

COVID-19 (Coronavirus) and Employment Law Guidance



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The COVID-19 pandemic is continually changing and the government and ACAS advice for employers is constantly being updated as the situation develops. The advice set out in this booklet is not intended to be an exhaustive or comprehensive statement of the law in this area, but rather an overview of the position for practical purposes. The law set out in this booklet is correct as at 17 March 2020. However, we strongly recommend that employers keep track of the guidance from the various sources set out in the List of Resources section on page 14 for the complete and up to date position.

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1. Sending an Employee Home

- An employer may wish to send an employee home for any of the following reasons:
 - (a) to self-isolate;
 - (b) out of an abundance of caution;
 - (c) the employee may have had contact with someone who has been infected or travelled to a country with a particularly large outbreak; or
 - (d) the employee may be exhibiting symptoms.
- The employer should consider whether it has the right to require the employee to stay at home and not attend work. An employer is not normally required to provide the employee with work as long as it continues to pay them. An employer will therefore be entitled to require the employee to stay at home in these circumstances.

2. Working from Home

- If the workplace and 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.
- If there is already an established requirement for the employee to work from home, then there is unlikely to be an issue in applying that obligation in an effort to contain the spread of COVID-19.
- In the absence of any such requirement, imposing home working will arguably amount to a change to the employee's contract which requires the employee's 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 an employee's 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.

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- Where home working is being newly introduced, or expanded, the employer should ensure that the health and safety implications have been considered and that the necessary infrastructure is in place.

3. School Closure and Childcare

- It would not normally 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 wish to assert their statutory 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.

4. Absence and Pay

Medical Suspension

- An employee has the statutory right to be paid when they are medically suspended, but this 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.

- 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.
- 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. 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, the employer normally has an obligation to pay their 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 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 set out below.
- 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 discussed below. 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).

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- If an employee refuses to attend work due to fears about coronavirus, they may be able to work from home which will 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. If there is no discrimination element 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 it is unlikely that the employee is entitled to pay as they are not willing to attend work.

Mandatory isolation

- Where an employee is required to self-isolate or is subject to mandatory quarantine or detention underpinned by a legal obligation to stay away from the workplace then it is likely that they would not be regarded as "able" to work with the result that they would not be entitled to pay (assuming they are unable to continue working remotely from the quarantine location).
- However, it is likely that an employee who is forced to abstain from work because of compulsory detention or other restrictions would be entitled to SSP under the deemed incapacity provisions (see below).
- If the employee has the facility to work from the location to which they are quarantined, and they are well enough to do so, then this should be possible provided that the restriction imposed upon them does not explicitly or implicitly prevent them from working.

5. Statutory Sick Pay (SSP)

- An employee must be absent from work due to incapacity to qualify for SSP. Where an employee has not been diagnosed with COVID-19 or exhibited symptoms, their absence is unlikely to meet the definition of "incapacity".

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- The new Coronavirus Regulations 2020 state that a person is deemed incapable of work where he or she is isolating themselves from other people to prevent infection or contamination with coronavirus disease. This means that an employee who is in quarantine or self-isolation will be regarded as incapable of work and therefore entitled to SSP.
 - Those caring for someone in the same household who is exhibiting symptoms of COVID-19 is not explicitly covered by the new Regulations. The carer would only be covered by the new rule on deemed incapacity if the public health guidance also required them to self-isolate.
 - SSP will be payable from the first day of sickness absence related to COVID-19.
 - 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.
 - A temporary alternative to the fit note will be introduced shortly which can be used for the duration of the COVID-19 outbreak. This 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. This will meet employers' need for evidence and remove pressure from GP's.

6. Holiday

- Workers may wish to take annual leave as an alternative to scenarios where they would otherwise be on SSP or nil pay.
- The normal rules on taking annual leave under the Working Time Regulations 1998 will continue to apply. 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.

7. High Risk Employees and Discrimination issues

- 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.
- 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 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.
- 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.
- Some employees may fall into a high-risk category in relation to COVID-19 but are not disabled. The WHO has identified that those aged over 60, 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.

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- 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 the Coronavirus Regulations.
 - There have been reported incidents of racial harassment of Asians in relation to COVID-19. Unfortunately, there is the potential that employees may be harassed by colleagues or customers in the workplace because they are perceived to be at a greater risk of having the virus.
 - For these purposes, anything done by an employee in the course of their employment is treated as having also been done by the employer. The employer can be liable for harassment in these circumstances, whether or not the harassment is done with the employer's knowledge or approval.
 - There is a defence available to an employer if it can show that it took "all reasonable steps" to prevent the employee from doing the discriminatory act or from doing anything of that description. Employers would be advised to establish a zero-tolerance approach to harassment in the workplace, which is communicated both internally and externally, ensure all workers are aware of their anti-harassment policy and provide training to all staff on how to recognise harassment and what is inappropriate behaviour.

8. Travel

- Whether an employer can require an employee to undertake work-related travel overseas will depend upon the nature of the Foreign and Commonwealth Office (FCO) advice on travel to the areas of the country in question. It would not normally be appropriate to continue to require work travel to areas which the FCO has advised against travelling to. In most cases it would not be a reasonable request to require travel to such areas, and it may breach the employer's health and safety obligations, and the obligation of trust and confidence, to impose such a requirement on employees. It could even result in a personal injury claim should the employee contract the illness

while undertaking work-related travel in these circumstances.

- There will be some roles where the nature of the job is such that the employee can be reasonably expected to travel to areas which are dangerous in some way. In those, relatively unusual, cases where travelling to the area where COVID-19 is particularly prevalent is part of the role, the employer would still need to consider its health and safety obligations and what measures should be put in place to minimise the risk. The employer should also consider whether the employee in question has a pre-existing health condition, or other characteristic, which puts them at higher risk of contracting COVID-19 and developing a serious illness.
- If an employee is stranded whilst working abroad and 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.
- 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. 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.
- Where the employee is unable to travel home after being abroad on holiday 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.
- Whether an employee can be required to travel to a work event within the UK will depend upon the current government and public health advice, 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).

- The employer would, however, 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 Equality Act 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.
- Employers may wish to consider restricting an employees' travel during non-working time, for example 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.
- The employer could also consider advising the workforce that anyone who does travel to such an area will be required to remain at home on their return, and that contractual pay (including contractual sick pay) will not be payable in respect of such self-isolation. The employer would need to consider whether taking that approach amounts to a breach of contract or unilateral change in terms and conditions.
- 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.
- It is likely that an employer could require employees who return from a high-risk area to remain at home. 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.

9. Changing Terms, Lay-off and Short-Time Working

- **Lay off** is a form of temporary redundancy which occurs where a business says to an employee *“we’ve got no work for you, go home, we’re not going to pay you”*. 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; or
 - Temporary closure of the workplace due to insufficient employees being able to work.
- **Short-time working** occurs where a business says to an employee *“we have less work for you, we are going to supply you with ‘less than half’ of your normal amount of work, and we will only pay you for the work that you do*. 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.
- In order to send people home on either Lay Off or Short Time (together “LOST”) there needs to be a specific provision in the employee’s contract saying that this is allowed. The essence of LOST is that the employer is reserving the right not to pay them, even if they are ready and willing to work. The reality is that if LOST isn’t in the contract then the employer cannot do it. But these are unprecedented times. Whatever the strict legal position employers should seek wherever possible to find flexible solutions and work with their employees to see if they can get agreement on reducing hours/cutting pay/changing roles/temporary unpaid leave etc. Employers should present this to their employees on the basis that you are trying to keep the business running and avoid redundancies wherever possible. Employees can agree to vary their terms even where there is no contractual right to “LOST” and this can be agreed on a temporary basis for say one

month to be reviewed at the end of that period.

- If LOST is in the contract, employees are entitled to a “guarantee payment” of £29 per day (£30 from 6 April). There is a maximum of 5 days of guarantee payment payable in a rolling 3-month period, i.e. a maximum payment of £145 (£150 after 6 April) for a period of 3 months.
- If the employer has laid someone off, holiday continues to accrue at the normal rate during any period of LOST.
- If an employee isn’t available for work in any event, e.g. if they are unwell, then they are not treated as being laid off notwithstanding the fact that the rest of the workforce may have been laid off at a time when the employee was away from work ill, since the reason the employee had no work was sickness, not lay off.
- If someone is laid off or on short term for either 4 consecutive weeks or for 6 weeks in a rolling 13-week period, the employee is entitled to resign and treat themselves as dismissed on the grounds of redundancy, meaning that a statutory redundancy payment is payable. The employee needs to have at least 2 years’ continuous employment to do this. There is a very complicated procedure to trigger this.

10. Redundancy

- Redundancy occurs where a business shuts down or there is a reduction in the need of employees to do work of a particular kind.
- Where an employer is considering making 20 or more redundancies at one establishment within a period of 90 days, the employer must consult trade union or employee representatives for at least 30 days before the dismissals take place. If there are 100 or more redundancies, then the consultation period should be at least 45 days.
- No one knows how long the Coronavirus will last, but the economic consequences are likely to be enduring. Consequently, any employer who is currently experiencing a downturn in work (or anticipates doing so) due to the Coronavirus pandemic should initially consider Lay Off or Short

Time working (where there is a specific provision in the employee's contract allowing this) prior to considering making redundancies, which are longer term.

11. 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 following:

- The employer should consider its contractual sick pay policy, and the practical implications on withholding pay or reducing pay to SSP only. The employer will wish to balance the costs of paying full pay where they are not legally 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;
- 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?;
- Compliance with government, Public Health England and World Health Organisation guidance on hygiene in the workplace, and other preventative measures. Consider appointing a coronavirus taskforce who are responsible for keeping track of developments, updating internal guidance and communicating with workers;
- Clear communication with employees on the employer's policy on homeworking, work travel and precautionary isolation;
- 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 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. 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;

- 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;
- 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.

List of Resources

- **England:** Public Health England and BEIS: COVID-19: guidance for employees, employers and businesses at <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19#history>
- **Wales:** Welsh Government: Coronavirus (COVID-19): employers and businesses guidance at <https://gov.wales/coronavirus-covid-19-employers-and-businesses-guidance>
- **Scotland:** Health Protection Scotland: COVID-19: Information and Guidance for Non-Healthcare Settings at <https://www.hps.scot.nhs.uk/web-resources-container/covid-19-guidance-for-non-healthcare-settings/>
- **ACAS:** Coronavirus: advice for employers and employees (relevant to employers throughout the UK) at <https://www.acas.org.uk/coronavirus>
- **WHO Guidance:** Getting your workplace ready for COVID-19 (applicable globally) at

https://www.who.int/docs/default-source/coronaviruse/getting-workplace-ready-for-covid-19.pdf?sfvrsn=359a81e7_6

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

- **England:** Public Health England: COVID-19: stay at home guidance at <https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance>
- **Wales:** Public Health Wales: Novel Coronavirus (COVID-19) - Self-isolation advice at <https://phw.nhs.wales/topics/latest-information-on-novel-coronavirus-covid-19/self-isolation-advice/>
- **Scotland:** Health Protection Scotland: Coronavirus (COVID-19) at <https://www.hps.scot.nhs.uk/a-to-z-of-topics/wuhan-novel-coronavirus/> and NHS Inform: Coronavirus (COVID-19) at <https://www.nhsinform.scot/illnesses-and-conditions/infections-and-poisoning/coronavirus-covid-19>

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