Burges Salmon

COVID-19: a guide for employers
Other Burges Salmon COVID-19 guidance for employers

**Employment**

The COVID-19 vaccine: What does it mean for employers?

The Coronavirus Job Retention (Furlough) Scheme from November 2020 to April 2021

Treasury Direction on the Coronavirus Job Retention Scheme: A summary of key points

A conversation about... COVID-19 and the reluctant returner

A conversation about… flexible working in a COVID-19 world

A conversation about...COVID-19 and the quarantined employee

Managing holiday and extension of carry-over provisions

The Test and Trace Scheme – what does it mean for employers?

**Pensions**

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JANUARY 2021: LOCKDOWN UPDATE

England was placed into lockdown on 5 January 2021 and the tiered system of restrictions was paused. This guide has been updated to reflect the national lockdown. Please note that some information in this booklet may have less relevance to employers in England while strict lockdown restrictions are in place.

In addition, Wales, Scotland and Northern Ireland have different systems of restrictions in place and you should refer to the specific guidance for each nation.
Introduction

The news that a vaccine is now available to protect against the effects of COVID-19 is, of course, the news that the world has been waiting for offering light at the end of a long and dark tunnel. However, the rollout for the vaccine both nationally and globally is complex and COVID-19 will continue to present a global challenge for many months to come. With restrictions still in place and with consumer demand still unpredictable, 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 (at the time of publication we are one week into the third national lockdown) so expect to update your approach on a regular basis in line with government guidance.

We are advising our clients on the continuing impact of COVID-19 on their workforces and workplace practices on a daily basis. If we can assist you, please do not hesitate to get in touch.

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As an employer, you are under a duty to take reasonable steps to ensure your employees’ safety.

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. Broadly, the current guidance throughout the UK provides that everyone who can work from home should do so. In England, individuals should only leave home to work where it is not reasonably possible to work from home and employers should take every possible step to facilitate home-working. In Scotland there is also a requirement to stay at home and people should only leave their homes for an ‘essential purpose’. Employers should carefully consider which employees may attend their place of work with these tests in mind. With some roles it will be obvious if the test is met. However, in other instances, for example with office-based work, the decision-making process will need to be done on an individual basis. Where a decision is taken that an individual satisfies the test, the decision-making process should be recorded. There are criminal sanctions for non-compliance with the relevant Regulations so you would want to be able to demonstrate your reasons.

The government ‘Working safely during coronavirus’ guidance comprises a suite of detailed non-statutory workplace guides for employers to take into account when complying with existing health and safety obligations. Where employers have employees who need to come into their place of work, the guides explain how to make working and workplace environments Covid-secure and 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.

The guides now highlight that the mental health and wellbeing aspects of COVID-19 should be considered, and direct individuals to the government guidance on the same (‘COVID-19 guidance for the public on mental health and wellbeing’).
Employees who attend the workplace

During lockdown employees should only go to work if they cannot reasonably work from home and employers should facilitate this as far as possible. Guidance on how to establish whether employees should work from home is provided in the workplace guides and engagement with employees about any necessary attendance in the workplace is a central theme in the guides with the aim of ensuring workers feel safe attending work. The workplace guides recommend that employers consult with any recognised trade union health and safety representatives or, if there aren’t any, with a representative chosen by employees. Employers should give particular consideration to vulnerable employees who are at higher risk.

As employers decide who needs to be in the workplace, risk assessments and actions should be updated to reflect this and to ensure the risk of transmission is managed. Employers should continue to monitor the wellbeing of any workers who remain working off-site.

Employers are 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 is 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 them.

- **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

Two groups have been identified as being at higher risk from the dangers
of COVID-19; the clinically extremely vulnerable and the clinically vulnerable.

In England, shielding advice has been reactivated and the clinically extremely vulnerable who cannot work from home are now strongly advised not to go into the workplace. Employers should consider alternative roles or a change of working patterns to enable home working. Where that is not possible, the guidance is clear that employers should not require such individuals to attend work and that they should have a conversation about alternative arrangements including consideration of use of the Coronavirus Job Retention Scheme (furlough).

Clinically extremely vulnerable employees may be eligible for SSP if they cannot work from home and a further formal shielding notification can be used as evidence for their eligibility. The clinically extremely vulnerable are included in the priority groups for the vaccine roll-out and consideration will need to be given to working arrangements for these employees after their vaccination. Please see ‘The COVID-19 vaccine’ below for more information on the vaccine.

Employees who live in the same household as a clinically extremely vulnerable individual can continue to attend work if they are unable to work from home. If, as a result of COVID-19, an employee has caring responsibilities for a vulnerable individual in their household, the Government has confirmed that the employee can be furloughed.

Further information is set out in the guidance in England on shielding and protecting people who are clinically extremely vulnerable from COVID-19.

The clinically vulnerable are at less risk than the clinically extremely vulnerable but are still at a higher risk than the general population. A full list of those who are viewed as clinically vulnerable can be found on the NHS website ‘Who’s at higher risk from coronavirus’ and it includes the over 70s, those who are pregnant and those with certain underlying health conditions. Like the clinically extremely vulnerable, you will also need to take account of any local COVID-19 alert level guidance in place. Clinically vulnerable employees should be allowed to work from home wherever possible and, as an employer, you should support this. The Government workplace guidance confirms that the higher risk that COVID-19 poses to certain individuals (including those who belong to ‘higher-risk’ groups which also include, for the purposes of the guidance, older males) should be considered as part of employer’s risk assessment on who should work and how risks can be effectively managed.

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 attend the workplace?

For those who cannot reasonably work from home, there are likely to be employees who are understandably nervous or anxious about attending 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 attend 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 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/ clinically 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 the grounds of that disclosure as a whistleblower. If the employee is disabled there is also an obligation to consider reasonable adjustments.
Working safely

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; and
• 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); and
• respond to the concerns, explain the safety measures that have been put in 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/ and or withholding pay may be possible in certain circumstances but you may wish to seek legal advice as the employee may have:

• protection against disciplinary action, suffering a detriment and/ or 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 COVID-19 vaccine

The rollout of the first wave of COVID-19 vaccinations is a welcome development
Working safely

and it should ultimately provide employers with opportunities to bring more employees back to the workplace. However, it will also present many logistical and ethical challenges that employers will need to address with care.

Find out more about the issues raised for employers and the steps to take by reading our briefing note ‘The COVID-19 vaccine: What does it mean for employers?’.

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 is required (in line with current guidance) to attend work and 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 employees coming into work 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 been 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.

Self-isolation

From 28 September 2020, Regulation 7 of the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 made it an offence for an employer to knowingly allow a worker (including an agency worker) who is self-isolating to attend any place other than the designated place they are self-isolating at during the isolation period for any purpose relating to their employment. Employers who contravene these Regulations will face a fixed penalty starting at £1,000.

Regulations 8 and 9 of the above regulations require workers and agency workers to notify their employer or agent of their requirement to self-isolate and the start and end dates of the isolation period. Individuals will commit an offence if they contravene the requirement to self-isolate.
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 and some will be unable to work because their children cannot attend school or nursery. 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 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 SSP of £95.85 per week. 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. Please note that the current self-isolation period of ten days begins the day after symptoms start and/or a positive COVID-19 test result is received. 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 11 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 so is self-isolating in consequence;

  (c) the employee is staying at home under paragraph (b) above and develops the symptoms of coronavirus, however mild, and
is staying at home for 11 days, beginning with the day the symptoms started;

(d) 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 until the date specified in a relevant notification; or

(e) the employee has received a pre-surgery notification and has been advised to stay at home for a period of up to 14 days before the date on which they will be admitted to hospital for the procedure referred to in the pre-surgery notification and is staying at home in accordance with that advice.

• an employee will be entitled to SSP if they are shielding in accordance with Schedule 2 of the SSP Regulations (“Schedule 2”). Shielding advice has been reactivated and those who have been issued with a further shielding notification can use this notification as evidence of eligibility for SSP.

• 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 if they are self-isolating after entering or returning to the UK and do not need to self-isolate for any other reason.

• 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 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 from the workplace and entitlement to pay

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: A furloughed employee is not entitled to receive SSP so if an employee who had been receiving SSP is moved onto furlough they should no longer be paid SSP.

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 (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
Absence from the workplace and entitlement to pay

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.) Where international travel is permitted, employers will need to consider how they approach the quarantine periods which may 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 10 days (or a potentially shorter period if they can use the ‘Test to Release’ scheme – further details of which are set out under ‘Business Travel’ below) following their return to the United Kingdom. Currently those required to quarantine following a trip abroad are not entitled to SSP. You may wish to introduce a policy to address how your organisation will deal with quarantine issues. For more information about how to manage issues around quarantine please refer to our video ‘A conversation about...COVID-19 and the quarantined employee’.

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 – from July to October 2020’ for further detail.
Absence from the workplace and entitlement to pay

AT A GLANCE: Absence and entitlement to leave and pay

<table>
<thead>
<tr>
<th>Reason for absence</th>
<th>Entitlement to leave and pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee is unwell with COVID-19</td>
<td>Entitled to:</td>
</tr>
<tr>
<td></td>
<td>• take sick leave;</td>
</tr>
<tr>
<td></td>
<td>• to receive SSP* from day 1 of absence; and</td>
</tr>
<tr>
<td></td>
<td>• may be entitled to additional pay under any company sick pay scheme.</td>
</tr>
<tr>
<td></td>
<td>Note: 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.</td>
</tr>
<tr>
<td>Employee is well but is required, in accordance with Schedule 1 or Schedule 2** to self-isolate / shield due to COVID-19.</td>
<td>Entitled to:</td>
</tr>
<tr>
<td></td>
<td>• take sick leave;</td>
</tr>
<tr>
<td></td>
<td>• receive SSP* from day 1 of absence; and</td>
</tr>
<tr>
<td></td>
<td>• may be entitled to additional pay under any company sick pay scheme.</td>
</tr>
<tr>
<td></td>
<td>But consider with the employee if working from home is an option (see ‘Working away from the workplace’ below for detail).</td>
</tr>
<tr>
<td></td>
<td>Note: shielding was previously paused in all tiers but has been reactivated. Those who receive further notifications will be entitled to SSP again while they are shielding.</td>
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</tbody>
</table>
### Employee who cannot work from home 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**))

<table>
<thead>
<tr>
<th>Reason for absence</th>
<th>Entitlement to leave and pay</th>
</tr>
</thead>
<tbody>
<tr>
<td>No entitlement to SSP.</td>
<td>Check entitlement under any company sick pay scheme.</td>
</tr>
<tr>
<td>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.</td>
<td></td>
</tr>
<tr>
<td>Disciplinary action and / or withholding pay may ultimately be justified but, given the current circumstances, should only be considered as a last resort. There are arguments that in doing so you may be subjecting the employee to an unlawful detriment which could result in employment tribunal claims. You may wish to seek legal advice in these circumstances.</td>
<td></td>
</tr>
<tr>
<td>See ‘Can an employee refuse to attend the workplace?’ above for information about circumstances where an employee may be justified in staying away as a result of health and safety concerns.</td>
<td></td>
</tr>
<tr>
<td>The clinically vulnerable and clinically extremely vulnerable are in a different position – see ‘Protecting people who are at higher risk’ above.</td>
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</table>

*Subject to fulfilling usual SSP eligibility criteria*
### Absence from the workplace and entitlement to pay

<table>
<thead>
<tr>
<th>Reason for absence</th>
<th>Entitlement to leave and pay</th>
</tr>
</thead>
</table>
| Employee is unwell but not related to COVID-19                                     | Entitled to:  
  - take sick leave;  
  - receive SSP* but only from day 4 of absence and SSP will not be refunded; and  
  - may be entitled to additional pay under any company sick pay scheme. |
| 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 | Entitled to:  
  - take sick leave;  
  - receive SSP*; and  
  - may be entitled to additional pay under any company sick pay scheme. |
| Employee is well but self-isolating on the employer’s instruction (and not because they are required to do so under Schedule 1**) | Entitled to receive their normal pay unless the company sick pay scheme covers this situation. |
| Employee is well but absent from work due to child needing to self-isolate from school or nursery and/ or school/ nursery closure | Consider if holiday/ parental leave/ unpaid leave or furlough is appropriate if available if employee cannot work from home – see below for details. |
| Employee is well but absent from work due to workplace closure as a result of COVID-19 | Entitled to receive normal pay even if they cannot work from home (see ‘Working away from the workplace’ below for detail).  
  
  Note: consider whether employees can be furloughed – you may want to take legal advice.  
  Employees who are unwell during a workplace closure should be treated as being on sick leave. |

Note: consider whether employees can be furloughed – you may want to take legal advice.
### Absence from the workplace and entitlement to pay

<table>
<thead>
<tr>
<th>Reason for absence</th>
<th>Entitlement to leave and pay</th>
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<tbody>
<tr>
<td>Employee is well but is required to quarantine on return to the UK following a work trip abroad</td>
<td>No entitlement to SSP. If the employee can work from home then they are entitled to receive their normal pay. If the employee cannot work from home then they should be paid at their normal rate of pay during the quarantine period.</td>
</tr>
<tr>
<td>Employee is well but is required to quarantine on return to the UK following a holiday abroad</td>
<td>No entitlement to SSP. If the employee can work from home then they are entitled to receive their normal pay. If the employee went abroad through their own choice and cannot work from home then consider unpaid leave and/or additional holiday to cover the quarantine period. Disciplinary action may be possible if the employee was instructed by the employer that the quarantine period would not be sanctioned as leave. <em>Note:</em> There are current restrictions on national and international travel for leisure purposes.</td>
</tr>
</tbody>
</table>

*Subject to fulfilling usual SSP eligibility criteria

**of the SSP Regulations
Schools and nurseries are subject to closures during lockdown and even if open, many children will be required to self-isolate from time to time as either they or their cohorts show COVID-19 symptoms and/or test positive for COVID-19. This means that employees may need to stay away from work – often with little notice – in order to care for their children.

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 from home and cannot make alternative arrangements for their care, then consider what alternative options might be available. In the short-term, as an emergency measure, employees may need to rely on their right to take time off to care for a dependent. Employees do not have a right to be paid in these circumstance unless this is included in their contract and/or any dependents leave policy.

Many employers have chosen to furlough employees in this position (see ‘The Coronavirus Retention Scheme’ below for more details). 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.

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.
Employees should not leave their home to go to work unless they are able to do so under the current restrictions (see above ‘Working Safely’). Whilst many employees are enjoying working from home, if an employee is struggling to work from home, perhaps because of childcare issues or because of mental ill-health, employers should factor in their requirements when determining whether it is reasonably possible for an employee to work from home. Assessing the reasonableness of an employee attending the workplace will, however, be a higher test to meet compared to previous guidance in England that everyone who could work effectively from home should do so and any deviations from the work from the latest Stay at Home guidance will certainly be the exceptions rather than the norm.

Where employees cannot work from home, some employers are splitting teams so they work at different locations in a bid to de-risk. 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. 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 – particularly as the situation has moved from short to longer term. 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 of 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 you still 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, particularly if the homeworking is continuing.

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. 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 e.g. telephone bills, postage etc?

• keep arrangements under regular review.

As the situation continues, employers may find that employees start to submit formal requests to work flexibly to enable them to continue to work from home and/ or to continue a different pattern of working on a permanent basis. To find out about how employers can best manage these requests please refer to our video ‘A conversation about… flexible working in a COVID-19 world’ where we discuss these issues.
Travel is now only permitted in very limited circumstances. The ‘Working Safely’ guidelines state that walking or cycling should be used where possible for work-related travel and the current lockdown guidance for those in England repeats this message. The government advises that if individuals need to use public transport, they should avoid busy times and routes where possible.

If you need an employee to stay overnight away from home, and can do so within the parameters of the government guidance, you will need to log their stay centrally and make sure that any accommodation meets social distancing guidelines.

During lockdown, individuals can only travel (both internationally and within the UK) if they have a legally permitted reason to do so. Travellers may be required to declare their reason for travel outside of the UK before their journey and there may be severe penalties for failure to comply with the rules on travel and quarantines. Travel for work (where it cannot reasonably be done from home) should be a permitted reason however employers should ensure that they are aware of the current legal exceptions for travel, which may be subject to change.

At the current time, travel corridors have been suspended and all arrivals to England from outside of the UK and Ireland will need to self-isolate for ten days (or, if available, the shorter period under the Test and Release scheme). The government has banned arrivals from a designated list of countries by anyone who does not have resident rights in the UK and any UK residents returning from the countries on this list will be required to undertake the ten day quarantine period in a government-approved hotel or facility. Many other countries have similar quarantine requirements in place on entry. In addition, individuals must have proof of a negative coronavirus test to travel to the UK. If you are asking an individual to travel internationally, you will need to consider paying for the necessary tests as well as any stay in a hotel or facility that is required by the destination country or on return to the UK.
Where international travel is legally permitted (and those circumstances will be very limited), the FCO continues to advise against all non-essential travel to some countries and territories (details of the country-specific Covid advice can be found on the FCO website and is updated regularly). Given this guidance, and taking into account the restrictions to enter the UK and that any country or area may restrict travel without notice, an employee may be entitled to refuse to travel abroad for business especially in respect of any countries that are designated as high-risk or that the FCO has advised against visiting.

A ‘Test to Release’ scheme is now in place and allows individuals in certain cases to pay for a private test and reduce their isolation period. The earliest a test can be taken is five full days after the individual has left the country in question. If you are asking an individual to travel internationally, you may want to consider paying for this test.

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 refuses to travel within the UK or abroad overseas, and your request that they travel 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). In addition, employees may well want to avoid the period of self-isolation that foreign travel will now require on return to the UK for a number of justifiable reasons including caring for clinically vulnerable people and/or childcare reasons.
Overview of the scheme

On Friday 20 March 2020 the Chancellor of the Exchequer announced the introduction of the Coronavirus Job Retention Scheme – known also as the furlough 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 was expected to close at the end of October 2020 has now been extended until the end of April 2021.

On 5 January 2021, guidance on the furlough scheme was updated to confirm that employers can furlough employees who have caring responsibilities as a result of COVID-19 (such as those who are impacted by school closures or who have a vulnerable individual in their household).

The scheme is not without its complexities and the supporting guidance has changed on a regular basis. We have written a briefing for employers explaining more about the operation of the extended scheme which you can read here. Our previous guidance notes on how the scheme works are also available on our website.

As a result of the extension, the Coronavirus Job Retention Bonus, which was to be paid in February, has now been withdrawn although a replacement retention incentive is expected to be introduced.
The government had intended to introduce a temporary right to 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 note giving information about how the right would operate [here](#) although to date this right has not become law.
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 4 weeks of holiday for up to 2 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 the level of cases fluctuates these changes continue apace – always check the latest government guidance before taking decisions. [COVID-19: UK government response](#).

• Remember that restrictions are easing (and ramping up) at different rates across the United Kingdom. Always check government guidance pertinent to your area before making decisions.

• 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.