

## CORONAVIRUS – Information for Employers (*as at 13 March 2020*)

### A. Pay and Sick Pay

#### In what circumstances is SSP payable?

The introduction of regulation 2(1)(c) Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 - with effect from today's date - means that an employee who is in quarantine or self-isolation will be regarded as being incapable of working (for SSP purposes).

The government has announced that (1) it will bring forward emergency legislation temporarily making statutory sick pay payable from the first day of sickness absence (rather than day 4) and (2) small employers (i.e. 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.

In the March 2020 Budget, the government announced that a temporary alternative to the fit note will be introduced in the coming weeks which can be used for the duration of the COVID-19 outbreak. This system will enable people who are advised to self-isolate to obtain a notification via NHS 111 which they can use as evidence for absence from work, where necessary.

#### Absence and pay: no symptoms or diagnosis

If the workplace and the nature of the role allow for remote working, then this may provide the employer with an alternative to suspension for the purposes of self-isolation. The employer may be acting out of an abundance of caution (where government guidance does not suggest that self-isolation is required); the employee may have had contact with someone who has been infected or travelled to a country with a particularly large outbreak; or they may be exhibiting symptoms.

If there is an identified risk that an employee may have been exposed to COVID-19, then in light of an employer's duty to protect the health and safety of *other* employees, the employer may wish to keep that employee away from the workplace until the risk has passed. It is unlikely to be a breach of implied duties to require an employee to stay at home, assuming there are reasonable and non-discriminatory grounds for concern, and the matter is dealt with appropriately, proportionately and sensitively.

Where the employee falls within the category of individuals who are being advised through public health guidance to self-isolate, or where the employee is exhibiting symptoms, then the employer may be entitled to treat the employee as on **sick leave** rather than on **suspension**.

#### Where an employer sends an employee home from work to self-isolate, what pay are they entitled to?

This will depend upon the precise circumstances.

Where the employee is able to continue to work from home then, subject to any contractual provision to the contrary, they will continue to be entitled to their normal rate of pay. If they are not able to do so, then consideration would need to be given to the terms of the contract of employment, although most employment contracts will not provide for this type of scenario.

### **Scenario 1: employer suspends for reason not falling within government self-isolation advice**

Where an employee is suspended by their employer because of a possible risk of infection which does not fall within the government's self-isolation advice, it is likely that they have the right to continue to receive **full pay** on the basis of the employer's implied duty to pay wages. NB: Some casual employees may have no entitlement to be provided with work and therefore have no entitlement to pay if the employer does not provide them with work due to a fear of possible infection.

Where an employee is willing and able to perform work in accordance with the contract, there is an implied term that the employer has an **obligation to pay wages**, unless there is a contractual right not to do so: An employer could argue that the employee is not able to work because of the risk that they pose to colleagues. However, this does not affect their ability to come into work and perform their duties so it would be risky to withhold pay on this basis and may also discourage employees from identifying a risk that they may have been infected and indirectly lead to an increased risk of infection in the workplace. An employee in these circumstances will **not** be entitled to SSP because they are not unfit to work and do not fall within the deemed incapacity provisions in regulation 2(1).

### **Scenario 2: employer suspends for reason falling within government self-isolation advice**

Where an employer is considering suspension because an employee falls within the public health advice to self-isolate then an employer may direct the employee to return home and seek medical advice. If the employee does fall within the category of people required to self-isolate, then they will fall within the new *deemed incapacity* rules for SSP. In those circumstances it is likely that the employer could treat them as being on sick leave and pay them contractual sick pay/SSP.

### **Where an employee refuses to attend work due to fears about coronavirus**

If the employee is unable to work from home, the employer would need to consider the current public health advice, the specific reason that the employee is concerned about attending work, and whether it would be discriminatory to refuse home working. If there is no discrimination angle, and the public health advice is that the employee could reasonably be asked to continue to attend work, then it is possible that the employee could be investigated for misconduct in terms of their refusal to follow a reasonable management instruction, and their unauthorised absence.

If the absence is unauthorised then the employee would likely not be entitled to pay as they are not willing to attend work.

### **Where an employee self-isolates following either a direction by a medical professional or government guidance, what pay are they entitled to?**

Where an individual self-isolates in response to direction by a medical professional/government guidance, they will be deemed incapable under the new deemed incapacity rules for SSP. They will therefore be entitled to contractual sick pay/SSP.

### **In what circumstances could holiday be used by workers to cover periods of absence?**

Workers may wish to take annual leave as an alternative to being on SSP or nil pay. Workers are entitled to take statutory annual leave during sickness absence but may not be compelled by the employer to do so.

Workers 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 (check your contract/policy documents).

### **Absence and pay: symptoms or diagnosis**

An employee who has mild respiratory symptoms but no diagnosis of Covid-19 may be treated as being on sick leave and be paid contractual sick pay/SSP.

### **Mandatory isolation**

Where an employee is subject to mandatory quarantine or detention then it is likely that they would not be regarded as "able" to work, and so the implied right to wages would not be engaged. This assumes that they were unable to continue working remotely from the quarantine location. It is likely that an employee who is forced to abstain from work would be entitled to SSP.

An employee who is ordered to self-isolate or is quarantined under the Coronavirus Regulations may, if they have the facility to work from the location to which they are quarantined and they are well enough to do so, undertake work provided that the restriction imposed upon them under the Coronavirus Regulations does not explicitly or implicitly prevent them from working.

### **Employer's duty of care**

What should an employer do where an employee who is at work starts displaying symptoms?

They should be removed to an area which is at least two metres away from other people. If possible, this should be a room or area where they can be isolated behind a closed door, such as a staff office. A window should be opened, if possible, for ventilation. The affected employee should call NHS 111 from their mobile, or 999 if it is an emergency (if the employee is seriously ill or injured or their life is at risk) and explain which country they have returned from in the last 14 days (if applicable) and outline their current symptoms.

While the employee waits for advice from NHS 111 or an ambulance to arrive, they should remain at least two metres away from other people. They should avoid touching people, surfaces and objects and be advised to cover their mouth and nose with a disposable tissue when they cough or sneeze and put the tissue in a bag or pocket then throw the tissue in the bin. If they do not have any tissues available, they should cough and sneeze into the crook of their elbow.

If the employee needs to go to the bathroom while waiting for medical assistance, they should use a separate bathroom if available.

Both the government guidance and the Acas guidance are updated frequently and employers would be advised to check the online versions for the latest advice.

### **At what point should an employer close the workplace?**

The Acas guidance advises that 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.

### **High risk employees and discrimination issues**

People who suffer from certain health conditions are at higher risk of serious illness or death if they contract COVID-19. A requirement imposed by an employer to continue travelling to and attending work, or to not pay or to dismiss them due to their absence in this scenario, could amount to discrimination. In addition, if the reason the employee self-isolates is because of a disability that puts them into a high-risk category such as an auto-immune disease or a respiratory condition, disability discrimination issues may arise.

1. Indirect discrimination. There may be a case that the employer's provision, criterion or practice (PCP) of requiring all employees to continue to attend work in a pandemic could be indirectly discriminatory against the employee and those who share the employee's disability. In such a case, the employer should consider whether the PCP can be justified as a proportionate means of achieving a legitimate aim.
2. Discrimination arising from disability. This occurs where both:
  - A treats B unfavourably because of something arising in consequence of B's disability;
  - A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

Where an employee self-isolates because of their disability and their employer treats them unfavourably because of this by not paying them or dismissing them for unauthorised absence, the employee could have a potential claim under section 15. The employer's actions would be because of "something arising in consequence" of the employee's disability (the employee's decision to self-isolate). As no comparator is required in respect of a section 15 claim, it will not necessarily be a defence for the employer to argue that it would treat all employees who decide to self-isolate without medical instruction in the same way.

The employer may, however, escape liability if it can show that:

- it did not know, and it was not reasonable for it to know, that the employee was disabled; or
- its treatment of the employee was a proportionate means of achieving a legitimate aim of, for example, maintaining staffing levels in its workplace to meet customer demand.

3. Reasonable adjustments:

an employer may be liable for a failure to make reasonable adjustments if it does not facilitate a disabled employee's request to work from home in a pandemic. However, where the employee's role is not suitable for remote working, it will not necessarily be a failure to make a reasonable adjustment for the employer to not continue to pay a disabled employee who self-isolates before seeking medical advice. The emphasis is on assisting the employee to work, not to not work. Where an employer decides not to pay a disabled employee who self-isolates, it could potentially be argued that this is hindering the employee from "remaining in work" as few employees can afford to remain employed without pay for the duration of a pandemic.

Where a disabled employee refuses to attend work because of the perceived increased risk because of their disability, medical advice should be sought as soon as possible, from the employee's GP or occupational health, to confirm or clarify the potential risks and to see what adjustments, if any, should be made to assist the employee in continuing to work. Where the matter is urgent and there is insufficient time to obtain medical advice, employers may wish to err on the side of caution.

### **How should an employer deal with an employee who has severe anxiety and is afraid to attend work?**

The employer could offer flexible working or allow the employee to take holiday or unpaid leave. An employee with severe anxiety may find their condition is exacerbated by travelling or being in public places due to the increased risk of contracting COVID-19. If their anxiety prevents them from attending work in these circumstances, it is possible that they may be regarded as on sick leave and therefore entitled to contractual sick pay/SSP.

Where an employee suffers from severe anxiety, this could amount to a disability under the EqA 2010. Medical advice should be sought as soon as possible to determine whether the employee is disabled (if there is no recent diagnosis) and, if so, to see what adjustments, if any, should be made to assist the employee in continuing to work, such as home working or flexible hours.

### **What about other high-risk employees who choose to self-isolate?**

The World Health Organisation (WHO) has identified that those aged over 60, or who suffer from cardiovascular disease, a respiratory condition, diabetes, an auto-immune condition or who are pregnant, are at a higher risk of developing more severe symptoms. Such employees may wish to self-isolate, even before seeking medical advice. Employers should consider whether there are any potential indirect age discrimination issues if they require all employees to be in receipt of either a fit note or written request under regulation 2(1)(b)(i) to be eligible for contractual sick pay.

### **Is an employer liable where an employee is harassed by other employees or customers because they are from a country with a high incidence of COVID-19?**

For the purposes of the EqA 2010, anything done by an employee in the course of their employment is treated as having also been done by the employer (section 109(1)). The employer can be liable for harassment in these circumstances, whether or not the harassment is done with the employer's knowledge or approval (section 109(3)).

There is a defence available to an employer if it can show that it took "all reasonable steps" to prevent the employee from doing the discriminatory act or from doing anything of that description. Employers would be advised to establish a zero-tolerance approach to harassment in the workplace, communicated both internally and externally, to ensure all workers are aware of their anti-harassment

policy and provide training to all staff on how to recognise harassment and what is inappropriate behaviour.

The position is more complicated when an employee is harassed in the workplace by a third party, such as a customer or visitor. To establish liability, the employee would need to show that it was their employer who "created" the intimidating, hostile, degrading, humiliating or offensive environment which is likely to be difficult to prove.

### **Homeworking**

Homeworking may constitute a variation of the contract requiring employee consent. However, where an employee is faced with either being on SSP or nil pay as an alternative, they may well be willing to consent to working from home as a way of preserving pay.

Where home working is being newly introduced, or expanded, the employer should ensure that the health and safety implications have been considered and that the necessary infrastructure is in place.

### **Can we refuse to allow an employee to work from home if they will also be looking after children who have been sent home from school or nursery?**

In normal circumstances, it would not be appropriate for an employee to work from home while also providing childcare. However, as the COVID-19 outbreak escalates, employers may need to take a pragmatic approach. If all schools and nurseries close, the majority of parents in the workplace will face this issue and putting a blanket ban on working from home while also looking after children may preclude a large proportion of the workforce from performing any duties. In these unprecedented circumstances, employers may be prepared to take a more relaxed and flexible approach to homeworking and allow employees to work around their childcare responsibilities.

Employees with younger children who require constant attention may not be able to work at all while responsible for looking after those children. However, they may be able to split the childcare with the other parent, so that both parents are able to, at least, continue working part-time.

Employees in these circumstances may assert their right to time off to care for a dependant. Time off in these circumstances is unpaid, unless there is a contractual right to pay. Given that school closures could last a relatively long time, it is likely that many employees who consider that they can undertake some work while providing childcare would prefer to do so (rather than assert their statutory right to time off) if the employer is willing to allow them to work flexibly.

### **Are there any home-working health and safety issues we should consider?**

Yes. 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.

### **Travel**

#### **Can an employer require an employee to undertake work-related travel overseas?**

To require work travel to areas where the FCO has advised against travel would not be a reasonable request, and may breach the employer's health and safety obligations, and the obligation of trust and

confidence. It could even result in a personal injury claim should the employee contract the illness while undertaking work-related travel in these circumstances.

### **What is the position where an employee is stranded overseas on a work trip?**

The employer could treat them as being on sick leave in terms of pay, although most employers would likely continue to pay full pay in these circumstances. The employer would also need to consider the additional expenses incurred by the employee in terms of accommodation and subsistence, and ensure that assistance is provided to make arrangements, and that the employee is reimbursed for such expenses. If medical assistance is required, the employer should ensure that the employee is able to access its business travel insurance policy, and that such other assistance as may be appropriate is provided.

If the employee is unable to travel home because they are subject to lockdown or precautionary isolation and unable to access transport home, similar considerations will apply. However, the employee should continue to receive full pay on the basis that they are only in that situation because their employer sent them overseas.

If there is a breakdown in the pre-arranged transport home (for example, due to flight cancellations), the employer should explore other options to repatriate the employee. The employer remains bound by its implied duties towards the employee, and it is likely that its ongoing responsibilities towards the employee would require the employer to make reasonable efforts to find a way for the employee to return home, at the employer's expense. The contractual position and any policy on overseas travel should also be considered.

### **What is the position where an employee is stranded overseas following a holiday?**

Where the employee is unable to travel home because they have contracted COVID-19 and are either not permitted to travel or too unwell to do so, the employer should treat them as being on sick leave in terms of pay. The employee is entitled to take annual leave if they prefer to do so, but they cannot be compelled to do so. Where the employee is unable to travel home because they are subject to lockdown or precautionary isolation and unable to access transport, their entitlement to pay or contractual sick pay/SSP will depend upon the precise circumstances.

### **Can an employee still be required to travel to a work event within the UK?**

This will depend upon the current government and public health advice on travelling and attending events within the UK, and the nature of any objections from the particular employee (see GOV.UK: COVID-19: guidance for employers and businesses and Public Health England: Coronavirus (COVID-19) - what you need to know). If there is no public health advice against taking this action then, in principle, employers are entitled to continue to impose such a requirement.

However, the employer would need to consider whether the employee falls into one of the high-risk categories. If so, the employer should consider whether it would be putting the employee's health and safety at risk by asking them to travel to and attend the event. It should also consider whether the employee has any rights under the Equality Act 2010 if the reason that they are at high-risk is linked to a protected characteristic.

The employer should consider whether attendance at the event is necessary, even if the employee does not fall into a high-risk category, given that many employees will have understandable anxiety about long journeys on public transport and attending large events.

### **Can an employer restrict employees' travel during non-working time?**

Employers could consider instructing employees not to travel to areas where the government advice is to avoid travel in light of the coronavirus outbreak. It is questionable whether this could 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.

The employer could also consider advising the workforce that anyone who does travel to such an area will be required to remain at home in accordance with the current government guidance on self-isolation on their return, and that contractual pay (including contractual sick pay) will not be payable in respect of such self-isolation. The employer would need to consider whether taking that approach amounts to a breach of contract or unilateral change in terms and conditions.

If the employer does issue any 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 employer's new policy disproportionately affects them. It is likely that any such claim would come down to the proportionality of the employer's response. Also, if the employer attempted to revoke the employee's annual leave to prevent them from travelling, similar questions would arise.

Even where the employer attempts to impose a new travel restriction of this sort, it is questionable whether the employee commits a disciplinary offence in contravening it, given that it is unlikely to be regarded as reasonable to restrict employees' leisure activities.

### **B. Dealing with the economic impact: changing terms and lay-off**

The action an employer should be taking will depend, to some extent, upon the nature of the workplace, the roles carried out and the demographic of the workforce, but some of the issues that employers should consider include:

- The employer's approach to sick pay in the various scenarios identified above. The employer should consider its contractual sick pay policy, and the practical implications on withholding pay or reducing pay to SSP. The employer will wish to balance the costs of paying full pay where they are not legal obliged to do so with the indirect costs (in terms of spreading the virus and increasing sickness absence) where employees attend work following potential exposure to the virus, or even when exhibiting symptoms of it, in order to continue receiving pay.
- Whether the infrastructure is in place to allow large numbers of employees to work from home. Is the IT system prepared for a high number of employees to work remotely? Do employees have the hardware necessary to work from home? Will additional guidance need to be issued to reduce demand on the IT systems if many people will be working remotely simultaneously?
- Compliance with government, PHE and WHO guidance on hygiene in the workplace, and other preventative measures. Consider appointing a coronavirus taskforce who are responsible for keeping track of developments, updating internal guidance and communicating with workers.
- Clear communication with workers on the employer's policy on homeworking, work travel and precautionary isolation.
- Ensure that employees have provided up to date personal details.

- Plan for mass closures of schools and nurseries. Identify business critical roles and how they can be maintained. Consider what pay employees will receive if they work part-time to fit around childcare, and the benefits of acting flexibly to allow as many employees as possible to continue working. Consider whether the business would be best served by encouraging employees to work flexibly and making that facility available, or by encouraging the use of statutory rights to time off to care for dependants, annual leave or parental leave.
- Provide clear information to managers on how to deal with an employee who attends work displaying symptoms, or who has potentially been exposed to the virus.
- Identify any high-risk employees and consider whether there are any potential discrimination implications which mean a more cautious approach is required.
- Critically consider whether any domestic and international work travel and events are necessary. Consider whether internal meetings can be carried out through virtual meetings.
- Where travel is necessary to high risk areas, consider what protective measures should be put in place and ensure that protective equipment is sourced and ordered.
- Identify the minimum safe level of workers required to continue operating, and how that can be maintained in the worst-case scenario. Identify the point at which the business may need to cease operating temporarily.

**In what circumstances should the employer consider *lay-off* and *short-time working*?**

*Laying off* employees means 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.

These are temporary solutions to the problem of no or less work. However, if employees are laid-off or put on short-time working in circumstances where the employer does not have the contractual right to do so then the employer will be in fundamental breach of contract entitling the employee to resign and claim constructive dismissal.

**Lay-off** may need to be considered in the following scenarios:

- a downturn in work due to the effect of COVID-19 on suppliers and customers means that fewer employees are required on a temporary basis;
- temporary closure of the workplace due to insufficient employees being able to work.

**Short-time working** may need to be considered where there is:

- a downturn in work due to the effect of COVID-19 on suppliers and customers meaning that the business does not need all employees to work their contracted hours.

NB: Employees who are already unable to work, for example due to sickness or (arguably) medically advised self-isolation, cannot be laid-off.

An employee will be put on **short-time working** for a week where the employee's remuneration for the week is less than half a week's pay.

A week for these purposes is:

- in the case of a weekly-paid employee, the seven days ending on the day to which their pay is normally calculated;
- in the case of all other employees, the seven days from Sunday to Saturday.

Subject to meeting relevant statutory conditions, an employee who is laid off or put on short-time working will be entitled to apply for a *statutory redundancy payment* in certain circumstances.

Alternatively, such an employee may be entitled to be paid a *statutory guarantee payment* (SGP) by their employer. There will be a breach of contract where the employer lays off employees or puts them on short-time working without the contractual right to do so.

An employee may be entitled to a statutory guarantee payment (SGP) on up to five "workless days" in a three-month period. A "workless day" is a day during any part of which the employee would normally be required to work in accordance with their contract

These provisions are quite complicated – please seek further advice if relevant.

### **Data protection issues**

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

If a colleague is infected, employees must be notified of the infection risk as soon as possible. However, the identity of the infected 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.

### **Rights of other types of workers**

Where an employer decides to exercise its discretion to pay employees in full, this will not be covered by the statutory guarantee payments regime in connection with lay-off.

**Agency workers** are entitled to "the same basic working and employment conditions" as employees recruited to do the same job.

Pay is defined as "any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise but excluding any payments or rewards."

The Agency Workers Regulations (AWR) guidance provides the following non-exhaustive list of pay for these purposes:

- basic pay;
- overtime pay;

- shift or unsocial hours allowance or risk payments;
- payment for annual leave;
- certain bonuses or commission payments;
- certain vouchers or stamps with a monetary value.

Occupational sick pay, benefits in kind and guarantee payments on lay-off are specifically *excluded* from the definition of "pay".

It could potentially be argued that *discretionary pay* in the event of a business closure amounts to "basic pay". However, this term is clearly meant to apply to the normal situation where an employee is paid in exchange for work done, which is not the situation here. Conversely, discretionary pay does not fit squarely within any of the list of exclusions to "pay" under the AWR either. The payment would not qualify as a guarantee payment because the employees are being in full.

As the legal position is unclear, it may well end up being a practical issue for the employer to consider with the temporary work agency bearing in mind any internal relations issues if the agency workers are treated differently to the permanent staff.

**Please note that these situations and the applicable guidance are changing on an almost daily basis. If in doubt, please check with the Employment team at Roythornes.**

**Desley Sherwin - 13/3/2020**