

Coronavirus Briefing no. 4

Tuesday, 24 March 2020

This situation is changing daily. Please follow up to date governmental advice. What follows is intended as practical guidance which is appropriate at the date of publication.

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1. Measures employers should already have in place

If employees are not working from home:

- Encourage employees and visitors to exercise good hygiene including washing their hands regularly;
- Place hand sanitisers around the workplace and encourage their use;
- Consider regular cleaning of areas that have high traffic e.g. reception desks and lifts;
- Consider whether face-to-face meetings are strictly necessary and, if so, encourage non-physical greetings (as opposed to shaking hands);
- Have a plan to close your workplace or drop down to a skeleton staff.
- This will include:
 - making sure as many people as possible can work from home;
 - checking everyone has a laptop and a charger at home;
 - preparing an external statement to respond to media enquiries and to place on your website (i.e. “we *have a sophisticated and tried-and-tested home working policy and our service to our customers will not be affected*”.) You may want to prepare a number, for different situations (e.g. office closure, skeleton staff, etc) and get pre-approval on the wording from board-level;
- Make sure managers and employees know what the symptoms are and how to spot them;
- Get a room ready in the office in case an employee develops symptoms whilst at work. Preferably a room with/near to its own private bathroom, with a telephone and one not containing confidential/sensitive documents.

If employees are working from home:

- Ensure employees have access to adequate equipment and systems to be able to work from home;
- Consider scheduling regular phone or video calls between teams;
- Encourage employees to call each other rather than use email;
- Encourage employees to provide feedback on how to make home-working work. Your IT team are likely to be involved in this process. Collate and circulate tips on a regular basis; and
- Be prepared to deal with concerns that certain employees are not using their time working from home effectively. This would ordinarily be done informally at first and escalated as appropriate.

Whether the office is open or not:

- Make sure you have up-to-date contact information for all staff members and make sure managers have the information for their direct reports;
- Consider whether overseas (and domestic) travel is necessary;
- Keep staff updated. Good policies are only useful if employees are aware of them; and
- Be prepared to clamp down on the mistreatment of anyone from high-risk areas. You may need to remind employees of your ‘dignity at work’/ ‘equal opportunities’ policy and may even need to start disciplinary action.

2. Where can employers find the most up to date information?

- <https://www.gov.uk/government/topical-events/coronavirus-covid-19-uk-government-response> contains various links to NHS, FCO and other government guidance
- <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19> government guidance for employers
- <https://www.acas.org.uk/coronavirus> contains practical guidance for employers, which is currently being updated daily.

3. What if an employee goes into self-isolation or 'quarantine'?

- The updated government guidance of Monday, 16 March is to self-isolate for 14 days if you or someone in your household experiences particular symptoms. It can reasonably be assumed that the number of people self-isolating is likely to dramatically increase.
- If an employee can work from home, fine (assuming a medical professional has not told them they can't work from home).
- If an employee cannot work, there is a question over whether an employer has to pay them. The answer is it depends. If they have a 'fit note' (unlikely given they won't be allowed to go to their GP) or if they have been told by the NHS 111 line to self-isolate then they should be paid sick pay as if they are sick in the normal way. The definition of '*incapable of work*' for the purposes of the Statutory Sick Pay Regulations was amended last week (13 March) to reflect that people who are self-isolating will be entitled to statutory sick pay.
- If an employee hasn't got a 'fit note' or been told by 111 to self-isolate then strictly an employer does not have to pay but at least in the early stages the best practice will be to pay sick pay in the normal way, to encourage employees not to come in and spread the disease.

4. Can an employer reclaim statutory sick pay from the government?

No but the Chancellor announced in last week's budget that businesses with fewer than 250 employees will be able to reclaim statutory sick pay paid as a result of coronavirus-related absences for the first 14 days of absence. The law has not, as yet, been changed but this is pending.

5. What if an employee refuses to come to work due to concerns about the risk of catching the virus at work or on the train?

If an employee doesn't have symptoms but are fearful of catching it on a busy train or in the office the ACAS guidance referred above is helpful here. It says: (a) listen to their concerns, (b) if you think it's genuine, then (c) try to resolve their issue. This might include offering a late start and late finish (to avoid busy trains), making working from home easier, or offering the employee their own room to work in. It's going to depend on what their specific concerns are but follow the up-to-date guidance and try and make it work on a case-by-case basis.

6. Can an employer tell an employee not to come to work if they have been to a high-risk area?

Probably, but we strongly suggest you document your thought process first to avoid any accusation that you are taking a different approach with different classes or groups of people which could open up a risk of an accusation of discrimination. In this situation you will have to pay employees as normal.

7. What if an employee feels unwell having just come back from a high-risk area or having been around an infected person?

- You need to be prepared to act fast;
- Keep them at least 7 feet (c.2 metres) away from other people;
- Ask them to go somewhere you can shut the door behind them (see above re getting a room ready);
- Ask them to avoid touching anything;
- Ask them to only cough or sneeze into tissues or into their elbow (not their hand); and
- Once they are isolated, get them to call 111 or use the 111 online tool (here: <https://111.nhs.uk/>) and follow the instructions they're given.

8. What if someone needs time off to look after someone else? This is typically going to be a child if a school is closed.

Employees are entitled to 'reasonable' time off to care for 'dependents'. Reasonable time is only as much as they reasonably need to put in place alternative arrangements (e.g. arrange to a child-minder). This time does not need to be paid.

Practical considerations might take over here and you may need to display more flexibility to let employees work from home if this is feasible.

9. Is statutory sick pay now payable from the first day of illness (rather than after the three 'waiting days')?

The government has announced this change but legislation effecting this change is not yet in force. That said, it will certainly be best practice to pay sick pay from day one, if only to encourage employees to self-isolate if they need to.

10. Do companies have to pay self-employed contractors even though they aren't working because: (a) they are self-isolating, or (b) there is not enough work for them?

No. The government is under some political pressure to ensure the self-employed are paid a form of sick pay, but we do not anticipate the government making changes in this respect. Nonetheless, you may take a practical view that you want to pay something, again to ensure that contractors do not feel financial pressure to come to work when they should be self-isolating.

11. What are 'short-time working' and 'lay-off'? And how do they relate to 'redundancy'?

'Short-time working' means reducing employees' hours or the number of days they work in a week. 'Lay-off' means providing no work for a period of time. Employers need a contractual right to do this. Most contracts of employment will not contain this right.

Employees who are put on short-time working or laid off have certain statutory protections which employers cannot contract out of. These include statutory guarantee payments for the first five days of lay-off and the right to resign and claim a statutory redundancy payment after: (a) four consecutive weeks or lay-off or short-time working where an employee receives less than 50% of their normal pay, or (b) six weeks of such measures, within any 13 week period.

Short-time working and lay-off are separate from the concept of redundancy. If staff are placed on short-time working or laid-off, they keep their jobs. By contrast if a position is made redundant, the employment relationship with the person in that position will come to an end.

In any event, taking steps to put employees on short-time working or lay-off and/or taking steps to make employees redundant will raise a number of issues and we advise employers to take legal advice beforehand, in particular to avoid claims of breach of contract, unauthorised deductions from wages, unfair dismissal and discrimination.

12. Can employers force staff to take holidays?

The legal position is different in respect of statutory holidays and non-statutory holidays:

- In respect of statutory holidays (i.e. 20 days per year + bank holidays), yes. Notice must be given though, and that notice must be at least twice the length of the holiday which is being enforce. For instance: two weeks' notice must be given if an employer wants to force an employee to take one week's statutory holiday.
- Some contracts allow employers to determine when staff must take any non-statutory holidays (i.e. any holiday entitlement in excess of 20 days per year + bank holidays). Typically though, this is only included in contracts in respect of a Christmas/new year shutdown, if at all. It is worth checking your contracts to see if you have this right.

13. What if redundancies are necessary?

The coronavirus situation does not change the law in this area. Many businesses will need to make redundancies because there is a reduced need for work of a particular kind, due to the economic impact of the coronavirus.

The law in respect of 'unfair dismissal' will still apply though, so the correct procedure will still need to be followed and a consultation process will still be necessary.

Employers should take legal advice prior to taking redundancies in order to mitigate unfair dismissal and other risks.

14. Can employers try and avoid making redundancies as part of a consultation, by alternative methods?

Yes. There are various alternatives through which redundancies can be avoided. Following a process of consultation with employees and subject to their agreement, alternatives to redundancy might be:

- reducing hours (and pay);
- agreeing a period of unpaid leave;
- agreeing time off that is paid, but at a lower rate; or
- agreeing with employees that they will defer part of their salaries.

None of these options can be unilaterally imposed on employees, but they may form part of a solution to avoid redundancies if they can be agreed with employees as an alternative.

Care should be taken at this stage to avoid any treatment which could be characterised as discriminatory, for instance by treating one group of employees who tend to be (say) older differently to another group who tend to be younger.

Again, legal advice should be obtained prior to taking any of these steps.

15. Can employers reclaim 80% of the wages of any employees who are laid-off due to the coronavirus?

Yes, with qualifications. All UK employers may access the government's "Coronavirus Job Retention Scheme" in respect of 'furloughed' employees. "Furlough" is not a legal concept in English/Welsh employment law. The Government have said the scheme will apply to those employees who would otherwise be 'laid-off' which we assume is meant to cover those who would otherwise be made redundant.

Currently there is only limited guidance as to how the Coronavirus Scheme will work but what we do/don't know at this stage is:

- The scheme will cover up to 80% of an employees' wages;
- The scheme covers up to £2,500 pcm per employee;
- It is not clear how the scheme will work in respect of employees who do not have a fixed working hours or fixed weekly/month salaries;
- At the moment it appears as if it will cover basic salary only (rather than also lost commission, even for employees who earn much of their take-home pay via commission); and
- It is only initially in place for three months, but it may be extended in due course.

Employers will need to (quoting from the government website):

- *"designate affected employees as 'furloughed workers,' and notify your employees of this change - changing the status of employees remains*

- subject to existing employment law [MH bold emphasis] and, depending on the employment contract, may be subject to negotiation;*
- *submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal (HMRC will set out further details on the information required)."*

In the absence of a lay off provision in the employment contract, an employer will need to seek the consent of the employee to designate him/her as a 'furloughed worker'. If employers approach this with employees in the correct way, this should be obtainable, if the alternative is redundancy. Again, legal advice should be sought before taking steps to obtain employee consent.

With regards to the mention of 'existing employment law':

- The scheme does not automatically give employers a right to pay employees less than their normal full pay.
- Sections 11 and 14 above cover what to do if an employer doesn't have the contractual right to lay employees off.

We expect to see further detail about how the scheme will actually work in practice, in the coming days and weeks, here: <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses#support-for-businesses-through-the-coronavirus-job-retention-scheme> and here: <https://www.businesssupport.gov.uk/coronavirus-job-retention-scheme/>.

16. Can employers reclaim 80% of the wages paid to employees who are put on short-time working?

Probably not. The 'Coronavirus Job Retention Scheme' only appears to apply to employees who are laid-off rather than those put on short-term working. The guidance produced by the Government for employees specifically states they must not undertake any work for the employer during any furlough period.

17. What about the self-employed?

We understand there is a proposed amendment to the Coronavirus Bill which proposes to cover the income of the self-employed along similar lines to the cover for employee salaries (i.e. up to 80% of income per person). This briefing will be updated as and when we have further information on this point.

18. Is there a list of what types of businesses can stay open in the lockdown period?

Yes, here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874732/230320 - Revised guidance note - _finalVF.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/874732/230320_-_Revised_guidance_note_-_finalVF.pdf) Again this may be updated in the next edition of this briefing.

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