Burges Salmon

COVID-19: a guide for employers
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Introduction

COVID-19 is presenting a global challenge on a scale that has not been seen in a generation. The effect on business is seismic from swingeing drop-off in consumer demand through to potential supply chain collapses. There are numerous issues to consider and people lie at the very heart of this crisis.

With estimates suggesting that a fifth of the UK workforce could be absent from work at any given time in the months ahead, employers will have difficult decisions to make.

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.

You may also find it useful to read COVID-19: guidance for employers and businesses which has been produced by the Department for Business, Energy and Innovation.

We have been advising many of our clients on the impact of COVID-19 on their workplace practices. 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. Whilst employees are required to work from home wherever possible (see ‘Working away from the workplace’ below) some employers are still reliant on employees coming into work.

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.

COVID-19 can spread if a person comes within close proximity of someone who is infected or if they touch a contaminated surface and then touch their own mouth, nose or eyes.

Workplace precautions

To help prevent the spread of infection you should:

- in line with current Government guidance (COVID-19: guidance for employers and businesses), make sure employees work from home wherever possible. Where this is not possible, employees should adhere to the guidance on social distancing (Guidance on social distancing for everyone in the UK and protecting older people and vulnerable adults);

- consider your approach to any vulnerable employees (Guidance on social distancing for everyone in the UK and protecting older people and vulnerable adults);
• make sure people understand, through internal communications, posters and noticeboards, how they can help prevent the spread of infection;

• make sure any visitors to your building understand the precautionary measures you expect them to take and adhere to guidance on social distancing;

• supply tissues (and waste bins), antibacterial hand wash and sanitisers across all offices and sites;

• encourage frequent hand-washing;

• arrange for frequent on-site cleaning paying particular attention to disinfect objects and surfaces touched regularly. More information can be found at (COVID-19: cleaning of non-healthcare settings);

• have a process in place to deal with any suspected COVID-19 cases on site;

• 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.
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 of the school and nursery closures. This means employers will need to carefully consider the question of pay – not least because of the unprecedented levels of absence which are anticipated.

**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 has 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 £94.25 per week - £95.85 per week from 6 April 2020. 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 guidance published by Public Health England, NHS National Services Scotland or Public Health Wales (‘Public Health guidance’) effective on 12 March 2020 and by reason of that isolation are unable to work;
- 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 in accordance with Public Health guidance. 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 once they are fit to return to work.

**Company sick pay**

Many employers operate enhanced sick pays 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 expected 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 Public Health guidance 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 Public Health guidance but cannot work from home will need to take sick leave. 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 for other employees.

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.

Vulnerable adults

The Government has issued guidance advising those who are at increased risk of severe illness from COVID-19 to be particularly stringent. Those who have been designated as ‘extremely vulnerable’ are being advised to follow shielding methods to minimise interaction with other people – this includes staying at home at all times and avoiding face-to-face contact with people. Those in the same household should also reduce their contact outside the home. (Guidance on shielding for the extremely vulnerable).

Those who are less at risk but still vulnerable are subject to less stringent advice. A full list of those who are viewed as vulnerable can be found at Guidance on social distancing for everyone in the UK and protecting older people and vulnerable adults. Vulnerable employees should be allowed to work from home wherever possible and, as an employer, you should support this.

Those who are pregnant are also categorised as vulnerable. Until the social distancing measures are relaxed, 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. You may want to seek legal advice in this situation.

Holidays

Employees 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.)

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.

Short-time working, lay off and furlough

Many businesses, particularly in the retail and hospitality sectors, are experiencing serious reductions in demand and may be considering short-time working, laying
Absence from the workplace and entitlement to pay

off employees for a period of time and/or furloughing under the Government’s newly announced Coronavirus Job Retention Scheme (see COVID-19: government guidance for employers and businesses).

The legal implications of these steps are complex and we recommend seeking specific legal advice if you are considering any of them. For more detail on furlough please see The Coronavirus Job Retention Scheme below.
## 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><strong>Employee is unwell with COVID-19</strong></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;</td>
</tr>
<tr>
<td></td>
<td>• may be entitled to additional pay under any company sick pay scheme.</td>
</tr>
<tr>
<td></td>
<td><strong>NB</strong> 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><strong>Employee is well but is required, in accordance with Public Health guidance, to self-isolate due to COVID-19.</strong></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;</td>
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<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 employee if working from home is an option (see ‘Working away from the workplace’ below for detail).</td>
</tr>
</tbody>
</table>
## Absence from the workplace and entitlement to pay

<table>
<thead>
<tr>
<th>Reason for absence</th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Employee who cannot work from home is well but is not attending work due to concerns about COVID-19 (and not because of Public Health guidance)</strong></td>
<td>No entitlement to SSP.</td>
</tr>
<tr>
<td></td>
<td>Check entitlement under any company sick pay scheme.</td>
</tr>
<tr>
<td></td>
<td>Employers should make every effort to find a way for the employee to work from home in accordance with Government guidance. If this is not possible and an employee is self-isolating and Public Health guidance does not support their decision, first understand the employee’s reasons for self-isolating and assess the risk. Vulnerable employees or those in the same household as an ‘extremely vulnerable’ person for example may be justified in not attending 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. Disciplinary action may be justified but, given the current circumstances, should only be considered as a last resort.</td>
</tr>
<tr>
<td><strong>Employee is unwell but not related to COVID-19</strong></td>
<td>Entitled to:</td>
</tr>
<tr>
<td></td>
<td>• take sick leave;</td>
</tr>
<tr>
<td></td>
<td>• receive SSP* but only from day 4 of absence and SSP will not be refunded;</td>
</tr>
<tr>
<td></td>
<td>• may be entitled to additional pay under any company sick pay scheme.</td>
</tr>
</tbody>
</table>

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

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<th>Reason for absence</th>
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</tr>
</thead>
<tbody>
<tr>
<td><strong>Employee is well but self-isolating on the employer’s instruction</strong>*(and not because of Public Health guidance)**</td>
<td>Entitled to receive their normal pay unless company sick pay scheme covers this situation.</td>
</tr>
<tr>
<td><strong>Employee is well but absent from work due to school or nursery closure</strong></td>
<td>Entitled to unpaid time off to deal with the immediate situation – see below for details.</td>
</tr>
<tr>
<td><strong>Employee is well but absent from work due to workplace closure as a result of COVID-19</strong></td>
<td>Entitled to receive normal pay (see ‘Working away from the workplace’ below for detail). <strong>NB</strong> 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.</td>
</tr>
<tr>
<td><strong>Employee is well but has been quarantined whilst on holiday</strong></td>
<td>It is likely in this situation that the employee will be treated as being in self-isolation and so will be entitled to:</td>
</tr>
<tr>
<td></td>
<td>• take sick leave;</td>
</tr>
<tr>
<td></td>
<td>• receive SSP* from day 1 of absence;</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 employee if working from their base is an option – in which case they would be entitled to normal pay.</td>
</tr>
</tbody>
</table>

*Subject to fulfilling usual SSP eligibility criteria
The closure of schools and nurseries after 20 March to all children except for those of key workers, will mean many parents may find it difficult to work. As with school closures due to snow, the employee has a statutory entitlement to take emergency time off (which does not need to be paid) to care for their child. However, this is a short-term solution. The employee would not be able to rely on this right to cover a school closure for a period of weeks or months.

In the first instance, employers should assess which of their employees are potentially going to struggle as a result of the closure to better understand the scale of the problem. It will be sensible to consider whether you can be flexible on days, hours and times of work and you may want to consider whether duties can be reassigned amongst a team to accommodate an individual’s circumstances.

If the employee cannot work whilst their child’s school is closed and cannot make alternative arrangements for their care, then consider what alternative options might be available – it may be possible to require an employee to take annual leave to cover some of their absence. You may also want to encourage eligible employees 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 then consider offering unpaid leave. Also consider whether the employee can be furloughed (see The Coronavirus Job Retention Scheme below) – something an employee in this situation is likely to agree to.

In these circumstances, dismissing an employee fairly who cannot come to work for childcare reasons is likely to be difficult so, unless you suspect the employee is taking advantage of the situation, it would be sensible to agree to unpaid leave, if furloughing is not an option.
Current government guidance on social distancing (Guidance on social distancing for everyone in the UK and protecting older people and vulnerable adults) asks that people work from home wherever possible and employers are asking their employees to adhere to this. Generally a request to work from home would be regarded as a lawful instruction on the part of the employer (especially given the current crisis) and should not give rise to any problems, even if there is no specific provision in an employee’s contract of employment to allow for this. However, if an employee does raise concerns about working from home then you will need to listen to what they say and seek to address their concerns. If their concerns are justified, then consider what alternative arrangements might be feasible.

In a bid to de-risk the situation, where employees cannot work from home, 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.

If you are asking employees 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 will 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 if the absence from work is likely to be for any length of time.

Also consider the following:

• if you have a homeworking policy,
Working away from the workplace

then recirculate this. Whilst many employers offer homeworking, not all employees will habitually work this way and so a refresher of the policy will be useful – also consider ‘stress-testing’ your IT systems to make sure they can withstand the increased levels of use;

• 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. Consider what steps/ restrictions which need to be put in place to protect personal data which is being taken off-site;

• if you are requiring employees to use their own devices, such as PCs and tablets, how does this affect confidentiality requirements?

• does your insurance cover homeworking?

• how will you supervise work?

• how will you stay in touch with employees?

• 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?
Currently the FCO is advising all British nationals currently abroad to return to the UK now. It is also advising against all but essential international travel. 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 at the current time.

When these current restrictions are relaxed, 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.

Government guidance means that all employees should work from home wherever possible and public transport should only be used where it is essential to do so. (Guidance on social distancing for everyone in the UK and protecting older people and vulnerable adults). It will be difficult currently for an employer to require an employee to travel where this is not an integral part of their role. 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 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.
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. Guidance on the Coronavirus Job Retention Scheme was published on Thursday 26 March.

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 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.

The scheme will last for 3 months initially and reimbursements are to be backdated to 1st March for those employees who have already been laid off (in accordance with the legally recognised lay-off provisions – not in the more general sense). It does seem, however, that until employees are formally placed on furlough, no entitlement to reimbursement would arise.

We have written a briefing for employers explaining more about how the Scheme will work. You can read that briefing here: The Coronavirus Job Retention Scheme: an essential guide for employers
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.
In an effort to relieve a potential operational challenge for employers, the Government is introducing 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. This is a very fast-moving area – always check the latest Government guidance before taking decisions. COVID-19: UK Government response

• 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 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-19: government guidance for employers and businesses

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 the Coronavirus Job Retention Scheme

Guidance on social distancing for everyone in the UK and protecting older people and vulnerable adults

Guidance on shielding for the extremely vulnerable

ABI Q&A on the travel insurance implications of COVID-19

Number of COVID-19 cases and risk in the UK