

AN EMPLOYER'S GUIDE TO CORONAVIRUS

UPDATED AS AT 25 MARCH 2020

Categories of absent employees		Legal rights to leave and pay	Practical advice for employers
Employees who are sick	Confirmed to be suffering from coronavirus or otherwise unfit to attend work due to sickness	Normal sick leave and sick pay entitlements would apply.	Given the unique nature of the virus, consider relaxing sickness management procedures (e.g. discounting absences due to confirmed Coronavirus or advised self-isolation).
Employees who self-isolate following guidance from Public Health England (PHE)	Exhibiting symptoms of Coronavirus	If the employee is able to work remotely from isolation, they are entitled to receive normal pay.	PHE guidance strongly suggests that employers use their discretion around the need for medical evidence for a period of absence where an employee is advised to stay at home either as they are unwell themselves, or live with someone who is. If evidence is required, there is a new online isolation note available on NHS 111 online. Paying contractual sick pay to employees who self-isolate, or even providing normal pay where contractual sick pay is unavailable, will encourage more employees to follow PHE advice and assist in limiting the spread of the virus. Employees who cannot afford to live off SSP (currently £94.25 per week) are more likely to seek to attend work against PHE advice.
	Member of the household of anyone exhibiting symptoms of coronavirus	Where they are unable to work remotely and have self-isolated based on PHE guidance, they are entitled to Statutory Sick Pay (SSP) (subject to meeting the other requirements for payment). SSP is available from the first day of absence from 13 March 2020. The government has committed to reimbursing employers with fewer than 250 employees (as at 28 February 2020) up to two weeks' SSP claimed by an employee as a result of coronavirus. It may be that employees' contracts give them a right to contractual sick pay in these circumstances.	
Older and vulnerable employees	Employees aged 70 or older	Employers have a duty to ensure the health, safety and welfare of employees. PHE guidance is clear that employers should strongly advise and support vulnerable people to stay at home and work from there if possible. If they are unable to work from home, they are likely to be entitled to SSP as with others self-isolating as above.	The government have now instructed everyone to stay at home and to only go out for work where it absolutely cannot be done from home. Vulnerable people should be particularly stringent in following social distancing measures. The PHE advice on social distancing includes avoiding non-essential use of public transport (when possible), avoiding contact with friends and family and working from home (where possible). The guidance says that employers should support employees to work from home. The PHE Guidance for Employers states that it is good practice for employers to ensure employees who are in a vulnerable group are strongly advised to follow social
	Employees who are under 70 but have one or more of the underlying health conditions listed by PHE	Those designated as extremely vulnerable are strongly advised to follow shielding measures to stay at home at all times and avoid any face-to-face contact for a period of at least 12 weeks from the day they receive their letter. Employers should ensure that this category of employee is not in the workplace and is at home.	
	Employees who are "extremely vulnerable"		

		<p>Where employees are able to work from home, they are entitled to receive their normal pay.</p>	<p>distancing guidance and to stay at home, working where possible.</p> <p>It is possible that some vulnerable employees may seek to attend work even though the advice is that they should stay at home. This may be particularly an issue if they are only receiving SSP where they are unable to work from home. Paying enhanced company sick pay may alleviate this issue, but otherwise an employer may need to instruct vulnerable employees to comply with PHE advice. However unpalatable, it may constitute a failure to follow a reasonable instruction if a vulnerable person fails to follow PHE advice.</p> <p>Failure to undertake a risk assessment in relation to pregnant employees (and new/breastfeeding mothers) or to address any risks identified by the assessment, may be an act of pregnancy and maternity discrimination.</p>
	<p>Pregnant women</p>	<p>Pregnant women fall within the vulnerable persons group. PHE guidance states that pregnant women should be strongly advised and supported to stay at home and work from there if possible.</p> <p>If a pregnant employee can work from home, she will be entitled to full pay.</p> <p>Employers are under a special duty to assess any risks to employees who are pregnant, have recently given birth or are breastfeeding, and to take steps to alleviate such risks. Where necessary, an employer may suspend a pregnant employee on full pay. Pregnant employees who follow the PHE advice to stay at home may be entitled to full pay on this basis, even if they cannot work from home.</p>	
<p>Employees instructed not to attend work by their employer</p>		<p>Employees are entitled to receive normal pay unless their employment contract provides that their employer can withhold pay in such circumstances (unusual).</p> <p>Employees working from home would generally be entitled to full pay. This may become a more complicated issue if they have childcare or other dependent responsibilities that means they cannot work normal or full hours.</p>	<p>Many employers have already closed or partially closing their workplaces given the government instruction to only attend work where this absolutely cannot be done from home.</p> <p>Employers should consider if they have the contractual right to ask employees to work from home. This could be a mobility clause in the employment contract, allowing employees to work anywhere within a certain area, or an express right to ask employees to work from home. Given the current government advice, not many employees are likely to refuse to work from home.</p> <p>Consideration also needs to be given to equipment/utilities used when working from home and the payment for such.</p> <p>There may also be health and safety implications of working from home.</p>
<p>Employees who refuse to attend work</p>		<p>The government advice to all is that employees should only attend work where this absolutely cannot be done from home.</p> <p>An employee without a contractual right to work from home cannot unilaterally decide to work from home without their employer's consent. However, given the government latest announcement, employers would be well advised to comply with such a request, if at all possible.</p>	<p>Employees should be home working wherever possible now.</p> <p>If home working is not possible, employers should do their best to set up working arrangements to reduce risk such as not sharing offices, flexing working hours to reduce the number of employees working at once or to enable employees to avoid using public transport at rush hour. Employers should ensure they follow the</p>

	<p>Where an employee is not able to work from home and unreasonably refuses to attend work, they have no legal right to pay and may be subject to disciplinary proceedings. In the current circumstances, taking this approach would not be advisable unless the employee can objectively show that homeworking is impossible.</p> <p>Likewise, although an employee cannot unilaterally decide to vary their contractual working hours, employers should give any request to avoid rush hour public transport reasonable consideration.</p>	<p>most up to date guidance for employers from the government, for example to enforce working more than 2 metres away from others and frequent hand washing.</p> <p>Be consistent in how you treat employees to avoid claims of discrimination (while ensuring that necessary precautions are taken in respect of vulnerable individuals).</p> <p>Be alive to the impact on an employee's mental health if they are forced to attend work when they have genuine concerns about their risk of infection. The situation may result in the employee taking sick leave for stress-related illness.</p> <p>An employer may face claims of constructive unfair dismissal where they are perceived to have acted unreasonably in the face of genuine health and safety concerns back up by PHE guidance.</p> <p>If an employee alleges that an employer is in breach of a legal obligation for forcing them to attend work when unnecessary, this could amount to a protected disclosure. Any detriment or dismissal on the grounds of such disclosure could risk whistleblowing claims.</p>
<p>Employees who have childcare responsibilities because of school and nursery closures</p> <p>(This could also apply to employees caring for elderly relations or other vulnerable individuals if day centres or nursing homes are ordered to cease operations temporarily.)</p>	<p>The PHE refers to the statutory right for employees to take unpaid emergency dependant's leave in relation to looking after children. This right does not address the inevitable long-term childcare that is required, unless employees have an enhanced contractual right to such leave.</p> <p>More likely is that employer and employee can agree a change to working hours or working schedule (and pay) to allow employees to work and look after children, perhaps by sharing childcare with a partner.</p> <p>Many employees are already working from home. For those who are not currently working from home, employers should now allow the employee to do so, where possible. This may allow employees to work more whilst looking after children.</p> <p>If employees cannot work, they may have the right to take unpaid parental leave for up to four weeks per year per child. Employees could also consider taking some holiday.</p> <p>If an employee is self-isolating and caring for a child who is sick in their household, they would be entitled to SSP at a minimum.</p>	<p>The right to unpaid emergency dependant's leave is limited and is not intended to extend beyond the reasonable amount of time necessary to enable an employee to deal with the immediate crisis. The employee is entitled to time off to put care arrangements in place, but they are not entitled to time off to provide the care themselves longer term.</p> <p>Employers may wish to explore flexible working options with their employees in order to find a mutually agreeable and pragmatic solution to the situation. This is likely to need revisiting from time to time.</p>

	<p>If there is no work for someone at home looking after children and they “would otherwise have been laid off”, employers could consider designating them as a furloughed worker under the Coronavirus Job Retention Scheme, allowing the employer to get a reimbursement from HMRC of 80% of monthly salary capped at £2,500 per month. The furloughed worker cannot work, but will receive partial pay.</p>	<p>We are waiting for more details on the conditions of the Coronavirus Job Retention Scheme from the government.</p>
<p>Employees who cannot attend work because attending to sick dependants</p>	<p>If the sick dependent is living in the same household as the employee, the employee will need to self-isolate and will be paid SSP.</p> <p>If the sick dependent is not in the same household, the employee has a statutory right to take emergency unpaid dependant’s leave (as above). The PHE Guidance for Employers highlights this right in relation to helping children or another dependants if they are sick. Some employers might offer pay depending on the contract or workplace policy.</p> <p>Employees may be able to partially work from home whilst caring for someone. Employers may agree reduced hours/ pay.</p> <p>If there is no work for someone at home looking after sick dependants and they “would otherwise have been laid off”, employers could consider designating them as a furloughed worker under the Coronavirus Job Retention Scheme, allowing the employer to get a reimbursement from HMRC of 80% of monthly salary capped at £2,500 per month. The furloughed worker cannot work, but will receive partial pay.</p>	<p>The right to unpaid emergency dependant’s leave is limited and is not intended to extend beyond the reasonable amount of time necessary to enable an employee to deal with the immediate crisis. The employee is entitled to time off to put care arrangements in place, but they are not entitled to time off to provide the care themselves longer term.</p> <p>This right to unpaid time off may, therefore, provide little assistance to employees dealing with the situation of a dependant who is sick for a lengthy period of time. Employees may be entitled to other statutory leave in these circumstances, such as parental leave (see above).</p> <p>We are waiting for more details on the conditions of the Coronavirus Job Retention Scheme from the government.</p>
<p>During temporary workplace closures or reduction work</p>	<p>If an employer is temporarily unable to provide employees with work, or has to reduce the amount of work it can provide, the employee would usually be entitled to receive their normal pay. Other options for employers in this situation may include voluntary sabbaticals, career breaks, a reduced hours scheme (to reduce hours overall), unpaid leave or a requirement to take holiday.</p> <p>Some employers may have a contractual right to lay employees off (providing no work and no pay) or impose short-time working (a reduction in hours and pay) on a temporary basis. The employer may use lay off or short time working (known as LOST) only where it has an express contractual right to do so.</p> <p>Where an employee would otherwise be laid off or made redundant, the employer may designate them as a furloughed worker and may be able to access support to continue paying part of that furloughed worker’s wages/salary through the new Coronavirus Job Retention Scheme. HMRC will reimburse 80% of furloughed workers “wage costs” up to a cap of £2,500 per month. Further details on this scheme are expected soon.</p>	

<p>Large scale redundancies (20 or more employees being made redundant)</p>	<p>There is a duty to collectively consult if an employer proposes to make 20 or more employees redundant at one establishment within a 90 day period. Consultation must commence 45 days before the first dismissal or 30 days before for fewer than 100 redundancies.</p> <p>The maximum sanction for breaching the obligations is a "protective award" of up to 90 days' gross actual pay for each affected employee, which can add up to a substantial amount.</p> <p>There is a very narrowly interpreted defence to a failure to collectively consult. Where special circumstances render it not reasonably practicable to consult, the employer need not fully comply with the duty, but must still take such steps towards compliance as are reasonably practicable. "Special circumstances" could possibly be interpreted to cover the sudden disaster of the coronavirus at the moment. With the passage of time, when it is no longer a sudden disaster, it is far less likely to apply.</p> <p>Where an employee would otherwise be laid off or made redundant, the employer may designate them as a furloughed worker and may be able to access support to continue paying part of that furloughed worker's wages/salary through the new Coronavirus Job Retention Scheme. HMRC will reimburse 80% of furloughed workers "wage costs" up to a cap of £2,500 per month. Further details on this scheme are expected soon. This would enable the employer to retain their workforce for when business conditions improve.</p>	
<p>Employees not in a vulnerable group who cannot work from home</p>	<p>Full pay</p>	<p>Employer should continue to assess risks and follow the PHE guidance for employers and businesses.</p>

KEY CONTACTS

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