

31 March 2020

This note addresses some of the key questions employers are asking about their obligations to employees when dealing with the current COVID-19 outbreak. It will be updated as the situation develops.

Government guidance on the outbreak, which is changing frequently, including in relation to business closures, who has to self-isolate and the periods of self-isolation required, can be found [here](#).

Sickness and other absence, pay and other issues

Can we require an employee not to attend the office because we suspect they may have COVID-19 and if so what are they entitled to be paid?

This will depend on the reasons for excluding an employee. If you are doing so in line with government guidance on self-isolation, it will be reasonable to require the employee not to attend the office, in order to comply with health and safety obligations to other staff. The employee will be eligible for statutory sick pay from day one and government guidance asks employers to "use their discretion and respect the medical need to self-isolate in making decisions about sick pay".

If an employee is being sent home in circumstances where there is no government guidance to that effect, the employee will generally be entitled to be paid in the normal way if they have a contractual right to be provided with work (as most employees will). The employer is under an implied duty to pay wages for work that the employee is willing and able to perform and which the employer's actions have prevented them from carrying out.

Is an employee entitled to sick pay whilst self-isolating even if they do not in fact have COVID-19?

The government has recently announced a temporary change to statutory sick pay rules to ensure that those who are self-isolating in accordance with government guidance are entitled to statutory sick pay from day one of their absence, even if they are not infected with COVID-19.

Whether an employee will be entitled to company sick pay in those circumstances will depend

on the terms of the sickness absence policy. However, employers will need to consider whether not offering company sick pay in those circumstances makes it more likely that employees will ignore advice and attend for work, potentially affecting other employees. They will also want to bear in mind the government guidance that employers should respect the medical need to self-isolate when making decisions about sick pay. If an employee is asymptomatic, it may be possible to agree that they will work from home, in which case they would be entitled to be paid as normal.

Can we require medical evidence that someone is off sick?

Employers are normally allowed to ask for medical evidence such as a doctor's note if an employee has been absent from work for more than seven days. At the moment, the government is "strongly suggesting" that employers should "use their discretion" around the need for medical evidence where an employee is staying at home in accordance with the government's public health advice.

Isolation notes are now available through the NHS website and NHS 111 online service. Employees can use these to provide evidence of advice to self-isolate without needing to contact a doctor, reducing the pressure on GP surgeries and supporting social distancing measures.

Can we ask staff to have their temperature screened when arriving at work?

If employees consent to having their temperature taken when they arrive at work, this is uncontentious. If this reveals that an employee has a high temperature, they should then be required to self-isolate in accordance with current government guidance.

However, the question arises as to how to respond if an employee refuses to give consent, particularly in circumstances where the government is not currently recommending that employees be screened in this way. Although in principle you could take disciplinary action against the employee for refusing to take a test, on the basis that you have a good reason for requesting it, in the current situation that might appear heavy-handed and a dismissal for refusing is likely to be unfair. It might, however, be reasonable to exclude an employee from the workplace if they refuse a test.

Can we continue to operate normal sickness absence procedures?

In theory, absences related to COVID-19 can be treated in exactly the same way under attendance management policies as any other type of absence. Employers will want employees to report sickness absences in the normal way. However, in practice, employers may conclude that such absences should be discounted from sickness trigger calculations to avoid the risk of employees coming to work when they ought to be self-isolating. In the long run this is likely to be a way of managing the risk of large scale infection of the workforce. Disregarding COVID-19 absences could also be a reasonable adjustment for employees with disabilities.

Should we tell other staff the identity of an employee who has tested positive for COVID-19?

Employers will need to consider duties of confidentiality and data protection requirements before naming a member of staff who has tested positive for COVID-19. While employers will want to keep staff informed about cases, as a general rule there will be no need to name the member of staff concerned. Employers should not provide more information than is necessary. This would normally involve informing co-workers who have been in contact with an employee who has subsequently developed COVID-19, without actually telling them who that person is.

How does the new right to emergency volunteering leave operate?

Under the Coronavirus Act 2020, which was passed on 25 March 2020, workers are entitled to be absent from work to act as an emergency volunteer in health and social care if they have been issued with an emergency volunteering certificate by the Secretary of State for Health and Social Care, the NHS Commissioning Board or a body such as a county, district or London borough council. There are no restrictions in the Act in relation to who can volunteer, although in practice those with relevant medical or social care skills are presumably most likely to do so. The worker has to give the employer a copy of the certificate and at least three days' notice of their intention to be absent from work. An employer cannot refuse to allow a worker to take leave, although employers with fewer than 10 staff are exempt from the requirements.

The volunteering certificate will specify whether the worker will be volunteering for a consecutive period of two, three or four weeks over a 16 week period. A worker can only take one period of leave during each 16 week period.

During leave a worker is entitled to all their normal terms and conditions of employment except remuneration. They are entitled to return to the same job after a period of leave and they are entitled not to be dismissed or subjected to a detriment for taking or seeking to take leave. The Secretary of State is responsible for paying volunteers while they are acting as an emergency volunteer. Details of that scheme are not yet available.

Home working and pay

Which employees are permitted to continue to attend for work?

Since 23 March 2020 the UK has implemented more stringent social distancing requirements. Employees are only permitted to travel to and from work if "this" (presumably the work) absolutely cannot be done from home. Certain businesses have been required to close, including all non-essential retail stores, hotels and other communal spaces and leisure facilities. However, businesses that have not been required to close are able to remain open at the moment.

This presumably means that if a business is permitted to remain open and an employee's work

cannot be carried out from home, they are allowed to continue to attend the workplace. This was the position the Secretary of State for Health outlined in the government's press briefing on 24 March 2020. All public gatherings have been prohibited, but there is an exception for essential work gatherings, although such meetings and gatherings should be minimised. Employers also have a duty to require employees to practise social distancing while at work as far as possible.

Who is the government treating as key workers?

The government has said that the children of key workers will be prioritised for educational provision if they cannot be safely cared for at home. Key workers include those:

- working in frontline health and social care;
- education and childcare staff who are needed to support children still attending school;
- in key public services including the administration of justice and public service broadcasting;
- involved in food production and distribution and the provision of other key goods such as medicine;
- engaged in public safety and national security roles and transport provision;
- working in utilities, communication and essential financial services provision, including banks, building societies and financial market infrastructure.

Workers who think they fall within of the categories are being asked to confirm with their employer that their role is necessary for continuation of the relevant public service, based on business continuity arrangements. In practice, employers have some discretion about which roles are viewed as essential for these purposes.

Can we require employees to work from home to prevent COVID-19 from spreading?

If you have a contractual clause that allows you to direct where an employee works, you have the right to direct them to work from home.

Even where there is no such contractual entitlement, in the current circumstances it will almost certainly be a reasonable instruction to require employees to work from home, particularly given that government guidance indicates that travel to and from work is permitted only where it is absolutely necessary. Given that there is no financial loss to the employee it is difficult to see on what basis an employee would challenge such a decision.

Can employees require an employer to allow them to work from home?

In most cases the answer to that question will be no. An employee is not entitled to demand to work from home simply as a protective measure, although discrimination issues could arise for employees in high risk groups, perhaps because of age or underlying health conditions. The duty to make reasonable adjustments also applies to employees with disabilities. It is possible that an employee could seek to argue that they should be allowed to work from home because they live with someone in a high risk group. There is nothing in government guidance to indicate that those living with someone in a high risk group cannot continue to attend work, so in principle employers could refuse such a request. However, to a large extent this question has now been overtaken by the revised government guidance on social distancing, which indicates that employees should be working from home wherever practicable.

Do we have to allow an employee to work from home when we know their children will also be at home eg because schools have closed?

An employee generally cannot insist on homeworking alongside taking care of their children. However, given that many employees are likely to be facing this situation in the coming weeks, and that grandparents are less likely to be available to help out as emergency childcare, employers may want to take a pragmatic approach to homeworking in those circumstances, perhaps allowing employees to work more flexibly for a period or to reduce their hours temporarily. Staff could also be invited to take other types of leave, such as parental leave, perhaps on a part-paid or more flexible basis than usual, or to take a period of unpaid time off to deal with an emergency situation involving a dependant (see below). The employer could also consider placing the employee on furlough pursuant to the government's job retention scheme.

Do employees remain entitled to their normal pay while home working?

Yes, if an employee is carrying out their normal duties from home, they remain entitled to receive their normal pay.

What happens to roles that cannot be performed from home in the event of an office closure?

While employees remain able and willing to work, they will be entitled to be paid. For longer periods of closure, employers will need to consider whether they are contractually entitled to place staff on short-time or temporary layoff, although such provisions are relatively uncommon outside certain industry sectors. Many employers will be considering accessing the government's job retention scheme by placing employees on furlough.

Other time off

Can we force employees to take annual leave if we are forced to close the workplace?

Under the Working Time Regulations, employers can require employees to take all or part of their statutory annual leave at specified times by giving them the appropriate amount of notice

(broadly twice as much notice as the period of annual leave concerned).

Any holiday to which employees are entitled in excess of their statutory entitlement will be governed by the rules of the employer's holiday policy.

Can we stop employees from taking leave to ensure business continuity?

Employers can prevent workers from taking annual leave under the Working Time Regulations by serving a counter-notice when a worker requests a period of leave. However, workers normally have to be permitted to take their leave in the year in which it accrues and employers are not allowed to make a payment in lieu.

The government has announced that the rules on holiday carry forward will be relaxed where it is not reasonably practicable for workers to take some or all of their leave because of coronavirus. Workers will be able to carry their basic holiday entitlement forward into the next two holiday years. The additional eight days of holiday to which workers are entitled under the Working Time Regulations can already be carried forward by agreement.

This change is designed to support employers who are under particular pressure as a result of COVID-19, such as the food industry, and help them to manage their workforce at a time of heightened demand while not depriving workers of their right to leave. However, the changes will apply to all employers.

Are employees entitled to time off if a child's school or child-care provision closes?

Yes, employees have a right to unpaid time off to deal with emergency situations involving a dependant, including where there has been an unexpected disruption to caring arrangements.

In theory this is designed to cover short periods of absence only, while an employee makes alternative arrangements for their dependant. It is unclear how the right will be interpreted in circumstances where making alternative caring arrangements is impossible because of the COVID-19 situation. In practice, because leave is unpaid, there is limited incentive for an employee to take leave where they do not need to do so.

Are employees entitled to time off if their child is sick?

The right to unpaid time off applies in this situation also.

However, if the child is suspected as having COVID-19, government guidance requires households to self-isolate. The government is changing the statutory sick pay rules to ensure that employees who are self-isolating in accordance with government guidance are entitled to statutory sick pay. This change is expected to take effect retrospectively with effect from 13 March 2020.

Managing economic difficulties arising from the current situation

Can we implement a unilateral pay freeze or cut or require staff to reduce their hours?

A pay freeze should be straightforward to implement. In the private sector it is relatively unlikely, although not impossible, that employees will have a contractual right to a pay rise. To the extent that decisions on pay rises have not been taken and communicated to employees, a pay freeze can be implemented where there is no right to an increase.

However, imposing a pay cut or requiring employees to reduce their hours unilaterally will generally amount to a breach of contract. Employees could choose to resign and claim constructive dismissal, or (more likely) protest against the pay cut, keep working and bring unauthorised deduction from wages claims in the employment tribunal or a breach of contract claim in the county court. The position may be different if the contract allows the employer to reduce an employee's hours (for example in the case of a zero hours contract or the contract of an hourly paid employee which expressly grants the employer the power to vary the hours worked).

If employees are prepared to agree to a pay cut or reduced hours and pay, perhaps on the understanding that the arrangement will be temporary and revisited once the current crisis is over, it would be possible to implement a pay cut or change in hours by consent. Employees may be more willing to agree to reduced hours or a pay cut in circumstances where this might avoid more draconian measures like redundancies.

Can we require staff to take a period of unpaid leave?

At the moment, employers are more likely to want to access the government's job retention scheme as an alternative to asking staff to take unpaid leave. Further details of the scheme, to the extent that these are available, are provided below.

However, for the sake of completeness it is important to remember that it will generally be a breach of contract to require an employee to take a period of unpaid leave, entitling the employee to resign and claim constructive dismissal, or bring an unauthorised deduction from wages claim in the employment tribunal or a breach of contract claim in the county court.

In limited circumstances where an employee's right to be paid depends on being given work by the employer, the employer may have a contractual entitlement to lay the employee off for a period without pay or to put the employee on short-time working. The employee may be entitled to a statutory guarantee payment or a statutory redundancy payment depending on the circumstances.

Employees may be willing to agree to take a period of unpaid leave, particularly if this is offered as an alternative to redundancies. In the financial crisis some employers offered an element of pay during leave as an encouragement to staff to take it. It was also relatively common to allow employees to spread the pay they lost over a period of time, such as six months, so that they did not have to suffer a complete loss of pay up front.

How does the government's job retention scheme work?

Businesses, regardless of size, will be able to designate eligible employees as "furloughed workers" and will then be required to submit details of those employees to HMRC. HMRC will reimburse the employer for 80% of all wage costs for the furloughed workers, subject to a cap of £2,500 per month. A system for reimbursement is being developed as a matter of urgency. Guidance for employees indicates that employers could choose to fund the difference in wages between the government payment and actual salary but are not obliged to do so. The scheme is currently expected to run from 1 March 2020 for three months and the first payments are expected to be made by the end of April.

It is not entirely clear whether employees need to consent to being categorised as "furloughed workers". The government guidance refers to this being "discussed" with employees and that any changes to the contract should be by agreement, which indicates that consent will be required. In practice, most employees will presumably be willing to agree if the alternative is redundancy, although it adds a layer of additional administrative complexity to the process.

In addition to wage costs, employers will be able to reclaim a sum in respect of employer's NICs and mandatory employer auto-enrolment pension contributions from HMRC. For further information please see our note on the job retention scheme.

Do normal redundancy processes apply?

If an employer decides that it needs to make redundancies, the normal requirements for employee consultation where an employer is proposing to dismiss 20 or more employees at one establishment within a period of 90 days continue to apply. Consultation must take place for 30 days if there are between 20 and 99 redundancies and for 45 days if 100 or more redundancies are proposed.

It is not clear whether the current pandemic would be regarded as "special circumstances" making consultation or the normal periods of consultation not reasonably practicable. Insolvency in itself is not normally regarded as a "special circumstance". However, it seems likely that the current situation may amount to "special circumstances", particularly in industry sectors that have been particularly badly affected or required to close by the introduction of the government's social distancing requirements.

It is important to remember that even if COVID-19 amounts to a "special circumstance", this does not necessarily mean that consultation obligations can be ignored. Employers in this situation should still take whatever steps they can to consult employees before implementing redundancies, even if consultation does not last for the full period normally required.

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