

SSP and COVID-19

New Regulations providing sick pay for those who self-isolate

Regulations providing for those who self-isolate in accordance with public health guidance on coronavirus to be deemed incapable of work, for the purpose of claiming statutory sick pay, were brought into force on 13 March 2020.

The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 amend Reg 2 of the Statutory Sick Pay (General) Regulations 1982, which defines '*persons deemed incapable of work*' for the purpose of sick pay entitlement. The definition now includes a person who is 'isolating himself [or herself] from other people in such a manner as to prevent infection or contamination with coronavirus disease, in accordance with guidance published by Public Health England, NHS National Services Scotland or Public Health Wales and effective on 12th March 2020; and [who] by reason of that isolation is unable to work'.

What about employees who cannot obtain a fit note from their GP?

In the Spring 2020 budget, the Government announced its intention to introduce a temporary alternative to the fit note to be used during the COVID-19 outbreak. This will allow individuals who are advised to self-isolate to obtain a notification via NHS111 which should be treated as evidence of absence from work.

Government has also announced plans to pass emergency legislation temporarily making statutory sick pay payable from the first day of sickness absence, which it is understood will apply retrospectively from 13 March 2020.

Absence and pay

What if an employee refuses to attend work due to fears about Coronavirus?

If they are able to work from home then this should resolve the matter. Provided however that there is no discrimination arising where for instance an employee claims to have a disability which puts them at a higher risk of serious illness if they catch COVID-19, and the public health advice is such that the employee could reasonably be asked to continue to attend work, then a refusal to attend work could be treated as a failure to follow a reasonable management instruction amounting to an act of unauthorised absence which would be dealt with as a matter of misconduct and any absence would result in the employee not being entitled to receive any pay.

What does an employer pay an employee who has been sent home to self-isolate?

If an employer considers suspending an employee because they fall within one of the circumstances in which public health advice is to self-isolate, or they are self-isolating following direction of a medical professional, they will fall within the new deemed incapacity rules for SSP. In those circumstances, it is reasonable to treat the employee as being on sick leave and pay them SSP (subject to any contractual sick pay rules). By implication therefore, this is not the case where the suspension does not fall within the Government's self-isolation advice, in which case the employee will be entitled to full pay. It is therefore important that employers continuously monitor the Government's advice on self-isolation.

What should we do if an employee is living with someone who is suspected to have, or has been diagnosed with, COVID-19?

If a member of an employee's household is suspected of having, or has been diagnosed with COVID-19, they will need to self-isolate for 14 days. The employee will be deemed incapable for work under the new deemed incapacity rules for SSP. They will therefore be entitled to SSP, or any contractual sick pay which may apply in this scenario.

Homeworking

Can our employees work from home?

As the situation across the globe continues to escalate companies across the UK are putting in place contingency plans, many of which require employees to work from home. Many employees will be familiar with and able to work from home with remote access to IT facilities with little or no disruption to their day. Thought however needs to be given to other practical considerations such as ensuring that measures are taken to ensure GDPR compliance where staff are processing confidential client data away from the normal workplace environment.

You will need to take appropriate technical and organisational measures against unauthorised or unlawful processing of data and accidental loss, destruction or damage to data. Questions to ask yourself include:

- Who will have access to the employee's computer and personal data stored on it? Specific security measures should be in place to ensure that members of the household do not have access to personal data held on the computer.
- Will the employee's home be left unattended for regular periods? If so, is it properly secured?
- Does the remote working system permit the employee to encrypt and/or password-protect information?
- Where paper files are kept, are there suitable systems for storage?
- How is information moved between home and office, both in terms of physical transfer by post or courier and data transfer electronically?
- Are employees given guidance about what data it is appropriate to transfer?
- Are there rules on retention of documents, proper disposal (for example, shredding and not just putting in the paper recycling bin at home) of paper-based records and storage and deletion of computerised personal data?
- What measures will need to be taken against accidental loss, destruction or damage?

An employer is responsible for an employee's welfare, health and safety, "so far as is reasonably practicable". Employers must conduct a suitable and sufficient risk assessment of all the work activities carried out by their employees, including homeworkers, to identify hazards and assess the degree of risk. You will therefore need to consider these obligations in the context of any employees who work from home to decide what measures they need to put in place. This will include:

- The *Provision and Use of Work Equipment Regulations 1998 (SI 1998/2306)* cover the use of work equipment in the home. Equipment supplied by the employer must be suitable for its purpose, maintained in good working order and inspected regularly.
- The use of electrical equipment at work is covered by a variety of EU and UK legislation including the *Electricity at Work Regulations 1989 (SI 1989/635)*. Briefly, an employer is responsible for the equipment it supplies. However the homeworker's domestic supply, including electrical sockets, remains their responsibility and they should be reminded of this.

Can we enforce homeworking?

Self-isolation following government guidance is deemed incapacity from a statutory sick pay perspective. However, this only applies where the employee is unable to work. It does not prevent an employee from being permitted to work from home and continue to receive full pay if they are well enough, and the appropriate facilities are in place for them to do so.

Where there is a mobility clause in an employee's contract requiring them to work a reasonable distance from their current place of work, it is likely that there will be a contractual right to require the employee to work from home.

Similarly, where there is an established requirement to work from home in order to meet business need, there is unlikely to be an issue in applying that obligation in an effort to contain Coronavirus. Where there is no established requirement, imposing the requirement to work from home arguably constitutes a variation of contract which would ordinarily require employee consent. However, in practice for many employees working from home is the "best case scenario" with the alternative being SSP or potentially being temporarily laid off without pay.

What about high risk individuals?

On 16th March the government "strongly advised" the that following categories of vulnerable individuals practice social distancing with one measure including to work from home.

- Individuals aged over 70;
- Pregnant women; and
- Individuals aged under 70 with an underlying health condition (being any adult instructed to get a flu jab each year on medical grounds.

Where such individuals cannot work remotely, an employer should consider their position very carefully before requiring an employee to come into work if they fall into one of the vulnerable categories identified. To do so could amount to a breach of the employer's duty of care to the employee and a breach of the implied term of mutual trust and confidence. This could amount to a repudiatory breach of contract resulting in a claim for constructive dismissal and/or discrimination.

Conversely, where those employees cannot carry out their role from home, requiring them to remain at home on SSP could be discriminatory. The government's guidance is only a strong recommendation not a legal requirement. It is therefore ultimately the employer and employee's decision whether the employee continues to come into the workplace. This places employers in an extremely difficult position because it could be a breach of the employer's duty of care to allow the employees to come into work

Affected employees are potentially entitled to SSP or contractual sick pay if applicable. However, unlike self-isolation for seven or 14 days, social distancing for vulnerable employees may be required for many months. Very few employees will be able to afford to receive only SSP long-term and some may put pressure on their employer to allow them back to work. The alternative for employers is to continue to pay the employees full pay. However, this is a difficult situation for employers, many of whom have been adversely financially impacted by COVID-19 already.

The government is expected to introduce measures to assist both individuals and businesses in this situation as soon as possible.

However, where the nature of a pregnant employee's role means that they cannot work from home and there is no suitable alternative work available that they could do from home, the employer should consider suspending the employee on full pay.

Are employees entitled their normal remuneration when working from home?

Employees who are working from home are entitled to receive their normal pay. Similarly however, employees who are prevented from attending work but cannot properly fulfil their duties from home are also entitled to receive their normal pay as they are fit and able to work but simply unable to do so for reasons beyond their control.

What if an employee who is working from home is diagnosed with Coronavirus?

We already know that the Government has confirmed that Statutory Sick Pay (SSP) will be extended to all of those who wish to self-isolate, even if they do not have any symptoms. SSP will be available to these employees from day 1 of quarantine.

If an employee who is already working from home is diagnosed, employers should speak to them to ascertain whether they are asymptomatic or if they are too unwell to work. If an employee is asymptomatic and has elected to work from home, they are entitled to receive their normal salary. However, where an employee is unfit for work, they should be managed under their employer's usual sickness absence procedures and will be entitled to receive SSP or contractual sick pay where applicable.

The Government has also announced that small employers (those 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.

We don't have enough equipment for all of our employees to work from home

Many employers may find that they do not have the hardware (ie laptops and mobile devices) to issue to all employees in the event that the entire workforce is required to work remotely. It is likely that in current circumstances, it will be lawful and reasonable to require an employee to use their own equipment, i.e. laptops and other mobile devices for work purposes to enable them to continue working from home. In the current climate, failure to do so is likely to be a disciplinary matter.

Monitoring

Employers may be concerned about the productivity of their employees when working from home. In reality, it is likely that the majority of employees who are able to work from home will be grateful that they are able to exercise what is essentially the "best case scenario", with the alternative being at home receiving SSP or having been laid off or placed on short time working and will want to be as productive as possible. However, many employees will have a clause in their contract which entitles the employer to monitor the use of electronic communications systems for a legitimate business purpose which employers may choose to exercise.

What happens now schools are to close?

Many employees will be faced with childcare problems.

The law recognises that there may be occasions where employees will need to take time off work to deal with unexpected events involving a dependant. Employees who are unable to attend work due to childcare commitments caused by school closures should therefore exercise their right to take unpaid, emergency dependent leave to care for their children.

It should be noted that employers must continue to pay employees who are working from home regardless of whether or not they are able to properly fulfil their duties. However, there is no obligation to pay an employee who exercising their right to take emergency time off to care for a dependant.

If an employee is self-isolating themselves, they are entitled to SSP, in most cases however children having been sent home from school are not strictly speaking self-isolating nor is the parent. The parent is simply exercising their statutory right to take emergency dependant leave in order to look after the child. The position may however change as events move on.

There is however the likelihood that some individuals might seek to suggest that they are in fact isolating themselves from other people to prevent infection which would then trigger their entitlement to SSP. In practice, this is extremely difficult to police for an employer who has no means of realistically challenging that decision.

What about employees who are working from home and caring for their children?

In reality, as a result of school closures next week, many employees will end up working from home whilst their children are at home. In normal circumstances this would not be appropriate however, employers should adopt a flexible approach here and continue to pay these employees as normal. However, employees should be aware that they are expected to fulfil their duties as normal and do what is necessary to get this done.

Employees with young children who require constant attention may not be able to work at all while responsible for looking after those children. However, it may be possible for them to split care with the other parent to enable them to work part time. Alternatively, these employees may choose to assert their statutory right to take unpaid time off to care for a dependant.

Annual leave

In what circumstances could holiday be used to cover periods of absence?

Employees may wish to take annual leave as an alternative to scenarios where they would otherwise be on SSP or nil pay. Employees are entitled to take statutory annual leave during sickness absence but may not be compelled by the employer to do so. Employees 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.

Can an employer cancel a period of annual leave?

Employers are entitled to require employees not to take statutory annual leave on certain dates. However, where consent has already been given to take the period of leave this is more risky. Any contractual provisions on annual leave, and any holidays policy would also need to be considered.

Can an employee in self-isolation reschedule holiday?

It is likely that an employee who is in self-isolation should be entitled to reschedule their annual leave, if they wish to do so. Where they are subject to self-isolation because they have COVID-19, or symptoms of it, then they would be treated in the same way as any other form of sickness absence.

Where the employee is in self-isolation because government guidance recommends that they do so (for example, if they live with someone with symptoms) but they are not incapable of working due to their own ill health then the position is less clear. Such individuals will be entitled to SSP because of the new rules on deemed incapacity. However, entitlement to SSP is not, necessarily, enough to bring them within the case law on rescheduling of annual leave for employees who are incapable of work due to ill health.

A period of self-isolation where the employee is not also sick does not have the same purpose as normal sick leave (because the purpose is containment of disease rather than allowing the individual to recover). However, it is also arguable that a period of self-isolation during which the employee is unable to leave their home would not be regarded as a period during which the employee can enjoy a period of relaxation and leisure, which is the purpose of annual leave. It may therefore be arguable that the principle that sickness absence and annual leave have a fundamentally different purpose may also be extended to self-isolation and annual leave. If that is correct, employers should allow workers to reschedule at least the four weeks' leave contained in statute where it is affected by self-isolation.

Changing terms and layoff

What happens if we don't have enough work for our employees or the workplace is required to temporarily close?

Many employers will be faced with the problem of minimised or even a halt to incoming work over the coming months. Two temporary solutions to this problem are lay offs and short term working.

Essentially laying off is a form of temporary redundancy in that that the employer provides employees with no work (and no pay) for a period while retaining them as employees. Short time working means providing employees with less work (and less pay) for a period while retaining them as employees.

Employers may consider laying employees off for a period of time where they have experienced a downturn of work due to the effects of Coronavirus. Similarly, lay-offs may be appropriate where employers are temporarily required to close the workplace due to an insufficient amount of employees being available or well enough to work.

Short term working may need to be considered where a reduction in work means that an employer no longer requires all of its employees to work all of their contracted hours.

At present, there must be an express clause in the contract of employment on order to send employees home on lay off or short time working without consultation. Generally, sending someone home without pay where there is no lay off clause in their contract will amount to constructive dismissal. However, it remains to be seen whether the Government will introduce emergency legislation in the coming days giving the statutory right to lay staff off even where there is no express contractual right to do so. Further it should be noted that employees who are already unable to work, for example due to sickness or arguably medically advised self-isolation cannot be laid off.

Bearing in mind that any temporary closure will be treated as the employer's decision, in principle, employees will remain entitled to full pay, given that it is the employer's decision to temporarily close the workplace which is preventing them from performing duties.

For most businesses, this will present substantial economic hardship if the business is forced to close and cut off revenue whilst still having to pay employees. In addition to taking advantage of the various measures announced by the Government to help businesses survive during the pandemic, the key objective will be to reduce payroll on a temporary basis which may involve some of the following:-

1. Agreeing to a temporary reduction in pay and benefits.
2. Considering layoffs.
3. Giving notice to staff to take holiday.
4. Seeking volunteers to take unpaid leave.
5. Seeking volunteers for voluntary redundancy.
6. Considering whether there are workers and contractors whose contracts can be terminated without the risk of an unfair dismissal or redundancy payment claim.
7. Terminating the employment of those with less than 2 years' service.

If an employee goes off sick during lay-off, are they entitled to SSP?

In the context of the COVID-19 outbreak, the definition of deemed incapacity for SSP purposes has been widened. This means that those who are required to self-isolate as a result of COVID-19 (whether due to actual or possible infection) are entitled to SSP. The position on entitlement to SSP during lay-off is not entirely clear. However entitlement to SSP has been widened as a result of the COVID-19 outbreak and the trend is towards making SSP available in a wide variety of circumstances, so statutory interpretation may well support a claim for SSP during lay-off where the individual is incapable of working either under the normal or deemed incapacity provisions.

Are employees permitted to take pre-arranged annual leave during a period of lay-off?

Yes, if the employment contract continues during lay-off then employees' rights in terms of annual leave will be unaffected.

What help for struggling employers is offered by the government?

In the Spring 2020 Budget, the government announced several measures to help employers who are struggling with the economic consequences of COVID-19. These include business rates reliefs, a Coronavirus Business Interruption Loan Scheme, a grant scheme for small businesses, and a dedicated helpline for those who need a deferral period on their tax liabilities. Further financial support is expected to be announced imminently including Government support for wages.

Can you defer bonus in light of the economic effect of the outbreak?

Whether a bonus payment can be deferred will depend on the precise terms of the bonus scheme and whether it is discretionary or contractual. Employers would need to consider the contracts of employment, any relevant bonus schemes or policies and any implied terms.

If the bonus is contractual, then the terms will dictate whether it can be deferred or not regardless of the reasons for the proposed deferral. However, if the bonus is discretionary then the employer may have more flexibility in terms of deferring the bonus. Employers could also consider seeking employee consent to waive or defer bonuses. In normal circumstances employees are unlikely to agree to this, but in the context of the COVID-19 outbreak and expected widespread lay-offs and redundancies, employees may be more open to this approach.

Can we withdraw offers of employment or delay start dates for new recruits in light of the COVID-19 outbreak?

The first point to consider is whether a contract of employment has been entered into with the new recruit. If they have accepted an offer of employment without conditions, and there is therefore a binding contract of employment, then notice would need to be served in order to terminate the contract before they commence employment.

If there is a binding contract in force between the parties then any change in the start date will constitute a change in contractual terms. In this case, an employer would only be able to make a change to the start date either with the express consent of the new recruit or if there is an express contractual right to do so.

Even where an employer has a contractual right to vary terms, it is important to exercise this right reasonably and with reference to the implied terms of the contract. Particular consideration should also be given to any potential discrimination risks, particularly if the change in start date is as a result of sickness which could be disability related.

What if someone with COVID-19 comes into the workplace?

According to Acas guidance, if someone with COVID-19 comes into a workplace, the workplace does not necessarily have to close. In England, the local Public Health England health protection team (HPT) will get in contact with the employer to:

- Discuss the case.
- Identify people who have been in contact with the affected person.
- Carry out a risk assessment.
- Advise on any actions or precautions to take.

A risk assessment of each setting will be undertaken by the HPT with the lead responsible person. Advice on the management of staff and members of the public will be based on this assessment.

The HPT will also be in contact with the case directly to advise on isolation and identifying other contacts and will be in touch with any contacts of the case to provide them with appropriate advice. Advice on cleaning of communal areas such as offices or toilets will also be given by the HPT.

Travel

What if an employee is stranded overseas following a holiday?

If an employee is unable to travel home because they have contracted COVID-19 and are therefore not permitted to travel or are too unwell to do so, employers should treat them as being on sick leave in terms of pay. If they ask to take annual leave as an alternative, employers can agree to this but cannot compel employees to do so. The position is slightly different if they are subject to a lockdown or precautionary isolation and unable to access transport. Where there are no symptoms or diagnosis and the employee is not technically self-isolating, the situation is that they are probably entitled to nil pay unless they wish to treat the period of absence as part of their annual leave entitlement.

Can you still require employees to travel to a work event within the UK?

This is going to depend upon current Government and public health advice on travelling and attending events within the UK and the nature of any objections from the employee. If there is no public health advice against this however, in principle, employers are entitled to continue to impose such a requirement subject to the employee not falling within one of the high risk categories, in which case you should consider whether you would be putting the individual's health and safety at risk or breaching any rights they have under the Equality Act 2010 if the reason for them being at high risk is linked to a potential disability, for example, individuals with conditions that affect their immune system or respiratory system.

Can an employer require an employee returning from holiday in a high risk area to stay away from work?

It is highly likely that an employer could require employees who return from a high risk area to remain at home due to there being a strong health and safety argument for taking that decision. The individual's entitlement to SSP or full pay will be dependent upon whether they fall within the guidance from the relevant public health authority on self-isolation with SSP only being payable under deemed incapacity provisions for self-isolation under advice from Public Health England. If the advice is to self-isolate in those circumstances, the employee could be treated as sick and paid SSP but if (as is currently the case at the time of preparing this document), the advice on self-isolation does not cover returning from the country in question then it is likely that the employer could require the employee to remain at home but they would then remain entitled to full pay.

Can you restrict an employees' travel during non-working time?

Employers could consider instructing employees not to travel to areas where the government has advised to avoid travel in light of the coronavirus outbreak. However it is questionable whether this can 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. Employers could consider advising that anyone who does travel to a particular affected 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. Employers would need to consider whether taking that approach amounts to a breach of contract or unilateral change in terms and conditions.

Employers who issue directions in terms of non-work-related travel, it should consider whether any requirements or conditions on sick pay are indirectly discriminatory. For example, if the employer attempts to restrict travel to certain countries, employees who are nationals of those countries could, potentially, claim indirect discrimination on the basis that the new policy disproportionately affects them. It is likely that any such claim would come down to the proportionality of the employer's response.

However, it is unlikely that the breach of any such restriction would amount to a disciplinary offence given that it is unlikely to be regarded as reasonable to restrict an employee's leisure activities.

Data Protection Issues

Do employees have the right to be notified if colleague/customer develops the virus?

Information about an employee's health is defined by the The Data Protection Act 2018 as "special category of personal data". This means that it can only be processed by the employer in defined and restricted circumstances.

Employees must be notified of the infection risk as soon as possible. However, the identity of the individual should not be disclosed. An employer should simply advise that an employee who has been in the workplace has been infected and that appropriate precautions should be taken. This approach is supported by ICO guidance.

Lockdown

If the UK goes into lockdown and the government requires non-essential workplaces to temporarily close, do we still have to keep paying our employees?

Some employers will be able to continue to run their business with employees working remotely, but many employers will not be able to do so, such as those in the service industry. All employers should consider whether there is work that some or all of their employees could carry out in this situation, at least for an initial period. This may mean asking employees to temporarily carry out work that is not within their usual job description. However, in the circumstances, employees are likely to be flexible in order to both help their employer's business keep running and to keep getting paid.

What employees are entitled to be paid where an employer is not able to continue its business with employees working remotely is currently unclear. On the one hand, the employees are willing and able to work and would therefore be entitled to be paid in full if it were the employer's decision to close. However, this is an unprecedented situation where employers will be forced to close to comply with government requirements.

It is possible that further amending Regulations will be issued to update the relevant date in regulation 2(1)(c) of the SSP to the date the government issues new guidance requiring employers to close. This will allow for SSP to be paid to employees in this situation, in a similar way to how the Coronavirus Amendment No 2 Regulations moved the date forward to allow for SSP to be paid to employees self-isolating in accordance with guidance. It remains to see how the government intends to deal with this situation as and when it arises.

Can businesses that are instructed to close by the government argue that their contracts with employees and workers are frustrated?

The doctrine of frustration is rarely applied, particularly in an employment context. Ordinarily, it is unlikely that employment contracts are considered to be frustrated because this would require the position to be so fundamentally different to that envisaged that performance becomes impossible. However, it is possible that where a government instruction (or, indeed, other circumstances) prevent an employer from providing work to its employees, and prevents the employees from performing the work, employment contracts may be frustrated. Unfortunately, it is too soon to tell whether this will apply during the Covid-19 pandemic and it will remain a fact-specific question in any event.

How should a business collectively consult over redundancies if it is subject to compulsory closure?

If 20 or more redundancies are proposed at one establishment within 90 days, this will trigger collective consultation obligations.

The fact that an employer has closed its business does not mean it is no longer possible for it to collectively consult with its employees. Practically speaking, the employer must have a way of communicating with employees after business closure - whether by email, telephone or even by post. Employers should confirm to employees the way in which communication will take place prior to the business closure.

Further, the employer's duty is actually to consult with representatives of the affected employees, and not the employees themselves. Therefore, once representatives have been elected, the employer's consultation obligations become easier to manage.

If things are particularly difficult, it may be possible for the employer to rely on the "special circumstances" defence to justify a failure to comply in all respects with collective consultation obligations. However, this will not totally absolve the employer from obligations under section legislation and it will still be necessary to take reasonable steps to comply.

Employment tribunal proceedings

How are employment tribunal and court proceedings going to be affected by the outbreak?

Over the past week, the President of the Employment Tribunal has issued numerous guidance notes which strongly encourages tribunals to use video conferencing, including Skype, for as many purposes as possible - including some final hearings. The guidance also recommends that where a final hearing is due to be heard by a 3 person panel, parties should be encouraged to consent to the case being heard with a 2 person panel where one person cannot be present. Therefore it is likely that some hearings will be disrupted with many being converted to telephone or Skype hearings.

Next Steps

What should we do now?

The best course of action for each employer will be largely dependent on the nature of the workplace, the type of work carried out and the demographic of its employees. However, we summarise below some key considerations for employers in light of the Coronavirus outbreak:

- Ensure compliance with Government and World Health Organisation guidance in relation to hygiene in the workplace and other preventative measures.
- Consider your contractual sick pay policy, and the practical implications on withholding pay or reducing pay to SSP. Many employers will wish to balance the costs of paying full pay where they are not legal obliged to do so with the costs of spreading the virus and increasing sickness absence.
- Review IT systems and establish whether you have the infrastructure in place to allow large numbers of employees to work from home at the same time.
- Ensure that employees have provided up to date details.
- Consider the impact of the forthcoming school and nursery closures. Identify business critical roles and consider how these roles can be maintained whether by reducing employees' hours to part time to fit around childcare, by promoting flexible working or by encouraging the use of the statutory right to time off to care for dependents.

As the Government works on emergency legislation, regulations will continue to evolve over the coming months. However, it is clear at this stage that going forwards many employers will require their employees to work from home. If you need help with preparing a Home Working policy to help manage this then please do not hesitate to contact us for further advice.