

Employment

ISSUE DATE: 16 MARCH 2020

LAST UPDATED: 29 JULY 2020



Burgess Salmon **COVID-19: a guide for employers**

Other Burges Salmon COVID-19 guidance for employers

Employment

[The Coronavirus Job Retention Scheme – an essential guide for employers](#)

[Treasury Direction on the Coronavirus Job Retention Scheme: A summary of key points](#)

['A Conversation about...Covid-19 and the reluctant returner'](#)

[Managing holiday and extension of carry-over provisions](#)

[The Test and Trace Scheme – what does it mean for employers?](#)

[Workers to get time off to volunteer for NHS and social services](#)

Pensions

[Dealing with a contribution crisis](#)

[New guidance on furlough and pensions: what employers and scheme trustees need to know](#)

GDPR

[ICO issues guidance on workplace testing for employers](#)

Contents

- 4 Introduction
- 5 Working safely
- 12 Absence from work and entitlement to pay
- 20 School and nursery closures
- 22 Working away from the workplace
- 24 Business travel
- 25 The Coronavirus Job Retention Scheme
- 26 Right to emergency volunteering leave
- 27 Managing holiday and extension to 'carry-over' provisions
- 28 Practical tips
- 29 Useful websites

PLEASE NOTE THIS GUIDE IS BEING UPDATED ON A REGULAR BASIS. TO ENSURE YOU HAVE THE LATEST VERSION OF THE GUIDANCE PLEASE ACCESS IT VIA OUR WEBSITE:

Burges Salmon: COVID-19: a guide for employers

Introduction

COVID-19 continues to present a global challenge on a scale that has not been seen in a generation. The immediate effect on business was seismic from swingeing drop-off in consumer demand through to potential supply chain collapses. But even as the UK continues to unlock, there are numerous issues to consider and people remain at the very heart of this crisis.

In this booklet, we address the key issues for employers to consider. The situation is changing daily so expect to update your approach on a regular basis.

The Government produces and updates guidance on a regular basis much of which is targeted at employers – a list of some of the key pieces of guidance can be found at the end of this booklet.

We have been advising many of our clients on the impact of COVID-19 on their workforces and workplace practices. If we can assist you, please do not hesitate to get in touch.



Luke Bowery

Partner

T +44 (0) 117 902 2716

M +44 (0) 7980 765781

E luke.bowery@burges-salmon.com



Kate Redshaw

Senior Associate

T +44 (0) 117 902 6610

M +44 (0) 7980 984025

E kate.redshaw@burges-salmon.com

Working safely



As an employer, you are under a duty to take reasonable steps to ensure your employees' safety. Following the lockdown in the UK employees were required to work from home wherever possible. However, whilst employees will still be able to continue to work from home, from 1 August 2020, the requirement to work from home 'wherever necessary' is removed. Employers will have discretion, in consultation with their employees, to decide who can come back to the workplace provided this can be done safely.

The duty to ensure your employees' safety includes providing a safe place for your employees to work and so you need to take steps to assess and reduce the risk to your workforce of contracting COVID-19 on an on-going basis. Now that many more businesses have reopened, the Government 'Working safely during Covid-19' guidance has been overhauled and now comprises a one page set of actions: 5 steps to working safely ([Working safely during coronavirus](#)) together with a suite of detailed non-statutory workplace guides

for employers to take into account when complying with existing health and safety obligations. The guides cover a wide range of different types of workplace environments and businesses that operate more than one type of workplace will need to take account of more than one guide. These guides are updated on a regular basis and employers should make sure they are familiar with the latest guides for all their working environments.

A return to the workplace for more employees

Up until 1 August, employees were instructed to work from home 'wherever' possible. From 1 August, however, employers have the option of bringing people back into the workplace if it is safe to do so even if those employees can work from home. Detail as to how to do this is provided in the workplace guides and engagement with employees about the return to the workplace is a central theme in the guides with the aim of ensuring workers feel safe returning to work. In determining who

Working safely

can attend the workplace safely, the guides require employers to consult with their employees taking into account their employees' individual circumstances including any childcare responsibilities, any need to use public transport to get to the workplace and any protected characteristics. Employers should give particular consideration to vulnerable employees who are at higher risk.

If employers decide to bring more employees back to the workplace, risk assessments and actions should be updated to reflect this and ensure the risk of transmission is managed. Employers should consider the maximum number of people who can safely be accommodated on site and a phased return to work may help facilitate a safe return to work. Employers should continue to monitor the wellbeing of any workers who remain working off-site.

The guidance encourages employers to consider practical issues such as the maximum number of people that can be accommodated within the workplace, and how to ensure that workspaces are well ventilated. Employers are also advised to ensure their records of staff contact details are up to date to help with identifying contacts in the event of a Covid-19 outbreak and records of staff shift patterns should also be kept for 21 days in certain working environments.

The guidance on face coverings has also been updated, in light of increasing evidence that they are effective in helping to protect people from Covid-19. Whilst they are not to be considered as a replacement for other risk management measures, employers may consider whether face coverings could encourage employees to feel safe returning to work. Employers are also advised to have an up to date Covid-19 outbreak plan

In addition, you should make sure any visitors to your building understand the precautionary measures you expect them to take and adhere to guidance on social distancing. If you are a tenant in a building, make sure you are liaising with your landlord to understand the steps they are taking to prevent the spread of COVID-19 both in terms of maintenance of the common parts and in respect of any other tenants in the same building.

The implementation and monitoring of any risk assessments will also be key for employers, in particular:

- **Do what you say** – it is very easy to make something look good on paper but it is important to implement the steps you say you are taking.
- **Be prepared to change** – it is a risk management cycle so monitor whether the steps are working and be prepared to change.

Working safely

- **Consider the impact on other risks**
 - some tasks need two people to be done safely. Some tasks are safer with two people. Some tasks need to be supervised. Organisations should not, therefore, think about COVID-19 risk in isolation. Where a core pillar of any COVID-19 risk assessment is to keep two metres apart wherever possible, organisations also need to think about how this impacts other processes and existing risk assessments so as to avoid re-introducing or increasing risk in those other areas.

Protecting people who are at higher risk

At the start of the pandemic, those who were more at risk were subject to more stringent guidance. Two groups were identified as being at higher risk; the clinically extremely vulnerable and the clinically vulnerable. Those whose health put them at the highest risk were designated as 'clinically extremely vulnerable' and were advised to follow shielding methods to minimise interaction with other people which included a stipulation that they stayed at home (even if they were unable to work from home). These restrictions are now being relaxed and shielding in England is being paused from 1 August which (subject to any local lockdown requirements) means that those shielding may be able

to return to work after that date. Specific government guidance for employers on steps to take to enable those who had been shielding to return to the workplace is not yet available. However, as a minimum, employers should expect to continue to allow those who are clinically extremely vulnerable to work from home where they can. A full list of those who are viewed as clinically vulnerable can be found at [Staying alert and safe \(social distancing\)](#). If this is not possible and if it is safe to do so then, when shielding is paused, an employer may bring a clinically extremely vulnerable person back to work.

This should be done in consultation with the employee (see above) and, as a minimum, employers will need to treat them as they treat the clinically vulnerable (see below). If it is not safe to bring an employee back then it may be possible to furlough them (if they have been previously furloughed) and/ or continue to furlough them. SSP will no longer be available for those who have been shielding when shielding is paused.

The clinically vulnerable are at less risk than the clinically extremely vulnerable but are still at higher risk than the general population. A full list of those who are viewed as clinically vulnerable can be found at [Staying alert and safe \(social distancing\)](#) and includes the over 70s,

Working safely

those who are pregnant and those with certain underlying health conditions. Like the clinically extremely vulnerable, clinically vulnerable employees should be allowed to work from home wherever possible and, as an employer, you should support this. However, where this is not possible, employers should, in consultation with the employee, offer the employee the option of the safest on-site role enabling them to maintain social distancing guidelines. However an employer should not require a clinically vulnerable or clinically extremely vulnerable (or indeed any) employee to return where it is not safe for them to do so.

Many of those who are clinically extremely vulnerable or clinically vulnerable may also be disabled. This gives them additional protection from discrimination and also means that employers may need to make reasonable adjustments to accommodate the effects of their disability. The guidance also stipulates that 'particular attention should also be paid to those who live with clinically vulnerable individuals' who may also, in certain circumstances, be entitled to protection under discrimination legislation.

In addition, those who are pregnant are also categorised as clinically vulnerable. A pregnant employee who cannot

work from home may be entitled to be suspended from work on medical grounds (and to be paid full pay) unless the employer can alleviate the risks to which the employee is exposed in the workplace as a result of Covid-19, for example by altering hours or conditions of work or by providing a suitable alternative role.

You may wish to seek legal advice in the above circumstances.

Can an employee refuse to return to work?

There are likely to be employees who are understandably nervous or anxious about the easing of the lockdown and the return to the workplace.

An employee may refuse to attend their workplace if they reasonably believe there is a serious and imminent danger posed by coronavirus. Section 44 of the Employment Rights Act 1996 provides that an employee has the right not to be subjected to a detriment by any act, or any deliberate failure to act, by an employer on the ground that, in circumstances of danger which the employee reasonably believed to be serious and imminent, the employee refused to return to their place of work or any dangerous part of their place of work. Section 100 of the Employment Rights Act 1996 provides that a dismissal

Working safely

on these grounds will be automatically unfair and there is no qualifying period or cap on compensation for such a claim. Whether the employee's belief that there is a serious and imminent danger is a reasonable belief will depend on a number of factors, including the extent to which the employer has assessed risks and followed Guidance and whether any further safeguards, such as PPE, can be provided or other measures can be taken.

Employers will need to consider the varied circumstances of different employees and the danger of coronavirus must be considered within the context of any vulnerabilities; the measures that may be sufficient to reduce the danger for other employees, may not be adequate for clinically vulnerable/extremely vulnerable (or those who live with such individuals) or disabled employees.

A complaint that the workplace is unsafe could also amount to a protected disclosure and so the employee would be protected against detriment and dismissal on grounds of that disclosure as a whistleblower. If the employee is disabled there is also an obligation to consider reasonable adjustments.

Therefore employers will need to handle the situation carefully and engage with the employees to:

- understand their concerns;

- reassure them as to the steps taken on site and the measures put in place;
- respond to any particular concerns they have raised and consider any suggested measures that they put forward;
- inform them (where relevant) of the trade union's involvement in considering and supporting the business' social distancing and other safety measures.

A continuing refusal would need to be handled sensitively:

- continue to engage with the employee to understand and alleviate their concerns;
- where relevant, seek to engage with the trade union to see if they can help allay concerns;
- if the employee's concerns are linked to a particular health concern, consider an occupational health referral to understand the impact of the pandemic on the employee;
- if the employee's concerns are related to travelling to and from the workplace on public transport, consider what measures could be put in place to alleviate the concerns (e.g. providing a car parking space or changing working hours to avoid the rush hour);
- respond to the concerns, explain the safety measures that have been put in

Working safely

place and if they still refuse to attend the workplace consider alternative roles, the possibility of working from home and explore with the employee what other types of leave they could take to cover the period (e.g. unpaid leave, annual leave).

Disciplinary action may be possible in certain circumstances but you may wish to seek legal advice as the employee may have:

- protection against disciplinary action/ dismissal where the employee reasonably believes there is a risk of serious and imminent danger by coming into the workplace; and/or
- disability discrimination protections which may apply, depending on the employee's circumstances (for example, they may be clinically extremely vulnerable or clinically vulnerable or they may have a disability and/ or potentially be subject to a greater chance of suffering more serious effects from the virus than others).

The employee relations, legal and reputational risks associated with disciplinary action could be significant.

The employee's commute

Whilst an employer is not usually responsible for the employee's commute

to work, these are not usual times. If an employee has concerns about their commute – perhaps they are reluctant to take public transport for example – then the employer should listen to the employee's concerns and should consider taking reasonable steps to alleviate these concerns. For example, consider adjusting an employee's start time if this will allow them to walk to work rather than take public transport or altering the employee's start and finish times so they can avoid being on public transport at peak times. Consider what other arrangements you could put in place – for example many employers are taking advantage of the Cycle to Work Scheme or have made additional car parking spaces available and/ or have reallocated car parking according to need. Be aware that disability and health and safety issues discussed above may also apply to the commute.

Find out more about how employers can facilitate a return to work for employees by watching our short video ['A Conversation about...Covid-19 and the reluctant returner'](#)

The Test and Trace Scheme

The Government has issued guidance encouraging employers to support them in their test and trace scheme – a scheme which is aimed to reduce the spread of COVID-19 by asking those who have tested positive to identify those with whom they have been in close contact so that those people can then be traced and asked to self-isolate. Additional guidance on the test and trace scheme has also been released around obtaining staff and customer contact details for those in particular sectors including hospitality and leisure. To read more about what this scheme means for employers please see our briefing note [The Test and Trace Scheme: what does it mean for employers?](#)

Temperature checks

Any organisation considering the introduction of workplace temperature checks, should

be aware of the Information Commissioner's Office ('ICO')'s [Q&A](#) on workplace testing. This sets out the key data protection issues organisations will need to address before they put such tests into practice. The ICO suggests organisations should be cautious before deciding to carry out on-site temperature checks due to the intrusive nature of the measure. Employers planning to perform these checks may want to consider seeking legal advice to assess whether the measure is justified and whether staff and visitors' privacy can be respected. For example, one factor to consider is whether temperature checks could be performed in a semi-private area, out of sight and earshot of colleagues. To read more about the issues related to workplace testing please see our briefing note [COVID-19: ICO issues guidance on workplace testing for employers.](#)

Absence from work and entitlement to pay



COVID-19 means people will be absent from work for a number of reasons. Some will be ill themselves, others will need to look after dependants who are ill, some will be unable to work because of the school and nursery closures. This means employers will need to carefully consider the question of pay – not least because of the ongoing high levels of absence.

Entitlement to sick pay

At the outset, there was a lot of uncertainty around entitlement to statutory sick pay (“SSP”) in relation to self-isolation but the Government clarified many of the areas of concern.

Statutory sick pay: summary

An employee who is absent from work because they are ill is entitled to statutory sick pay of £95.85 per week from 6 April 2020 (previously £94.25). This is generally paid by the employer. Key temporary changes to SSP have been made by the Government in response to COVID-19 as follows:

- SSP is payable from day 1 where an

employee has or may have COVID-19;

- an employee will be entitled to SSP if they are self-isolating to prevent infection or contamination with COVID-19 in accordance with Schedule 1 of the Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) (“SSP Regulations”) (“**Schedule 1**”) and by reason of that isolation is unable to work. In summary Schedule 1 states that a person is incapable of work where:
 - (a) the employee has symptoms of coronavirus, however mild, and is staying at home for 10 days, beginning with the day the symptoms started (“day 1”);
 - (b) the employee lives with someone who is self-isolating under paragraph (a) above, and the employee is staying at home for 14 days, beginning with day 1; or
 - (c) the employee is staying at home under paragraph (b) above and develops the symptoms of coronavirus, however mild, and

Absence from the workplace and entitlement to pay

is staying at home for 10 days, beginning with the day the symptoms started;

- (d) the employee has been classed as 'clinically extremely vulnerable' in public health guidance and has been advised, by notification, to shield;
- (e) the employee has been advised by a 'relevant notification' (from Public Health England or similar) that they have had contact with a person who at the time of the contact was infected with coronavirus and they are staying at home for 14 days beginning with the date on which that contact occurred or (if sooner) the date in the notification.

- an employee will be entitled to SSP if they are shielding in accordance with Schedule 2 of the SSP Regulations ("Schedule 2"). Those employees who have been advised to shield will stop being eligible for SSP when their shielding period ends. The end date for each individuals' shielding period was set out in their shielding notification but under the amendments to the SSP Regulations, which were introduced on 6 July 2020, this end date can now be overridden by a further notification letter containing a new end date. The government has announced that shielding will end on 1 August. However, because of the amendments

to the SSP Regulations, further notifications to shield may be issued after 1 August in the event that the UK experiences a second wave of infections and the government deems it necessary for some people to shield again. Those who are issued with further shielding notifications will be entitled to SSP again while they are shielding;

- the SSP Regulations also address SSP provisions for those households that are now forming 'bubbles' with each other. If an employee is in a 'linked' or 'extended' household, and is self-isolating due to someone in that 'linked' or 'extended' household having COVID-19 symptoms, and the employee cannot work from home, SSP will be payable to that employee while they self-isolate. If the individual who has COVID-19 symptoms receives a negative COVID-19 test result, SSP will stop being payable;

Point to note: currently people required to quarantine on return to the UK from abroad are not entitled to SSP for that 14 day period.

- where an absence is due to COVID-19, small employers with fewer than 250 employees (as at 28 February 2020) will be refunded for up to 14 days' SSP per employee affected;
- refunds to employers of SSP will only be

Absence from the workplace and entitlement to pay

payable within the “eligible period”, which commenced on 13 March 2020. Payments of SSP made by employers to self-isolators before this date may not be refundable;

- medical evidence supporting the absence is not required for the first 7 days. After 7 days it is for the employer to determine what evidence it requires. If evidence is required to cover **self-isolation or household isolation** beyond the first 7 days of absence then employees can get an isolation note from **NHS 111 online** or from the **NHS website**. However government guidance strongly suggests that employers use their discretion around the need for evidence where an employee is absent because they are ill with COVID-19 or is self-isolating/shielding in accordance with Schedule 1 or Schedule 2. GPs will not be issuing Fit notes for COVID-19 related absences;
- keep records of staff absence in the usual way.

Point to note: **Government Guidance on the Coronavirus Job Retention Scheme** would indicate that an employee absent on sick leave can be furloughed – please refer to our briefing **The Coronavirus Job Retention Scheme: an essential guide for employers**.

Company sick pay

Many employers operate enhanced sick pay schemes. The fact that an employee is entitled to receive SSP does not mean they are necessarily entitled to receive enhanced sick pay under your scheme and often the terms of the scheme will allow the employer the discretion to decide whether to pay the enhanced sums.

Whilst decisions should be taken in line with scheme rules, given the scale of absence, it will be necessary to consider how you will exercise any discretion. For example:

- should you reduce levels of payments – if so should this be a blanket reduction or just for those who are unwell or absent due to COVID-19;
- a person who is well but is self-isolating under Schedule 1, or shielding under Schedule 2, is entitled to go onto sick leave and to receive SSP. However, they do not have to do this. Consider whether you want to ask employees in this position who can work from home to do so (in which case they will not be on sick leave and will continue to receive their normal pay);
- an employee who needs to self-isolate under Schedule 1, or shield under Schedule 2, but cannot work from home will need to take sick leave

Absence from the workplace and entitlement to pay

(unless they have been furloughed). Employers with discretionary sick pay schemes will face some difficult decisions in these circumstances. If the employee would normally receive full pay for a period of sick leave and the employer chooses not to pay at this level, then you face the risk of an employee who should be self-isolating coming into work thus presenting a health and safety risk.

These decisions are not easy and will depend on how your scheme is drafted and your organisation's specific circumstances.

Impact on revenue and levels of absence will vary dramatically from business to business and sector to sector. This means it will be sensible to review your approach on a rolling basis rather than taking blanket decisions at the outset.

Point to note: if your sick pay scheme is contractual, it will be difficult to reduce any payments provided for under the scheme. You may want to seek legal advice to understand your options.

Holidays

Employees who are working continue to be entitled to take holidays and should be encouraged to do so. Employees taking holiday should receive pay in the usual way. (See **Managing holiday and**

extension to 'carry-over' provisions below.)

Employers will need to consider how they approach the quarantine periods which attach where an employee returns from abroad. The quarantine period should not affect an employee who can work from home but employees who need to attend the workplace will be in a more difficult position as the quarantine requirements mean that they will not be able to return to the workplace for 14 days following their return to the United Kingdom.

If an employee falls ill (with COVID-19 or otherwise) whilst they are on holiday, then they are entitled to move to sick leave and to be 'reimbursed' for the balance of any unused holiday.

If the employee's workplace closes whilst they are on holiday they can still be treated as being on holiday until their return at which point they should be treated in line with other employees.

Particular rules apply to those who take holiday whilst on furlough. Please see our briefing [The Coronavirus Job Retention Scheme: an essential guide for employers](#) for further detail.

AT A GLANCE: Absence and entitlement to leave and pay

Reason for absence	Entitlement to leave and pay
<p>Employee is unwell with COVID-19</p>	<p>Entitled to:</p> <ul style="list-style-type: none"> • take sick leave; • to receive SSP* from day 1 of absence; • may be entitled to additional pay under any company sick pay scheme. <p>NB an employee who falls ill whilst on holiday will be entitled to switch to sick leave (and SSP/ sick pay) and have the balance of any holiday returned to them.</p>
<p>Employee is well but is required, in accordance with Schedule 1 or Schedule 2, to self-isolate/shield due to COVID-19.</p> <p>You may be able to keep employees who are shielding in line with Public Health England (or equivalent) guidance (and those who need to stay at home with someone who is shielding) on furlough and/or re-furlough if they cannot work from home (see The Coronavirus Job Retention Scheme below for details).</p>	<p>Entitled to:</p> <ul style="list-style-type: none"> • take sick leave; • receive SSP* from day 1 of absence; • may be entitled to additional pay under any company sick pay scheme. <p>But consider with employee if working from home is an option (see ‘Working away from the workplace’ below for detail).</p> <p>Note: Those employees who have been advised to shield will stop being eligible for SSP when their shielding period ends. Shielding is being paused in England from 1 August. However, further shielding notifications may be issued after 1 August, and those who receive further notifications will be entitled to SSP again while they are shielding.</p>

Absence from the workplace and entitlement to pay

Reason for absence	Entitlement to leave and pay
<p>Employee who cannot work from home is well but is not attending work due to concerns about COVID-19 (and not because they are required to self-isolate/shield under Schedule 1 or Schedule 2)</p>	<p>No entitlement to SSP.</p> <p>Check entitlement under any company sick pay scheme.</p> <p>If the employee cannot work from home, the employer should first understand the employee's reasons for refusing and assess the risk. Consider whether a change to hours, transport or job duties may assist in achieving a return to work. Whilst they may not qualify for SSP, you may be able to require the employee to take holiday or you could offer a period of unpaid leave to cover their absence. Furlough may, in some circumstances, also be an option.</p> <p>Disciplinary action may ultimately be justified but, given the current circumstances, should only be considered as a last resort.</p> <p>See 'Can an employee refuse to return to work?' for information about circumstances where an employee may be justified in staying away as a result of health and safety concerns above.</p> <p>The clinically vulnerable and clinically extremely vulnerable are in a different position – see Protecting people who are at higher risk above.</p>

*Subject to fulfilling usual SSP eligibility criteria

Absence from the workplace and entitlement to pay

Reason for absence	Entitlement to leave and pay
<p>Employee is unwell but not related to COVID-19</p>	<p>Entitled to:</p> <ul style="list-style-type: none"> • take sick leave; • receive SSP* but only from day 4 of absence and SSP will not be refunded; • may be entitled to additional pay under any company sick pay scheme.
<p>Employee who cannot work from home is well but is required to self-isolate due to someone in their 'linked' or 'extended' household experiencing Covid-19 symptoms</p>	<p>Entitled to:</p> <ul style="list-style-type: none"> • take sick leave; • receive SSP*; • may be entitled to additional pay under any company sick pay scheme.
<p>Employee is well but self-isolating on the employer's instruction (and not because they are required to do so under Schedule 1)</p>	<p>Entitled to receive their normal pay unless company sick pay scheme covers this situation.</p>
<p>Employee is well but absent from work due to school or nursery closure</p>	<p>Consider if holiday/ parental leave/ unpaid leave or furlough is appropriate if available if employee cannot work from home – see below for details.</p>
<p>Employee is well but absent from work due to workplace closure as a result of Covid-19</p>	<p>Entitled to receive normal pay even if they cannot work from home (see 'Working away from the workplace' below for detail) NB consider whether employees can be furloughed – you may want to take legal advice.</p> <p>Employees who are unwell during a workplace closure should be treated as being on sick leave.</p>

Absence from the workplace and entitlement to pay

Reason for absence	Entitlement to leave and pay
<p>Employee is well but is required to quarantine on return to the UK following a work trip abroad</p>	<p>No entitlement to SSP currently.</p> <p>If employee can work from home then entitled to receive their normal pay.</p> <p>If the employee cannot work from home then they should be paid at their normal rate of pay during the quarantine period.</p>
<p>Employee is well but is required to quarantine on return to the UK following a holiday abroad</p>	<p>No entitlement to SSP currently.</p> <p>If employee can work from home then entitled to receive their normal pay.</p> <p>If employee went abroad through their own choice and cannot work from home then consider unpaid leave and/ or additional holiday to cover quarantine period. Disciplinary action may be possible if employee was instructed by employer that the 14 day quarantine period would not be sanctioned as leave.</p>

*Subject to fulfilling usual SSP eligibility criteria

School and nursery closures



The closure of schools and nurseries in March to all children except for those of key workers, meant many parents have found it difficult to work. Whilst many summer holiday clubs have opened there will be many that have not and many employees who rely on grandparents to provide care during the holidays may find that this care is not available. Employers will need to continue to assess on an ongoing basis how their employees with children are coping.

If an employee can work from home, discuss potential arrangements with them – can you flex their hours – many parents are sharing the childcare operating on 'shift systems' so one works whilst the other looks after the children or can the employee use holiday to cover some of their hours?

If the employee cannot work during the summer holidays and cannot make alternative arrangements for their care, then consider what alternative options

might be available. Many employers have chosen to furlough employees in this position (see The Coronavirus Job Retention Scheme below for more details). However, it is no longer possible to furlough employees for the first time (save for those returning from maternity or other family leave) so furloughing may not be available. Eligible employees may also be able to take unpaid parental leave.

Employees with over 1 year's continuous employment are entitled to 18 weeks' parental leave per child. The leave is generally limited to four weeks per year but an employer can agree otherwise so could choose to extend the amount of time available. Again, whilst leave is generally taken in periods of a week, the employer can agree for parental leave to be taken as single days. Therefore a combination of parental leave and some work when childcare is available may be a possible solution.

School and nursery closures

If an employee has no entitlement to parental leave or has used their entitlement and has no holiday entitlement left then consider offering unpaid leave. Disciplining or dismissing an employee who cannot work for childcare reasons is unlikely to be reasonable in the circumstances so, unless you suspect the employee is taking advantage of the situation, it would be sensible to agree to unpaid leave as a last resort.

Working away from the workplace



From 1 August, employers will have discretion to bring people back into the workplace. So, whilst many employees have enjoyed working from home, if an employee is struggling to work from home, perhaps because of childcare issues or because of mental ill-health, employers may want to prioritise their requirements when determining who should be brought back into the workplace first.

In a bid to de-risk the situation, some employers are splitting teams so they work at different locations. If you require employees to work from an alternative site, you will need to consider the personal impact this might have, particularly if your contracts of employment are silent on this. As any change in location is likely to be on a temporary basis, then this will make a request that employees work elsewhere more reasonable. However, if the new location means the employee is having to travel a significant distance or if they will struggle to manage childcare because of

the new work location, you may need to be flexible with start and end times, for example. The same principles apply if you are asking an employee to change their working pattern to better accommodate social distancing. If the new hours cause difficulties for an employee because of childcare arrangements then the employer may need to revise the proposals in relation to that person to avoid the risk potential indirect discrimination/ constructive dismissal claims.

Where employees are continuing to work from home or from a different location then, even in these difficult times, you are still under various obligations as their employer. For example, you are still responsible for an employee's health and safety and need to carry out a risk assessment. If an employee uses specific equipment, for example, a particular office chair or an adapted keyboard, then you may need to arrange for the equipment to be transported to the employee's home/ new location.

Working away from the workplace

It is also important for employers to consider their employees' mental wellbeing. Whilst many employees may relish working from home, others, particularly those who are living alone may be finding this difficult. If you cannot bring these employees back to the workplace, make sure you keep in touch with employees – virtual coffee breaks, team WhatsApp and buddy-up schemes may each have a place.

Also consider the following:

- remember that as an employer you will still be under health and safety obligations towards your employee (see above);
- GDPR obligations do not disappear because of COVID-19. Keep under review steps/ restrictions in place to protect personal data which is being taken off-site;
- if employees are using their own devices, such as PCs and tablets, how does this affect confidentiality requirements?
- does your insurance cover homeworking?
- how do you supervise work?
- review touch points with employees – are you staying in touch with employees on a frequent enough basis?
- do you need to provide employees with stationery, paper and printer ink for example? How will you reimburse people for expenses eg telephone bills, postage etc?
- keep arrangements under regular review.

Business travel



The 'Working Safely' guidelines state that walking or cycling should be used where possible for work-related travel. From 1 August, anyone can use public transport and so an employee will be able to travel for work provided they can do so in line with government guidance. Employers may want to provide masks for employees who are required to travel using public transport.

If you need an employee to stay overnight away from home you will need to log their stay centrally and make sure that any accommodation meets social distancing guidelines.

In respect of international travel, the FCO has updated its advice against all but essential international travel to include a list of exempt countries, which no longer pose an unacceptable high risk. The FCO continues to advise against non-essential travel (except to the exempt countries listed). Further, if you travel to a country which is on the [travel corridor exemption list](#), you will not have to isolate for 14 days when you return to England, providing you have not stopped in a country that is not on the travel corridors exemption list. Given this guidance and taking into account that

any country or area may restrict travel without notice, an employee will almost certainly be entitled to refuse to travel abroad for business to any countries not listed on the FCO's exempt list at the current time.

Businesses should continue to assess their approach to international travel in line with FCO guidance. In deciding what approach to take in relation to travel, your start point should be the [FCO guidance on travel](#).

If an employee can travel within the UK in line with the guidance, they should be encouraged to adhere to the guidance on social distancing. If an employee refuses to travel within the UK or to a country on the FCO's exempt list, and your request that they do so is in line with Government guidance, listen to their reasons for refusing and see if you can address these concerns in the first instance. Many employees will still be very reluctant to take public transport – particularly planes and health and safety protections will apply to employees being asked to travel for work purposes (see 'Working Safely' above for more detail.)

The Coronavirus Job Retention Scheme



Overview of the scheme

On Friday 20 March the Chancellor of the Exchequer announced the introduction of the Coronavirus Job Retention Scheme in an effort to help employers avoid the need to make mass redundancies as a result of the impact of COVID-19.

The scheme which is open to all UK businesses, regardless of size, is designed to support employers whose operations have been severely affected by COVID-19. The scheme currently allows employers to claim for 80% of the usual monthly wage costs of any furloughed employees up to £2,500 per employee per month plus employer NICs and minimum auto-enrolment pension contributions but this is changing from August when employers will need to start to contribute to these costs.

The scheme will last until the end of October and a bonus is available to employers of £1000 per furloughed worker if that worker remains employed beyond 31 January 2021.

The scheme is not without its complexities and the supporting guidance changes on a regular basis. We have written a briefing for employers explaining more about how the scheme works which is updated on a regular basis. You can read our briefing here: [The Coronavirus Job Retention Scheme: an essential guide for employers](#)

Right to emergency volunteering leave



The Government is introducing a temporary right which will allow employees and workers (including agency workers) to take unpaid emergency leave from their jobs in order to volunteer in health and social care services.

Please see our briefing giving information about how the new right will operate [here](#).

Managing holiday and extension to 'carry-over' provisions



In an effort to relieve a potential operational challenge for employers, the Government has introduced a temporary change to the Working Time Regulations 1998 which will allow workers to carry over up to four weeks of holiday for up to two years if issues relating to COVID-19 have prevented the worker from taking their leave in the current holiday year.

You can find out more about this change in our [briefing on managing holiday and extension of carry-over provisions](#).

This briefing also contains more general information on managing holidays including:

- whether employers can require employees to take holiday; and
- requests by employees to cancel leave.

Practical tips



- Adhere to Government guidance on COVID-19 as a base line. As we start to ease lockdown these changes continue apace – always check the latest Government guidance before taking decisions. [COVID-19: UK Government response](#)
- Remember that lockdown is easing at different rates across the United Kingdom.
- Ensure your COVID-19 core team communicates regularly and issues regular employee communications.
- Make sure all staff contact details are accessible and up to date and put in place a mechanism so you know where employees are.
- Seek to act consistently across the business at any given time (bearing in mind that approaches may need to be adapted depending on how the situation develops over time). Make sure managers understand what is required of them.
- Whilst consistency is important, there will be occasions when you will need to consider an employee's particular circumstances, so avoid introducing blanket policies which offer no flex.
- Many employers will want to be generous in relation to paying employees who are absent from work. Whilst contractual terms will need to be adhered to, be careful to make it clear if a payment is discretionary so that if the situation escalates as larger numbers of employees are affected you can review your approach.

This guide gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information provided, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

Useful websites

[COVID-19: UK Government response](#)

[COVID secure guidelines on working safely](#)

[Short guide on working safely during coronavirus](#)

[FCO travel advice on COVID-19](#)

[ACAS advice for employers and employees on COVID-19](#)

[Public Health England guidance on self-isolation](#)

[COVID-19: cleaning of non-healthcare settings](#)

[Guidance on staying alert and safe \(social distancing\)](#)

[Guidance on shielding for the clinically extremely vulnerable](#)

[ABI Coronavirus Hub relating to insurance policies](#)

[Number of COVID-19 cases and risk in the UK](#)

www.burges-salmon.com

One Glass Wharf, Bristol BS2 0ZX T +44 (0) 117 939 2000 F +44 (0) 117 902 4400

Atria One, 144 Morrison Street, Edinburgh EH3 8EX T +44 (0) 131 314 2112 F +44 (0) 131 777 2604

6 New Street Square, London EC4A 3BF T +44 (0) 20 7685 1200 F +44 (0) 20 7980 4966

Burges Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burges Salmon entities, including details of their regulators, is set out on the Burges Salmon website at www.burges-salmon.com.

© Burges Salmon LLP 2020. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged.