practice to identify whether any employees are at particular risk due to underlying health conditions and whether adjustments can be made for these employees. Individuals with the following health conditions are identified to be at higher risk and may require stricter measures to mitigate their risk of infection:

- Diabetes
- Asthma
- Heart disease
- Lung disease
- Cancer
- Over 70+ years

Most notably, for those aged 70+ years, the Government has announced plans (this weekend – 14 March 2020) for this group to undertake a period of self-isolation over a prolonged period to commence in the forthcoming weeks. This period may last up to 3-4 months; therefore, employers should assess how many employees within their business will be affected and what measures can be offered to the employee during any self-isolation period.

Employers should also monitor whether employees are intending to travel abroad and whether precautions are necessary upon their return, e.g. self-isolation or home-working arrangements.

Finally, employers should ensure that there are procedures in place to deal with employees who may have Coronavirus either within or outside of the workplace. This may include the designation of a Coronavirus officer as a central point of contact for employees reporting symptoms.

2. STATUTORY SICK PAY AND CONTRACTUAL SICK PAY

What is Statutory Sick Pay and when is it payable in coronavirus cases?

Statutory Sick Pay (SSP) is the minimum payment employers are legally required to make to employees who are absent from work due to ill-health / sickness. The current rate of SSP is £94.25 per week and it is payable for up to 28 weeks.

All employers are required to pay SSP for staff who are absent from work due to sickness although some employers will have enhanced schemes under which employees are entitled to full pay for a period of time (see below).

Due to the emergency nature of the situation around Coronavirus the government has made changes to the rules around SSP:

- For suspected Coronavirus cases, SSP is now payable from Day 1 of absence rather than Day 4 under normal SSP rules.
- SSP is available to anyone required (on government guidance) to isolate themselves from other people in such a manner as to prevent infection or contamination with Coronavirus (even if they are not personally experiencing symptoms).
- The first 14 days of SSP paid out by small employers (those with fewer than 250 employees) in Coronavirus or suspected Coronavirus cases can be reclaimed from the government.

SSP should be paid when Coronavirus is suspected rather than proven. Current government guidance is for employees with even mild symptoms to self-isolate for 7 days irrespective of diagnosis so in most circumstances it will be unreasonable for employers to withhold SSP unless there is good reason to suppose that an employees' absence is not genuine.

Will employees need a sick note to receive SSP?

No, in an attempt to limit the number of people attending GP surgeries, employees can obtain a sick note through NHS 111. Even this may not be possible due to the pressure on the service.

What is Company (Enhanced) Sick Pay and when is it payable in coronavirus cases?

Company (or Enhanced) Sick Pay (CSP) is any sick pay which is above the minimum of Statutory Sick Pay and usually entails an employee receiving full pay for a period of time. It can be:

- Contractual - where it is written into an employee's contract and there is a legal requirement for a company to pay it; or
- Discretionary – where there is no legal or contractual requirement for a company to pay it but they can exercise their discretion to do so.

If an employee has confirmed or suspected Coronavirus, any contractual CSP will be payable in the same manner as any other sick leave situation. Failure to pay contractual CSP will give rise to a potential breach of contract claim and/or unlawful deduction of wages claims.

If the CSP is entirely discretionary (non-contractual), there will be no requirement to extend this offering to Coronavirus cases.

As with SSP, employers are encouraged to relax the requirement for a fit note as this will be difficult for employees to obtain.

For employees who are required to self-isolate (on government guidance), but who are not experiencing any symptoms, will be entitled to SSP and the Company will have discretion to pay any CSP. For example, as the employee is not actually sick, they would not be treated as on sick leave for the purposes of CSP. However, in this situation, we would encourage employers to offer home-working arrangements so that employees are not subject to any financial hardship. This situation is most likely to arise for employees who have travelled abroad and are placed in self-isolation on their return to the UK (on government guidance).

If employers do not intend to extend CSP entitlement to employees who are required to self-isolate but do not experience symptoms, this should be communicated to staff at the earliest opportunity to avoid any misunderstandings.

3. SICKNESS ABSENCE ISSUES

An employee phones in sick with suspected Coronavirus. What should I do?

First and foremost, do not encourage employees to come into the workplace.

Employers should firstly discuss symptoms with the Employee. Assuming they are consistent with Coronavirus (e.g. high fever, new consistent cough, shortness of breath) they should be placed on sick leave. Current Home Office guidance is for Employees with even mild symptoms to stay at home for 7 days.

If symptoms persist employees should then be encouraged to obtain a medical assessment through NHS 111:

- If NHS 111 advises that they do have suspected Coronavirus, then the employee should remain at home for as long as advised
- If NHS 111 advises that they do not have suspected Coronavirus, then the employee should be able to obtain an GP fit note for their symptoms in the ordinary way.

Clearly there is more pressure than usual upon both NHS 111 and GP services so employers should exercise discretion and flexibility in allowing staff who are symptomatic to stay off on sickness absence without the usual certification.

If an employee has mild symptoms and feels able to undertake work at home, this is an option for employers. This option will be particularly attractive to those employees who would otherwise only receive SSP for the period of isolation. In such circumstances, this option should be discussed with the employee to reach an agreement. However, if the employee is not fit to work from home, employers should insist that they take the period as sick leave.

An employee presents with symptoms of Coronavirus in the workplace. What should I do?

The symptoms of Coronavirus can vary between individuals, but common symptoms are fever, new dry coughs and sometimes respiratory problems. Some of these symptoms are in common with influenza although Coronavirus sufferers are less likely to exhibit common cold symptoms such as sneezing and excess phlegm.

If an employee presents in the workplace with Coronavirus symptoms it is advisable to immediately send them home, following which you can then (remotely) discuss their symptoms and ascertain whether they have had a medical assessment.

If their symptoms are confirmed as Coronavirus, it is recommended that you identify anyone else who has had close contact with the employee to ascertain if they should also be sent home as a precautionary measure. Employers should also consider if a decontamination exercise of the workplace is required.

As the employee will be presenting symptoms of ill-health (whether that be Coronavirus or not) the employee would be entitled to sick pay.

What if employees do not consent to being sent home?

As noted above, some employees will not want to be go off work on sick due to the loss of pay. If employees do not consent to being sent home, employers have two options:

1. Send them home on special leave ('medical suspension'). This would generally be on full pay until their symptoms can be assessed; or
2. Treat their refusal as a potential misconduct issue. As an employer, it is a reasonable request for employees to take sick leave when they are ill or suspected of illness.

Whichever option an employer adopts, it is recommended that further legal advice is obtained to ensure employers follow the correct process. Employers are also encouraged to notify employees in advance that it could be deemed an act of misconduct if an employee were to present at work, knowing or suspected to have Coronavirus.

An employee is not unwell but does not wish to attend work due to the risk of transmission. How should we treat them?

If an employee is not unwell and is self-isolating, then they are not classifiable as being off on sick. In these circumstances they are technically on unauthorised absence and are not entitled to pay.

Under normal circumstances employers would generally regard this as a conduct issue to be considered under the disciplinary policy. However, under the unusual circumstances of Coronavirus employers are advised to be sensitive in dealing with these matters as employees may have legitimate fears, particularly those with underlying health conditions.

The first step is to speak to the employee, to discuss their concerns and consider whether some form of agreement can be reached. This could involve addressing the employee's fears, so they feel able to attend work, agreeing a period of home working or a period of unpaid leave. We would advise that in current circumstances disciplinary sanctions should be an absolute last resort.

4. OVERSEAS TRAVEL ISSUES

An employee has travelled back from a Coronavirus affected area and is going into a 14-day self-isolate based upon government advice. How should they be treated?

The Home Office website contains a list of destinations from which individuals returning to the UK are advised to self-isolate. This includes:

- Destinations from which individuals should self-quarantine irrespective of symptoms (currently Italy, Iran, parts of Korea and China).
- Destinations from which individuals should self-quarantine if they have a cough, fever or shortage of breath, however mild (this is a much longer list which covers most of East Asia).

Both lists are changing regularly, and employers are advised to monitor the Home Office website.

There was previously some dispute about whether individuals who were advised to self-isolate could be legally classed as 'sick' particularly if they didn't present with symptoms. However, it was confirmed by the Health Secretary Matt Hancock on 3rd March 2020 that employees advised to self-isolate can be classified as sick and are eligible for SSP (as above).

Being classed as sick is unlikely to be attractive for many employees required to self-isolate, particularly if they will lose income due to the low rate of SSP which is currently £94.24 per week. It is therefore advised that employers should look at other options before classing employees as sick. Many employees will be able to work from home if they are provided with the technology to do so and it is advised that employers should seek to facilitate home working where possible. Employees should also be given the option to maintain full pay by using up outstanding annual leave.

An employee wishes to travel to a coronavirus affected area during their annual leave. How should we deal with the situation?

Employees who travel to Coronavirus affected areas are taking a personal risk. However, the courts have generally taken the view that it is not the role of employers to regulate the private lives of their employees. Employees can and do regularly participate in risky activities during their leisure time including skydiving, skiing and mountaineering. Whilst the Coronavirus risk is arguably different from these as involves the risk of transmission to others, employers would risk breaching trust and confidence were they to take measures to prevent an employee from travelling (such as cancelling annual leave or threatening disciplinary sanctions). A more measured approach would be to have a discussion with the employee to ensure that they are aware of the risks particularly in respect of any underlying health conditions.

If the employee decides to travel, they will need to be dealt with in accordance with the advice set out above when they return to the UK. Therefore, if government advice provides that they should self-isolate they should be treated as being on sick leave for SSP purposes for the 14-day self-isolation period. Any entitlement to CSP will then be at the discretion of the employer. However, to avoid any financial hardship, employers are encouraged to offer homeworking arrangements to minimise the effect on employees' pay.

An employee does travel abroad and become stuck due to a lockdown in the country they are visiting. How should we deal with the situation?

In these circumstances the employee is not classifiable as being sick as they are neither unwell nor self-isolating. Our view is therefore that this is a discretionary matter and that it is permissible to class this as period of unpaid leave as the employee is not available for work.

5. EMERGENCY LOCKDOWN**If we must close the workplace due to emergency lockdown what should we pay our staff?**

Where workplaces become contaminated with Coronavirus employers may decide that they have no option but to close the workplace.

The first consideration in these circumstances is whether employees have the capacity to work from home. If employees can work from home this is likely to be beneficial for both parties as the employee will receive full pay and will also remain productive during the period of lockdown. Employers are therefore advised to make provision for home working where possible.

Where employees cannot work from home due to the nature of their role, they can potentially be placed on lay-off until the lock-down period is over. Staff on lay-off are entitled to statutory guarantee pay only which is currently £29 a day. Lay-off can only be used where there is a contractual lay-off clause so employers should check their contractual documentation.

If there is no contractual lay off clause then employers may have no option but to pay employees full-pay. Clearly this is unlikely to be sustainable in the longer-term and employers should engage with employees, employee representatives and trade unions (where recognised) to discuss viable alternatives to protect jobs and the future of the business.

Employers also have the option of placing employees on annual leave (please see below) or seeking an agreement with the employees to reduce their hours and pay, or a period of special unpaid leave. In particular, if schools close parents are likely to require time off work which can be treated as unpaid leave.

In some cases, we understand that some employers will need to reduce their headcount to help save costs, therefore a redundancy / restructure exercise may also be required. We are currently working with businesses to help assess their current workforce and longer-term sustainability plans to identify when redundancies may be required and their associated costs. Please see below for further information.

Can we require staff to take annual leave?

Yes, providing sufficient notice is given employees can be required to take their annual leave at specific times. The requisite notice is at least double the number of days leave which is being taken. This is also a short-term measure which can be used to maintain staff incomes during closure periods.

How should working parents be treated during a period of school lockdown? Do I need to pay them?

Working parents have the right to take unpaid leave to look after their children. However, the statutory scheme is intended to cover an employer for a short period in an emergency and it is likely that school closures or a wider lockdown would last for a much longer period.

In a long-term lockdown, employers will have to discuss with working parents how their leave should be treated. If employees can work from home alongside their childcare responsibilities, then employers are advised to be flexible in accommodating this. If this is not possible then other options are allowing parents to take their annual leave entitlement or agreeing a longer period of unpaid leave.

6. EMPLOYMENT LAW ISSUES

Are there employee conduct issues which may arise from the context of Coronavirus?

Yes, the specific circumstances of Coronavirus may give rise to employee misconduct issues.

There is the clear possibility that some employees will seek to exploit the current circumstances to obtain sick pay under false pretences. To some extent this is the same as in any employee sickness absence scenario, although the greater difficulty of obtaining medical evidence at present means that employees will have to have a greater degree of trust in their employees. However, if there is evidence that this trust is being abused (such as social media posts which indicate that an employee is not unwell or self-isolating) it will be permissible to treat this as a disciplinary matter. Employers are advised to notifying employees in advance what their expectations are of employees during Coronavirus sickness, homeworking or self-isolation.

The greater use of homeworking may also give rise to conduct and performance issues as employees will be more difficult to monitor. Employers are therefore advised to consider measures which can be taken to monitor performance whilst homeworking such as IT monitoring and the use of timesheets.

What is the advice for employers who are struggling and considering redundancies?

Coronavirus is certain to harm the economy and some employers may already have decided that their business is unsustainable at current staffing levels. If this is the case the situation is no different to any redundancy scenario so employers should consider:

- The relevant collective consultation periods that apply. If an employer is considering making 20-99 employees redundant within a 90-day period, collective consultation required is at least 30 days. If an employer is considering making 100 or more employees redundant within a 90-day period, collective consultation is extended to at least 45 days.
- The potential redundancy costs. The total redundancy costs will include any redundancy payments which are made plus ancillary payments such as notice pay and holiday pay. Employees with less than 2 years' service do not qualify for a redundancy payment.
- Timing. Not only should businesses consider the timing of collective consultation periods that may need to be adopted, but also the notice periods of any redundant employees.
- Potential alternatives to redundancy. Staff and trade union representatives may be agreeable to alternatives to redundancy to save jobs in the long-term, particularly in the extreme and unusual circumstances of Coronavirus. Alternatives may include changes to terms and conditions such as reduced hours, pay or other benefits.

We are currently working with businesses to assess potential cost saving measures that will need to be implemented over the next few months and how to plan for such measures. If your business is looking to implement such measures, we recommend that you obtain legal advice before making any announcements. Please note, any unilaterally changes to employees' terms and conditions of employment may unnecessarily expose your business to breach of contract and/or constructive unfair dismissal claims. Please therefore seek advice before implementing such measures.

As the above illustrates, there are a vast number of circumstances which arise under Coronavirus and a lot of issues are heavily contextual and will depend upon specific facts. Our advice is to act cautiously and with the benefit of legal advice. The Acuity employment law team is available to help you.

Claire Knowles – Partner, Head of Employment

Mark Alaszewski - Associate

Rebecca Mahon - Solicitor

Amelia Wheatstone - Solicitor

Adam McGlynn - Trainee Solicitor