

# Briefing on employer and employees responsibilities in the wake of Coronavirus

The World Health Organisation (WHO) officially declared Coronavirus (COVID-19 the official name of the virus) a pandemic on 11 March 2020.

The risks and uncertainties of COVID-19 are having a profound impact on all of our daily lives. Government [guidance](#) on travel and what the public at large can do is updated on a daily basis.

In these uncertain times we consider below the implications of COVID-19 in the workplace. We set out the key statutory duties on employers and employees and attach some frequently asked questions. There will inevitably be more questions as the situation develops and we will endeavour to keep these updated.

## What are the employer's duties?

### *The general duty to maintain health and safety*

Employers are under a duty to ensure “*so far as is reasonably practicable*” the health, safety and welfare at work of all their employees. This includes providing a safe system of work and the provision of information and training and supervision as is necessary to ensure the health and safety at work of employees.

The duty on employers is not just limited to employees. It also applies to workers, including contract workers, as well as clients, customers and visitors to the workplace.

Employers are required to carry out a “*suitable and sufficient*” risk assessment to identify the risks to the health and safety and take “*reasonably practicable*” steps to eliminate or reduce that risk. Employers must consult employees in good time on health and safety matters including what the risks at work are, the steps taken to manage and control those risks and how information and training will be provided.

Employers should therefore identify in consultation with elected health and safety representatives, (or the workforce if there are no elected health and safety representatives), if COVID-19 presents a risk in the workplace. Where there is a risk (which is likely) the employer should take steps to prevent the risk. A record of the risk assessment should be kept where the employer employs five or more employees and reviewed as matters change.

The measures it is “*reasonably practicable*” for an employer to take depends on the risk taking into account a particular job or workplace as compared to the time, cost and physical difficulty of taking measures to avoid or reduce the risk. The risk must be a real risk as opposed to a

hypothetical risk. In cases where the risk is small it may not be reasonably practicable for the employer to take a measure which would be difficult and or too costly. On the other hand if the preventative measure can be taken without much difficulty it is likely to be reasonably practicable for the employer to take it.

In summary employers should:

- Assess the risks at work of COVID-19
- Implement preventive measures, where risks are identified
- Inform staff of the risks and preventative measures taken and
- Monitor and review the situation in consultation with employees and appropriate health and safety reps.

The government has produced specific guidance for health care professionals and staff in the transport sector. Other guidance is available for the educational sector and social or community care and residential settings [here](#).

### ***What actual steps should employers take?***

Public Health England and ACAS recommend that employers take the following steps:

- Keep all staff informed and up-to-date on actions being taken to reduce the risks of exposure to COVID-19 in the workplace.
- Make sure everyone's contact numbers and emergency numbers are kept up-to-date.
- Make sure managers know how to spot symptoms of coronavirus and are clear on the relevant processes to follow including public health guidance, as well as sickness reporting and sick pay procedures.
- Make sure there are clean places to wash hands with hot water and soap and encourage everyone to wash their hands regularly.
- Provide hand sanitiser and tissues and encourage staff to use them.
- Ensure regular cleaning of public and communal areas, as well as frequently touched surfaces such as door handles, lift buttons, telephones, photocopiers etc.
- Screen visitors by asking them to confirm that they have not been in a high risk area.
- Inform employees and workers of the latest information on COVID-19 including the symptoms and make clear they should stay at home if they develop symptoms.

The above list is not exhaustive and employers should review and monitor the risk assessment and preventative measures in consultation with the appropriate health and safety representatives (or workforce where there are no elected health and safety representatives). Any review should be consistent with the latest guidance on coronavirus from the WHO, the Government, Public Health England and ACAS.

### ***What is the employer's duty to provide personal protective equipment?***

The duty on employers to provide personal protective equipment against risks to health and safety is a last resort. Safe systems of work should be considered first and employers should take the steps identified above to reduce the risk of coronavirus in the workplace.

The government guidance for employers which is available [here](#) states that it is not recommended that employees wear facemasks and confirms that those dealing directly with members of the public behind a full screen will be protected from any airborne particles. Facemasks are only recommended to be worn by those advised to do so by healthcare workers. The ACAS guidance states that face masks might help those working in particularly vulnerable situations.

### ***How will the duty not to discriminate against workers apply?***

Employers must ensure that they do not treat individuals less favourably in terms of how they apply advice or practices in place to reduce the risk of COVID-19 because of race. An example could be where an employer introduces personal travel restrictions beyond those recommended by the FCO. Employers should also be vigilant to staff being harassed because their racial background or nationality is from an area which has been identified as high risk. So for example there are reports of Chinese people being subject to abuse over COVID-19 and employers can be liable for this kind of harassment of workers in the workplace.

Employers will also need to consider if disabled workers are particularly vulnerable and if so make reasonable adjustments. For example, if a disabled worker is at a higher risk of contracting COVID-19 due to suppressed immunity they are more likely to hit the triggers in a sickness absence procedure. In that case it could be a reasonable adjustment to adjust the sickness absence triggers if they are at a greater risk of being subject to capability procedures and dismissal. Another example is allowing disabled workers to work from home where there is a higher risk of contracting COVID-19 due to their disability or where consequences are more serious in the event of contracting it, due to the underlying medical condition.

A disabled worker who is refused pay because they have been advised to self-isolate as they are much greater risk may be able to claim that they have been treated unfavourably because of something arising from their disability. The employer would then have to argue the decision not to pay them was justified for a legitimate aim. The cost to the employer is unlikely, on its own, to be a legitimate aim.

## **What are the duties on employees?**

Employees are also under a duty to take reasonable care for the health and safety of themselves and others who may be affected by their actions or omissions at work. For example, by not coming into work if they have been advised to self-isolate. They are also under a duty to co-operate with any preventative steps taken by the employer. For example, by complying with good hygiene rules/practices.

Employees who feel unwell should ensure that they contact the employer in accordance with the employer's sickness absence policy and/or procedure and inform the employer.

## **What next?**

Both employers and employees are bound by the terms and conditions of the contract of employment and the implied duty of mutual trust and confidence. Given these are unexpected and uncertain times the way in which terms and conditions can be interpreted in light of the implied duty of trust and confidence and the statutory duties on health and safety is likely to be a developing area. Unions may wish to negotiate a specific COVID-19 collective agreement or policy in the workplace to address the concerns they and their members may have.

## **Frequently asked questions on COVID-19 in the workplace**

### ***Are employees required to self-isolate?***

Although there is no express contractual obligation to self-isolate, an employee who is required to self-isolate as a result of government [guidance](#) and fails to do so is likely to be in breach of the implied term of trust and confidence and/or the duty to take care of their own personal safety and the safety of others who may be affected by their actions. An employee who does not follow that advice may be disciplined by the employer and is unlikely to have a legal claim where the employer complies with its disciplinary procedure.

If the employee does not self-isolate in accordance with government guidance the employer may request that they do not attend the workplace. This is likely to be a reasonable instruction. An employer can rely on the implied contractual duty to ensure the safety of their employees while at work and/or the duty to maintain trust and confidence. An employer may also put the employee on “garden leave” if there is a clause in the contract which allows them to do this. A garden leave clause requires an employee to stay away from the workplace and stop working even though their contract of employment continues. An employee who fails to comply with a management instruction to stay away from the workplace in accordance with government guidance may be disciplined by the employer and is unlikely to have a legal claim where the employer complies with its disciplinary procedure.

Where the employer dismisses an employee this is likely to be for the fair reason of “some other substantial reason” (SOSR). Whether the dismissal is fair will depend on the employer following a fair procedure and acting reasonably in deciding to dismiss. Factors which are likely to be relevant include whether the employee fell within the category of employees advised by the government to self-isolate and the reason for dismissing was genuine.

***If an employee is required to self-isolate will they get sick pay?***

Regulations which came into force on 13<sup>th</sup> March 2020 mean that statutory sick pay (SSP) is temporarily extended to cover:

- Individuals who are unable to work because they have been advised to self-isolate in accordance with guidance published by [PHE](#), [NHS National Services Scotland](#) or [Public Health Wales](#)

The Government also intends to extend SSP entitlement to people caring for those within the same household who display COVID-19 symptoms and have been advised to self-isolate

As regards contractual sick pay, this will depend on the terms of the contract. In most cases contractual sick pay is dependent on an employee being incapable of work. Unless “incapable” is defined in the contract employees should assert that it should be interpreted in the same way as it is for statutory sick pay and as such the employee should receive contractual sick pay where they are required to self-isolate in accordance with PHE guidance.

### **Who is entitled to SSP?**

SSP is payable to those in employment, who are sick for 4 full days in a row (including non-working days) and earn at least £118 per week. “In employment” includes agency workers who are engaged on an assignment at the time they are sick but does not include the self-employed, those who have already been paid 28 weeks SSP and those who are within 4 weeks of their maternity leave date whose sickness absence is pregnancy related. As stated in the answer to the question immediately above, those who self-isolate, 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] are unable to work as a result will be entitled to SSP from day one.

The Government also announced in its budget on 11 March that its “new style’ Employment and Support Allowance (EAS) will be payable for those who are self-employed and employees who earn below the Lower Earnings Limit (currently £118 per week) and “who are directly affected by COVID-19 or self-isolating according to government advice from the first day sickness”.

### ***Can an employer take steps to prevent an employee who has refused to self-isolate from coming into work? If so, will the employee be entitled to be pay in these circumstances?***

In these circumstances an Employer is likely to be able to suspend the employee from work. Usually the employee will be entitled to their normal pay during suspension.

### ***Can an employer request medical evidence where someone has informed the employer that they are self-isolating?***

There is no legal requirement to produce evidence of sickness absence for the first 7 days of absence. However where the symptoms continue beyond 7 days the Government announced on 11 March that it plans for NHS 111 to issue a notification to confirm sickness absence for people self-isolating due to coronavirus (Covid-19). At the same time the government advised that 'employers should maintain records of staff absences, but should not require employees to provide a GP fit note'.

### ***Can an employee take time off to look after their child where the school has closed?***

Statutory dependants leave is available for employees from day one of employment. It permits employees (with some exceptions) to take a *reasonable* amount of time off during working hours where *necessary* to deal with an incident involving the employee’s child which occurs

unexpectedly. This would apply where the school closes in response to a risk of COVID-19. The right is dependent on the employee notifying the employer of the reason for the absence and how long they expect to be absent. Generally the period of absence should be short to deal with the unexpected situation. Case law suggests that alternative arrangements should be made where the leave is likely to be for a longer period. Note that there is no statutory right to be paid for statutory dependants leave.

Employees should check to see if their terms and conditions of employment provide for a right to paid compassionate leave.

Unions may wish to discuss with employers provisions available for employees as the situation develops and particularly as the Government moves towards the “delay stage” which could lead to the closure of schools.

***Can an employee take time off where a child or other dependant has been told to self-isolate?***

Statutory dependants leave is available for employees from day one of employment if there is a break down in child care arrangements or they are cancelled unexpectedly. This would apply where an employee needs to care for a child or dependant who has been advised to self-isolate by a medical professional or NHS 111. A dependant is an employee's spouse, civil partner, child, parent or someone who lives in the same household (but who is not their employed by the employee) who reasonably relies on the employee for assistance if they fall ill. Statutory dependant's leave is unpaid and is for a short period.

Employees should check to see if their terms and conditions of employment provide for a right to paid compassionate leave.

***Can an employee be prevented from travelling to Italy on a pre-booked holiday?***

The general position is that an employer cannot prevent an employee from travelling to wherever they want to go in their own personal time. However, an employee will be expected to check and follow government [guidance](#) from the Foreign and Commonwealth Office (FCO) which advises against all but essential travel to Italy as well as a number of other countries. An employee who ignores government guidance may be disciplined by the employer and is unlikely to have a legal remedy.

***Does an employee have to self-isolate if they feel unwell?***

Only those who have been advised in accordance with government guidance to self-isolate should self-isolate.

Those returning from travel to an area which is not an affected area do not need to self-isolate unless they have symptoms of COVID-19.

This position may change and employees should check the latest government [guidance](#).

***If an employee develop coronavirus symptoms during holiday can they claim sick pay?***

Case law has held that where a worker is sick during the four weeks statutory annual leave they can request that the period of statutory annual leave coinciding with the period of sickness be treated as sick leave rather than holiday. The worker can request that this be taken at a later date. Where the worker is near to the end of the annual leave year the worker can carry over their entitlement to the statutory four weeks annual leave for up to 18 months.

Where a worker is sick during a period of contractual annual leave they will need to check their terms and conditions of employment.

***Does an employee have to attend a work related event if they are concerned about contracting COVID-19?***

The employer should carry out a risk assessment and identify the risks of contracting COVID-19 from attendance at the event and advise what preventative steps the employer is taking. The employer should also inform and consult trade union health and safety representatives where the Union is recognised or elected health and safety representatives or, if there are none, the workforce where the union is not recognised.

***Does an employee have to come into work even if they are concerned they may catch coronavirus?***

The short answer is yes unless the employee has been advised in accordance with government guidance to self-isolate they should come into work.

[ACAS advice](#) "Coronavirus - advice for employers and employees" states that employers should listen to any concerns staff may have where an employee does not want to go into work



because they are afraid of catching the virus. Moreover, if there are genuine concerns, the employer must try to resolve them to protect the health and safety of their staff.

ACAS suggest that the employer could consider offering flexible working or agree with the employee to take time off as holiday or unpaid leave. However, there is no obligation on an employer to agree. However, the employer should ensure that any request is dealt with fairly and does not discriminate on grounds of age, disability, gender reassignment, marriage/civil partnership, race, religion or belief, sex and sexual orientation.

An employee who has 26 weeks continuous service has a statutory right to request flexible working. An employer can refuse a request on a number of statutory business grounds. It is also important to be aware that any change to the contract is permanent unless the employer agrees it is for a temporary period.

Flexible working may not be possible for a large number of workers. Where the union is recognised they may wish to negotiate with the employer contingency plans as part of a COVID-19 agreement.

***What can an employee do if they think the employer is not enforcing hygiene rules?***

If the workplace is recognised the employee should bring it to the attention of the union health and safety representative. If the workplace is not recognised the employee should bring it to the attention of the health and safety representative if there is one.

If it is not reasonably practicable to bring it to the attention of a recognised health and safety rep or there is no health and safety rep in a non-recognised workplace the employee should bring it to the employer's attention. When doing so we recommend that the employee makes clear to the employer that they are bringing this to their attention because:

- i. They reasonably believe it is harmful or potentially harmful to the health and safety of employees and others including clients/customers/service users and visitors.
- ii. Guidance from PHE and the government guidance (which advises people maintain good hygiene, as part of its strategy to contain COVID-19) is not being followed.
- iii. There is either no safety representative (non-recognised workplace) or it is not reasonably practicable to bring it to the attention of the appropriate health and safety representative or safety committee (e.g. because the health and safety rep is on holiday,

is based at another site, on another shift or you have tried and not been able to contact them)

An employee who is disciplined as a result of raising a health and safety issue which they reasonably believed to be potentially harmful to the health and safety of employees may have a claim that they have been subject to a detriment on health and safety grounds. Breach of the duty on health and safety may amount to a protected disclosure and an employee who is subject to a detriment for having disclosed the breach may have a whistleblowing claim.

***Will an employee be paid if work temporarily closes as a result of decontamination?***

Unless there is a clause in the contract of employment which allows the employer to withhold pay if there is no work, the employer will be acting in breach of contract if they temporarily close the workplace and do not pay the employee. This is known as lay off. In that case an employee with two years' service could resign and bring a claim for constructive dismissal and a redundancy payment. However, this is a high risk strategy because it brings employment to an end and if there is an upturn in business an employee will lose any continuity of service if they go back to work for the employer at a later date.

Alternatively, an employee with one month's service could remain in employment and claim for one or more of the following;

1. A statutory guarantee payment. This is limited to £29 per day (£30 from 6 April 2020) for a total of 5 days so a total of £145 (£150 from 6 April 2020).
2. Damages in the county court for breach of contract.
3. Unlawful deduction from wages in the Employment Tribunal.

An employer may seek to persuade employees to agree to taking unpaid leave. In that case the employees will have agreed to lay off.

Where there is a contractual right to lay off, employees can claim a redundancy pay under the statutory scheme if they have been laid off for four weeks in a row, or a total of six weeks (but no more than three consecutive weeks) in any 13-week period and are earning less than half their usual weeks' pay. However, in order to receive a redundancy payment an employee is required to resign bringing their employment to an end. There are also required to give their employer written notice of their intention to claim (NIC) a redundancy payment. The requirement to give written notice is complex and subject to strict time limits which, if the

employee gets wrong, will mean they won't receive a redundancy payment. An employer can also challenge a claim for a redundancy payment by giving the employee written counter notice if they can guarantee the employee 13 consecutive weeks of work within four weeks of receiving the NIC.

Note that an employee who is not available for work due to sickness absence is not treated as being laid off for the purposes of the statutory scheme. In most cases where the union is recognised a collective solution may be a better option.

***The employer has asked employees to take unpaid leave for part of the working week as a result of a down turn in work due to coronavirus do they have to agree?***

Unless there is a contractual right allowing the employer to do this then employees do not have to agree. However, this would count as short time working and it is important to consider the answer to the question above.

***How will my information be treated if an employee informs the employer that they are required to self-isolate?***

Information about a person's health is special category data under the General Data Protection Regulations. An employer is likely to be able disclose this information where it is necessary for the employer to carry out its obligations, such as to ensure the health, safety and welfare at work of workers and a safe working environment. The employer will need to have a policy in place which complies with the data protection principles.

***What is the position of an employee who is disciplined because they forgot to take a work laptop home in case the employer requires them to work from home?***

The employer should inform and consult employees and the recognised union where there is one about the requirement to take the laptop home and make clear that it will be treated as a disciplinary offence if they fail to follow this instruction. Given these unexpected and uncertain times the employer should be advised to treat the offence as minor and apply the [ACAS Guide on discipline and grievances at work](#) which advises that cases of minor misconduct "are usually best dealt with informally".

17<sup>th</sup> March 2020