

## Employment law implications arising from coronavirus

There is growing concern from employers about the implications of COVID-19. The situation is rapidly changing and therefore businesses must consider how to prepare for different scenarios.

We have therefore prepared a briefing note for employers to assist them in dealing with this unprecedented situation. This is up to date at the time of issue.

### What is coronavirus?

Coronaviruses are common across the world, with typical symptoms including fevers, coughing and breathing difficulties. It can also cause severe problems for the elderly, those with long-term health conditions and poor immune systems.

This particular strain of coronavirus, officially named COVID-19, was first identified in Wuhan, China, and has spread across the world.

The Government, via its dedicated coronavirus website [www.gov.uk/guidance/coronavirus-covid-19-information-for-the-public](http://www.gov.uk/guidance/coronavirus-covid-19-information-for-the-public) is providing daily updates about the total number of people who have been tested for coronavirus. There are also further updates about the steps the Government is taking to inform and protect the general public.

Additional information is also available from Public Health England [www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19](http://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19) and the World Health Organisation [www.who.int/emergencies/diseases/novel-coronavirus-2019](http://www.who.int/emergencies/diseases/novel-coronavirus-2019).

The current advice is to stay at home as much as possible, to work from home if you can, limit contact with other people, to keep your distance if you go outside (2 metres apart where possible) and to wash your hands on a regular basis. The message is simply “stay alert, control the virus, save lives”.

The Government have stated that those who display symptoms such as a high temperature, a new continuous cough or a loss of taste or smell should self-isolate immediately and stay at home for 7 days. Similarly, other members of the same household must stay at home and self-isolate for 14 days, regardless if those individuals have symptoms.

In addition, the Government has launched its track and trace system, thereby tracers from the NHS may contact individuals and inform them to self-isolate for 14 days due to the risk of being in close contact with someone who has tested positively for COVID-19. A new app is also being developed.

The advice is that self-isolated individuals do not attend their GP surgery, a pharmacy or hospital in person. Instead you must use the dedicated NHS 111 Coronavirus Service online, and to only call NHS 111 if they cannot get help online.

### Emergency Legislation and Regulations

The Coronavirus Act 2020 received Royal Assent on 25<sup>th</sup> March 2020, in which a number of key employment law changes were introduced:

1. The right to take unpaid emergency volunteering leave, i.e. to volunteer temporarily in the NHS or social care sector. Individuals are required to give their employer 3 working days' notice and produce a certificate from the relevant NHS or social care authority that the voluntary work qualifies. This is unpaid leave and must be in blocks of two, three or four weeks. There is allowance for employers to refuse the leave. During the absence, the individual's terms and conditions of employment with their employer are preserved and will be entitled to return to their original job on no less favourable terms and conditions. Similarly employers are prevented from subjecting such individuals to any detriment, and that any dismissal will be automatically unfair.
2. Statutory Sick Pay (SSP) will be available from the 1<sup>st</sup> day of absence. Employers with fewer than 250 employees (as of 28<sup>th</sup> February 2020) will be able to reclaim SSP paid for sickness absences relating to COVID-19. The refund will cover up to 2 weeks' SSP per eligible employee.

3. The Police have enforcement powers, including fixed penalty notices, for those who do not comply with social distancing and the Government's nationwide lockdown.
4. A number of businesses should be closed, including restaurants, cafes, canteens, cinemas, hairdressers, outdoor parks, but not takeaway outlets, food shops, newsagents, pharmacies, petrol stations and vets.
5. Workers are permitted to carry over 4 weeks' statutory holiday into the next two holiday years.

## Duty of health and safety

Employers have a duty of care under the Health and Safety at Work Act 1974 to protect the health and safety of their workforce, as well as who may be affected by their business, including clients, customers and third parties. There is also the common law duty, as well as express and implied duties in Contracts of Employment to protect the health and safety of their workforce.

As such, it is advisable to keep abreast of the developing situation with coronavirus. The situation is fluid and constantly changing, and therefore businesses have to be ready to adapt and implement significant changes with little to no notice, if and as when they are announced by the Government.

There are steps which employers can be taking now, including educating members of staff on coronavirus, as well as general hygiene, and the steps taken to reduce risks of infection in the workplace. This can include sufficient supplies of hot water and soap, encouraging everyone to regularly wash their hands, providing hand sanitisers and tissues, as well as regularly cleaning commonly touched surfaces such as door handles, buttons, bathrooms and kitchens.

## Current advice for workplaces

The Government has said workers should continue to work from home rather than their normal workplace, wherever possible. This in turns enables those who are not able to work from home attend the workplace, if it is safe to do so.

Hospitality and non-essential retail businesses are required to remain closed, although the Government is looking to gradually relax the restrictions during the summer month.

See our separate Bulletin for further details about managing your business as the country comes out of lockdown.

## Confidentiality

Employers should remember that they have implied and express duties of confidentiality, as well as guidelines on privacy and personal information under GDPR. Any information obtained about a member of staff must be stored and kept confidential, with only the information accessible to appropriate members of staff.

Naturally this may cause difficulties with coronavirus cases as employers will need to carefully balance the need to notify members of staff of the level of risk within the business, against the need to keep the identity of the individual circumstances of any coronavirus incident confidential.

## How to deal with absences from the workplace

In light of the potential impact of the coronavirus, sickness absence policies and procedures should have been reviewed to ensure they address scenarios when someone in the workplace has coronavirus. Employers should also have up-to-date emergency details for members of staff.

Absences from the workplace due to coronavirus can be for a variety of reasons, including sickness, medical appointments, travel restrictions, caring for a dependant and bereavement. Each business will have their own rules and procedures on whether certain absences are acceptable, and if so, whether they would be paid or unpaid.

We would recommend putting in place a Coronavirus COVID-19 policy and procedure.

## Sickness absence

Employers should ensure their policies make it clear, both to their line managers and members of staff, about how to report an absence, who to contact, by what time and how, when a fit note should be obtained, how and when to keep in touch during an absence, whether there are any trigger points to escalate the absence, and arrangements regarding pay.

One change as a result of COVID-19 is the legal definition of sickness absence for SSP purposes. In light of these changes, employees in the following situations will be able to claim they are incapable of working and therefore can be entitled to SSP:

1. They have symptoms of COVID-19, regardless of the severity of the symptoms, and as a result, are following Government advice to stay at home for 7 days.
2. They live in the same household as someone who is self-isolating (due to point 1 above) and are therefore following Government advice to stay at home for 14 days.
3. They are self-isolating (due to point 2 above) for 14 days, during which they develop symptoms of COVID-19 (as per point 1 above) and are therefore following Government advice to stay at home for 7 days after symptoms started. For example, if symptoms did not start until day 13, they would be self-isolating for a total of 20 days.
4. They are defined in public health guidance as being extremely vulnerable and at very high risk of severe illness from COVID-19 due to an underlying health condition, and have been notified that they need to follow shielding measures for a specified period.
5. Those who have been told to isolate under the Government's Test and Trace system.

Crucially the definition of sickness absence has not changed for businesses who offer enhanced sick pay, such as full or half Company sick pay. However, given the confusion regarding differing definitions of sickness absence, and potentially any further changes in the future, we would advise businesses to incorporate the Government's definition of sickness absence for Company sick pay purposes.

## Fit Notes and Online Isolation Notes

When a member of staff is sick, they can self-certify for the first 7 days. A GP fit note is required for absences which last longer from 7 days, however this could cause difficulties for those who cannot obtain the documentation due to delays or self-isolation. If there is a delay, the member of staff should contact their employer and explain the situation as soon as possible.

If the delay is due to coronavirus, we would strongly advise to use discretion and make some allowance around the need for evidence. It may be the case that an absence is not due to illness, but due to Government advice to self-isolate, which is deemed to be sickness absence for SSP purposes.

In order to assist employees who require evidence for their employers that they cannot work because they are unwell or self-isolating due to COVID-19, they can now obtain an Online Isolation Note. The Online Isolation Note can only be accessed online and will be emailed to an individual email address. For those who do not have the internet, someone else, such as a neighbour, close friend or family member with an internet connection can generate an Online Isolation Note on the individual's behalf.

The Online Isolation Note can be accessed through the NHS website and NHS 111 online.

## Sick pay

In light of the extended definition of sickness absence for SSP purposes, it will increasingly be the case that SSP will be payable in more cases than usual.

Furthermore, SSP is now payable from the 1<sup>st</sup> day of absence. Employers with fewer than 250 employees (as of 28<sup>th</sup> February 2020) will be able to reclaim SSP paid for sickness absences relating to COVID-19. The refund will cover up to 2 weeks' SSP per eligible employee.

Apart from the abovementioned announcements, current employment laws surrounding absences from the workplace remain unchanged and that businesses should not treat sick pay arrangements any differently simply because of coronavirus. Therefore individuals are still under an expectation to comply with a Company's Sickness Absence Procedure in order to get SSP or Company sick pay. Similarly sick pay is not owed to those who are not advised to self-isolate and these absences should be considered as an unauthorised unpaid absence.

## Workers and the self-employed

For workers and the self-employed who are not entitled to SSP, individuals may be able to claim Universal Credit and or contributory Employment and Support Allowance.

In addition, the Government has introduced a self-employed income support scheme, whereby self-employed workers can receive a grant worth 80% of their average monthly income, capped at £2,500 per month.

Unlike the Job Retention Scheme for employees, self-employed people can continue to operate their businesses and earn an income, as well as claiming these monies from the Government.

This scheme will use figures from the average income of self-employed workers over the last three years, is open to anyone with trading profits of up to £50,000, for those who make up the majority of their income from self-employment and for those who submitted a tax return for 2019. As a result, the scheme is not open to those with trading profits of over £50,000 per annum and for those who have a small self-employed job on the side.

For those who require additional financial assistance, they might be able to claim a number of grants and loans from the Government, as well as being able to access benefits under the Government's welfare system, including Universal Credit. The standard allowance in Universal Credit and the basic element in Working Tax Credits have been increased, as well as temporarily relaxing the requirements of the Minimum Income Floor.

## Time off for a dependant, school closures and other childcare issues

Absences from work may occur when a member of staff needs to take time off work to help a dependant, particularly if it is an emergency or unexpected event, such as a school closure or to help a family member who is in self-isolation.

Employees have a statutory right to take a reasonable amount of unpaid time off work to help dependants in an unexpected event. This includes a partner, child, parent, close family, an elderly neighbour etc.

The definition of unexpected event is wide and applies when an individual needs to take action because of an immediate or unexpected crisis. As such it can include situations where there is a need to:

- provide assistance when a dependant has a confirmed case of COVID-19, symptoms of COVID-19 or has been advised to self-isolate;
- to make longer-term care arrangements for a dependant who has a confirmed case of COVID-19, symptoms of COVID-19 or has been advised to self-isolate;
- take action required in consequence of the death of a dependant;
- deal with the unexpected disruption, termination or breakdown of arrangements for the care of a dependant, such as a child-minder or carer who has a confirmed case of COVID-19, symptoms of COVID-19 or has been advised to self-isolate; and/or
- deal with an unexpected incident involving a child while a school, nursery or another educational establishment is responsible for them.

Taking time off work for a dependant does not apply where an individual needs to take planned time off work or provide longer-term care for a dependant, such as long term arrangements for children affected by a school closure.

There is no limit to the length of time an employee can take unpaid time off work, as long as it is reasonable in the circumstances, although one to two days is considered reasonable.

There is no statutory right to any pay when individuals are off work for a dependant, school closures and other childcare issues. Similarly absences that become unreasonable in length i.e. to look after children for a couple of months due to school closures, can be considered to be unauthorised and there is no entitlement to any pay.

As school closures in particular may cause considerable problems for employers, it would be advisable to see whether flexible working could be explored, such as a change in working hours, days of work and/or working from home. Alternatively businesses could explore the option of allowing employees to utilise accrued untaken holiday entitlement, to take time off in lieu, to make up lost hours within a reasonable period of time or to consider the Coronavirus Job Retention Scheme.

See our separate Bulletin for further details about managing your business as the country comes out of lockdown, especially in relation to issues which arise from school closures.

## Grievances and complaints

Due to the growing alarm of coronavirus, there may be situations when individuals choose to self-isolate without medical advice. In these situations, the position is less clear and employers should tread with caution. Due to issues with the employer's duties of health and safety, employees could claim that they are blowing the whistle, and that if they suffer a detriment, could resign in protest and bring a claim of constructive unfair dismissal on the basis of being a whistleblower.

There may be members of staff who refuse to attend the workplace simply out of the fear from catching coronavirus. It would not be advisable to simply dismiss those concerns, but to listen and resolve them in order to protect their health and safety. Some interim measures such as flexible or home working could be explored. However if there is an outright refusal to attend work, this could result in employers being able to take disciplinary action, but again due to the risk of a tribunal claim, this should be pursued with extreme caution.

Communication is vital for employers to help prevent the spread of coronavirus. Regular updates about what your business is doing to protect members of staff will help, as well as signposting individuals to relevant contacts, explaining the importance of discussing matters with colleagues, undertaking regular risk assessments and to put in place contingency measures.

See our separate Bulletin for further details about managing your business as the country comes out of lockdown, as many grievances and complaints can be resolved if you have taken the appropriate steps.

## Company shutdown and furlough leave

In light of COVID-19, businesses may be medically advised or informed by the Government to temporarily shut down. Similarly businesses may suffer from a reduction in demand.

One option in such a scenario is to consider short-time working, i.e. a reduction of an employee's working hours on a temporary basis. Alternatively you could consider laying-off employees, i.e. provide your employees with no work or pay. A further option is to consider furlough leave.

It is important to note employees have the implied right to be provided with pay, and therefore the non-payment of wages could amount to a breach of contract. However Contracts of Employment may have the express right for employers to lay off employees or to put them on short-time working, or alternatively have an implied right to do so through custom and practice.

Whilst this is simple enough, there are situations where confusion may arise, particularly if an employee has been off work for an unreasonable period of time. As such, a statutory scheme is in place which gives employees the ability to determine whether they have been off work for an unreasonable time, in which case they would be entitled to consider themselves as redundant and claim a statutory redundancy payment.

There is also the statutory guarantee payment (SGP) which entitles employees to a SGP on up to five workless days in a three month period. There is no entitlement to an SGP if an employee has not been employed for more than a month, the employee has unreasonably refused an offer of alternative work or if the employee does not comply with your reasonable requirements.

In light of COVID-19, the Government have introduced the Coronavirus Job Retention Scheme and furlough leave. Although furlough leave is not a technical term that is used in employment legislation, it is simply a term to describe people who are laid off. It applies to any employees who would have been laid off or made redundant.

See our separate briefing note for further details about furlough leave.

## Employment Tribunal claims

The Presidents of the Employment Tribunal have issued guidance, stating that the Employment Tribunal will show significantly flexibility to ensure the overriding objective is maintained, namely dealing with cases fairly and justly. This includes ensuring parties are on an equal footing, being proportionate, avoiding unnecessary formality, seeking flexibility, avoiding delay and saving expenses.

In light of recent guidance, tribunal hearings, including preliminary and final hearings may be heard by electronic communication such as telephone or Skype. Tribunal Orders may also be postponed i.e. deadlines to exchange documents and witness statements, as well as deadlines for submitting ET1s and ET3s being varied if COVID-19 is the reason for the delay, although this will be accessed on a case by case basis.

## Discrimination

It is important to emphasise that businesses have a duty under the Equality Act 2010 to not discriminate against members of staff because of a protected characteristic, such as sex, age or race. There has sadly been a significant increase in abuse targeted towards Chinese and Italian nationals in recent weeks. Therefore employers must ensure individuals should not be singled out simply because they have a protected characteristic otherwise this could amount to discrimination.

## How can we help you

Please contact us if you require any advice on any of the employment and HR issues referred to above. The team is on hand to advise and assist.

In addition we can assist you in drafting a bespoke Homeworking and/or Coronavirus COVID-19 policy for your business and procedure for your workplace. Please contact Sally Morris on 01905 610410 or at [sally.morris@mfgsolicitors.com](mailto:sally.morris@mfgsolicitors.com) to discuss this offer further and any frequently asked questions.

**mfg Solicitors LLP**

**Advice is up-to-date as of 28.05.2020**

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