Hogan Lovells

UK employees and COVID-19 – employers' frequently asked questions

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This note addresses some of employers' key questions about their obligations to employees when dealing with the continuing COVID-19 outbreak. It deals with the position in England. The governments in Scotland, Wales and Northern Ireland are responsible for their response to coronavirus and different rules may apply.

Pay, sickness and other absences

Can we require medical evidence that someone is off sick or self-isolating?

Employers are normally allowed to ask for medical evidence, such as a doctor's note, if an employee has been absent from work because of illness for more than seven days. At the moment, employers are advised to "use their discretion" about the need for medical evidence to reduce pressure on the NHS and aid social distancing. Where inability to work is related to coronavirus employees are entitled to provide an "isolation note" from the NHS 111 service instead of a GP's note.

An isolation note is available to anyone who is self-isolating because they have symptoms of coronavirus, live with someone who has symptoms or have been told to self-isolate by a test and trace service. There is an online service that employers can use to check whether an isolation note is valid.

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, although the evidence that an employee is required to provide to support their absence will be an isolation note rather than a fit note.

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 in the workforce, particularly once the current national lockdown comes to an end but

before workers who are not in higher risk groups have been offered vaccination. Disregarding COVID-19 absences could also be a reasonable adjustment for employees with disabilities.

Are employees who are self-isolating entitled to sick pay?

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

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.

If an employee cannot work from home and their workplace remains open, their entitlement to company sick pay will depend on the terms of the sickness absence policy. However, failing to pay sick pay obviously increases the risk of an employee ignoring their obligation to self-isolate and it may therefore be prudent to offer company sick pay in these circumstances, particularly after the end of the current national lockdown.

As a general point, employers face fines of up to £10,000 if they knowingly allow an employee to attend for work when they are meant to be self-isolating.

Are employees who are shielding entitled to sick pay?

Although shielding requirements for the clinically extremely vulnerable were paused in August 2020, they have been reintroduced during the latest national lockdown.

If an employee who is shielding can work from home they should continue to do so, in which case they are entitled to their normal pay.

Employees who are shielding but who are not able to work from home are entitled to SSP from the first day of their absence. It is also possible to put an employee who is shielding on furlough under the government's job retention scheme. There is further detail about the job retention scheme below.

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 still unclear how the right will be interpreted in circumstances where schools are closed for a lengthy period and 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.

Many employees continue to juggle home-working while children are at home as a result of school closures because of COVID-19, and in practice most employers have been willing to permit this in current circumstances. It may also be possible to put an employee on furlough under the government's job retention scheme in such a situation.

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 self-isolating because they have confirmed or suspected COVID-19, government guidance requires households to self-isolate. In this case the employee would be entitled to statutory sick pay (see above) and potentially to company sick pay, depending on the terms of the sick pay policy.

Can we require employees to take annual leave in the normal way?

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.

Employees are entitled to carry statutory annual leave forward to the next two holiday years where it is not reasonably practicable to take their annual leave in the year in which it accrues as a result of coronavirus.

In practice, most employers have been encouraging employees to take annual leave during the holiday year in which it accrues, but allowing more leave than normal to be carried forward to the next holiday year.

Returning to workplaces and home working

The government's current advice is that anyone who can work from home must continue to do so. However, employees who cannot work from home are permitted to attend the workplace if their workplace is open. Most workplaces that allow access to the public are required to close, except for those offering essential public services. Employers must take steps to make workplaces COVID-secure if they are open.

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

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

How should we respond if an employee with no underlying health condition does not want to come to a workplace that is open because they are worried that this is unsafe?

If the employee is able to work from home, they should do so. This is consistent with current government guidance during the national lockdown.

If the employee cannot work from home, they are not entitled to demand to work from home simply as a protective measure, although discrimination issues could arise in respect of employees in vulnerable groups, perhaps because of their age. The position of vulnerable employees is dealt with below.

If an employee is concerned about the safety of the workplace, the employer may be able to reassure them by explaining the measures that the employer has put in place to protect their

health and safety. These should already have been discussed with employee representatives or the employees themselves in the absence of representatives. If the employee's concern is about travel to and from work on public transport, the employer may want to consider allowing them to flex their start and finish times so they are not travelling at what have (historically at least) been peak times for commuting. Flexibility about working hours is also one way that employers can minimise the number of employees in a building and help to maintain social distancing.

Ultimately however, and leaving aside the position of vulnerable employees, if the employee is refusing to attend the workplace the employer will not generally be under an obligation to pay them and could consider taking disciplinary action against them. Most employers are likely to want to seek a compromise with an employee in this situation, particularly given the current level of threat from coronavirus, potentially including agreeing a period of unpaid leave, or possibly furlough under the job retention scheme in appropriate cases, before proceeding with disciplinary action.

It is automatically unfair to dismiss an employee or subject them to a detriment for refusing to work in circumstances where they reasonably believe that there is imminent and serious danger. It seems relatively unlikely, although not impossible, that this provision would apply where an employer had fully complied with the government's health and safety guidance.

What is the position for employees who are vulnerable but not extremely vulnerable?

Employees with conditions such as diabetes, some chronic respiratory diseases and heart conditions are regarded as being at moderate risk from coronavirus. However, they are not classified as extremely vulnerable so have not been advised to shield. However, such employees may well be disabled for the purposes of the Equality Act. Employees aged 70 or over are also viewed as vulnerable, as are employees who are pregnant.

As previously noted, all employees who can work from home should do so during the current national lockdown. If employees cannot work from home, government guidance suggests that employers should consider whether vulnerable employees could take other roles temporarily to allow them to work from home, or change their working patterns to avoid travel at busy times. If this is not possible, employers will have to consider whether they are complying with their health and safety obligations if they do ask employees who are regarded as vulnerable to return to a workplace that remains open. Dismissing an employee for refusing to return to work could be unfair on ordinary principles, or automatically unfair as a health and safety related dismissal (in which case there is no maximum cap on compensation).

Employers may also face age discrimination or pregnancy and maternity related discrimination claims depending on the employee's circumstances. Employees who are pregnant may need to be suspended on full pay on health and safety grounds if it is not possible to work safely in the workplace and there is no suitable alternative work they can be offered.

Screening for and dealing with illness

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

If employees consent to having their temperature taken when they arrive at work, this is uncontentious, although employers will also need to consider data privacy implications of the request and particularly the need to comply with rules on processing special categories of data. If

a check reveals that an employee has a high temperature, they should then be directed to get a test and 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's guidelines do not specifically recommend that employees be screened in this way. Although in principle you could take disciplinary action against an employee for refusing to take a test, on the basis that the employee is refusing to follow a reasonable management instruction, in the current situation that might appear heavy-handed. A dismissal for refusing would be unfair if a tribunal found that the employer had not acted reasonably in all the circumstances in treating the refusal as a reason to dismiss. If the employer's risk assessment has identified temperature screening as an effective way of managing health and safety risk, and there are sensible reasons for reaching this conclusion, the employer may well be able to show that it is acting reasonably, particularly if the employee had been warned about the possible consequences of a repeated refusal.

Can we require employees to download a contact tracing app?

Similar issues arise if an employer wants to require an employee to download a contact tracing app before being allowed to return to the workplace. If the employee consents, this is obviously unproblematic (subject to any data privacy implications if the employer is itself processing data). An employee may be more likely to consent if the employer communicates the reasons for the request sensitively, potentially including consulting employees in advance, and makes it clear that the app is purely being used as a health and safety measure to protect all employees. Particularly where an employer will not be processing data, and is asking employees to use the app to minimise the risk of spreading the virus and protect other employees, it seems likely that this would be viewed as a reasonable instruction.

Can we require staff to be tested for COVID 19 before returning to work?

Asking an employee to undergo a test is more intrusive than asking them to have their temperature screened. As such, it is likely to be harder to persuade an employment tribunal that it was fair to dismiss an employee for refusing to consent to testing, particularly where this is not something that is specifically required or recommended by government guidance. It is potentially more likely to be reasonable if it has been identified that the employee has come into contact with someone who has COVID-19 through use of a contact tracing app, although at that stage employees could simply be required to self-isolate as a precaution instead of needing to have a test.

The employer would be more likely to be able to show that a dismissal was fair if it could point to compelling reasons why testing was required both in general and for the specific employee in particular. This may be difficult for the majority of jobs. Data privacy requirements would also have to be taken into account before introducing testing of this sort.

Can we require staff to be vaccinated against COVID 19?

At the moment, vaccinations are only being provided by the NHS on the basis of clinical priorities, with priority for the oldest age groups and those in frontline health and social care roles. Vaccines are not commercially available at this stage, so it is not an option for employers to pay for vaccines for staff.

In any event, it is likely to be unfair to dismiss an employee for refusing to be vaccinated. Persuading a tribunal that a dismissal was fair would be extremely difficult, given that requiring employees to have a vaccination in order to return to the workplace would be very intrusive. Justifying the requirement is likely to be difficult given that the government is not making vaccination mandatory for the population as a whole.

There is also the prospect of a requirement being challenged as indirectly discriminatory, possibly on the basis of an employee's religion or belief, for example if a vaccine contains gelatine or other animal based products, or has been tested on animals. It is relatively unlikely that being an "anti-vaxxer" would be a protected belief under the Equality Act.

In broad terms, while it is certainly open to employers to provide accurate information about vaccines and encourage their employees to be vaccinated through the NHS, requiring employees to be vaccinated is unlikely to be a route employers want to take.

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. The NHS Test and Trace system should contact employees who need to self-isolate as a result of workplace contact.

Managing economic difficulties

The government recently announced that its job retention scheme (JRS) will be extended until the end of April 2021. Under the JRS employees can be furloughed on a full time or flexible basis, receiving 80% of their normal wages, which employers can claim from the government. Click here for further information about the JRS.

In practice, many employers have accessed the JRS as an alternative to making employees redundant as a result of the current crisis.

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 JRS as an alternative to asking staff to take unpaid leave.

If an employer chooses not to access the JRS, 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.

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.

Employers cannot claim under the JRS for employees that are serving a period of contractual or statutory notice, for example if they have been given notice of redundancy by their employer.

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