



Employment Law Newsletter – Coronavirus update 18th March

Boris Johnson has said that if you or anyone in your household has a high temperature or a new and continuous cough you should stay at home for fourteen days. The concern being that without such drastic action, cases of infection could double every 5 or 6 days.

He also asked us to stop non-essential contact with others and to stop all unnecessary travel. That includes avoiding pubs, clubs, theatres and other such social venues. The government needs to slow the spread of the disease but also keep the economy growing.

As employers, you must carry out the same balancing exercise of minimising the economic damage to your business while protecting the health and safety of your employees.

What help is available from the government?

Reclaiming statutory sick pay (SSP)

Businesses that employed fewer than 250 people on 28th February 2020 can reclaim up to two weeks SSP for any employee who has claimed SSP (according to the new eligibility criteria) as a result of COVID-19. Remember to maintain records of those who are self-isolating, for how long and what prompted the decision. The new SSP regulations are not yet in force but the government said that eligibility for the scheme will start the day after they come into effect and that it will set up the repayment mechanism as soon as possible.

Regularly check the public health guidance on self-isolation as it has changed as the pandemic has developed, and it directly affects who is entitled to SSP during self-isolation.

One-off grants

The government will provide an additional £20 billion funding for local authorities to support small businesses that already pay little or no business rates because of Small Business Rate Relief (SBBR) so that they can get a one-off grant of £10,000 to help meet their ongoing business costs. A further £25,000 grant will be available to retail, hospitality and leisure businesses operating from smaller premises, with a rateable value over £15,000 and below £51,000.

Loans

A new temporary Coronavirus Business Interruption Loan Scheme, delivered by the British Business Bank, will launch in the next few weeks to support businesses with a turnover of no more than £41 million to access bank lending and overdrafts. The government will provide lenders with a guarantee of 80% on each loan (subject to a per-lender cap on claims) and the Scheme will

support loans of up to £5 million with no interest for 6 months.

Tax

Businesses and self-employed people in financial distress, and with outstanding tax liabilities, may be eligible to receive support with their tax affairs through HMRC's Time To Pay service. These arrangements are agreed on a case-by-case basis and are tailored to individual circumstances and liabilities.

Contingency

You may already have a contingency plan to ensure the continuity of your business should the coronavirus escalate forcing you to close your workplace. Advice from the government, Public Health England and the Foreign and Commonwealth Office is updated daily. You must do the same with your contingency plans as the situation and the behaviour of your customers changes. What you planned yesterday may not be sufficient today.

You should continue to explore technology, including using Skype and Microsoft Teams, that will enable employees to work remotely but collaboratively. Ensure that they understand how to use it along with who to ask for help.

If the coronavirus forces you to close must you still pay employees?

That closure may not be provoked by an infection in your workplace. Lack of customers or staff absences due to self-isolation may mean it is not cost-effective to stay open. Unless your contract gives you the express right to lay people off in these circumstances you will need to pay employees in full if they are ready, willing and able to work but your closure prevents them from doing so.

However, that does not preclude you from requiring them to work from home, requiring them to take annual leave or agreeing a period of unpaid leave or other temporary measure with a view to avoiding redundancies in the future.

If permanent closure or redundancies are an imminent threat, then you should act decisively and speak frankly to your workforce now.

An instruction to take leave should be at least twice the period of leave you wish them to take so two weeks' notice to take a week. However, these circumstances are unusual, so employees are more likely to agree without such notice.

What about your rules on absence?

For those who are ill and in self-isolation, you may have temporarily relaxed your requirement that they obtain a fit note from their doctor to authorise sickness absence after more than seven days. To reduce the risk of infection caused by unwell people attending work, you may also have temporarily relaxed your triggers for the level of absence that leads to disciplinary action where employees are sick with symptoms suggesting a risk of coronavirus. However, your other rules about who employees should contact, what information to provide and how often still apply.

It will be even more important that you know who will be absent, why, for how long and what medical advice they have been given so that you can plan each day effectively.

On 11th March 2020, the Chancellor announced that employees who are advised to self-isolate to prevent the spread of coronavirus will "soon" be able to obtain an alternative to the fit note from the NHS 111 service.

What if schools close, disrupting childcare arrangements?

Employees are entitled to unpaid leave to arrange alternative childcare in the event of a school closure, but it does not cover extended time off for employees to look after their children themselves. But remember that self-isolation, social distancing and the vulnerability of those over 70 may rule out employees' usual alternatives. They may have to stay at home so consider whether during the coronavirus outbreak it will be more difficult for employees to make alternative arrangements for the care of their children. Employees may have no option but to stay at home themselves so consider whether a period of paid or unpaid leave is more appropriate.

What if someone plans to work at home and care for their children?

Normally these two activities would be mutually exclusive. But current circumstances are not normal. You may be faced with many employees who wish to continue working but also need to look after their children. Reach a compromise. Discuss what help is available and agree whether they can be available to work for part of each day while their partner cares for their children. That would be better and more realistic than attempting to be available all day when their attention will be divided.

Schools may be closed for an extended period over Easter so many parents will be deciding their childcare arrangements so plan now. Identify the key roles and minimum staffing levels that are critical to keep your business operating effectively, what you will pay them and for how long.

Provide clear guidance to your managers.

You're worried an employee may be at risk, what should you do?

Check guidance from the relevant public health body on any health conditions that could cause a vulnerability to become seriously ill with the coronavirus (COVID-19), to see whether your fears have merit. Discuss your concerns and allay any fears that may prevent them from working remotely and discuss how any risk can be minimised by, with their consent, reassigning any high risk work or unnecessary travel.

If you decide that they are at a possible risk of infection, but they do not fall within the government's self-isolation advice, unless your contract provides otherwise, they are entitled to full pay. So, you should consider what you can do to enable them to work remotely.

Remember that an employee in these circumstances will not be entitled to SSP because they are not unfit to work and do not fall within the deemed incapacity rules.

Casual employees may have no entitlement to be provided with work and therefore have no entitlement to pay if you don't provide them with work in these circumstances. Check your contracts.

An employee considers themselves at risk and refuses to attend work. What do you do?

Speak to them. Find out why they consider themselves to be at risk including any medical advice they received so you can assess the risk.

High Risk

Employees with some disabilities, such as auto-immune conditions, respiratory conditions or diabetes, are likely to suffer more severe symptoms if they catch the virus or may be more likely to self-isolate due to the potential risks of catching the virus. Pregnant women are also at higher risk. For those with disabilities, you are obliged to make reasonable adjustments to remove or alleviate any disadvantage that they may experience due to their condition. Releasing them from attending work would be such an adjustment. A requirement imposed by an employer to continue travelling to and attending work, or to not pay or to dismiss them due to their absence in this scenario, could amount to discrimination. However, you should discuss their concerns and how you can address them.

Medical advice

Those who self-isolate because of advice from a medical professional or the government guidance will be entitled to SSP but decide how your contractual sick pay rules apply.

Mild symptoms

Those with mild respiratory symptoms who fall within the government guidance to self-isolate may be treated as being on sick leave and be paid SSP or contractual sick pay. Although their mild respiratory symptoms may not have ordinarily resulted in them taking sickness absence, the fact that they have symptoms likely brings them within either the normal definition of incapacity, or the new deemed incapacity rules.

Low risk and no symptoms

If they are not disabled, have no virus symptoms, diagnosis or direction from a medical professional to self-isolate, you could reasonably ask them to continue working followed by

potentially withholding pay and discipline if they refuse. Reasonableness will be the key so explore the reasons for any refusal. Employees will be getting their information from a number of sources. Some will be unreliable. The problem may stem from a lack of knowledge so try to find a less adversarial way of resolving the problem.

Can you require an employee to carry out work-related travel in the UK?

Advice changes quickly so this will depend upon the current government and public health advice on travelling and attending events within the UK, and the nature of any objections from the particular employee. If there is no public health advice against taking this action then, in principle, you are entitled to continue to impose such a requirement but consider whether you would be putting the employee at risk either because of the nature of the travel or the employee is in a high risk category. Employees will be understandably anxious so bear this in mind.

Alternatives to compulsory redundancies

Falling revenue and an uncertain future means that many of you will need to reduce costs. Identify, as best you can, what saving you need to make and how quickly but what are the alternatives to making compulsory redundancies?

Consultation

Speak to your staff and trade unions about the difficulties that the business faces. Agree the measures that are necessary to avoid or reduce redundancies such as a temporary reduction in pay and benefits for the duration of the crisis. Under the current circumstances, employees and their representatives will be willing to listen.

Withdraw job offers or defer new joiners

You may withdraw an offer of employment at any point before it is accepted, without having to give notice or make a payment in lieu of notice. If accepted, you can give contractual notice or make a payment in lieu. Alternatively, agree to defer their start date until you need them. If you explain that the alternative is to withdraw the offer, agreement is likely.

Reduce non-permanent staff

Reducing the number of agency, temporary and casual staff is often simpler and cheaper than dismissing permanent employees. Clarify their status and the contractual arrangement before acting. If the individual is not your employee, they will be unable to claim unfair dismissal, redundancy pay or notice. However, you must still act within the terms of your contract with them or their agency and avoid discrimination.

Secondment

Some parts of your business will have been more adversely affected than others. Consider seconding employees to other departments, group companies or where appropriate clients. As with other measures, employees will consider this measure as way of maintaining their employment.

Redeployment/retraining

If the need for redundancy is established, you can offer to retrain or redeploy as part of an offer for any available suitable alternative employment. If a selected employee accepts the offer, a trial period will apply.

Early retirement

Your pension scheme may offer early retirement so invite volunteers. To avoid claims of age discrimination, ensure that it is truly voluntary by offering to all those that are eligible. Explain that you reserve the right to reject volunteers so that you do not lose vital staff. Your employees will need advice on how early retirement might affect their pension.

Unpaid leave/sabbatical

Arrange for employees to take periods of unpaid leave. This would usually be for a few days or weeks. If you need them to be away for longer, consider offering a sabbatical. Obtain their consent and agree how long they will be away, their employment status when away from the

business and whether they will return to their current job.

Lay-offs

A lay-off is where employees are not provided with work by their employer and the situation is expected to be temporary. You can lay someone off where you have an express contractual right. In the absence of a contractual right or consent, enforced lay off can lead to claims of constructive unfair dismissal or unlawful deductions from wages.

Alternatively, speak to employees and the trade union about the financial implications, record the agreement and any payment terms in writing. Don't keep employees laid off for longer than necessary and remember that holiday continues to accrue during a lay-off period. If an employee resigns during a lay-off period or you dismiss them they are entitled to be paid their normal salary during the notice period.

Reducing hours

These can be changed with an employee's agreement, but you will need to convince your employees that the change is necessary. Explain the financial impact of such cuts, both on them individually (in terms of salary and benefits reduction) and on the organisation as a whole (for example, how many jobs might be saved if the measures are adopted).

Pay freeze

Many contracts of employment provide for salaries to be reviewed regularly. Few contracts promise an increase so, following a review, consider implementing a freeze. This step alone will not avoid so consider it along with other measures.

IR35 delay

Reformed IR35 rules have applied to the public sector since April 2017 and were due to be extended to the private sector from April 2020. Due to the coronavirus (COVID-19) crisis, the Government has announced that the extension of the reforms to the private sector will be delayed until 6th April 2021.

Employment Tribunals

Employment Tribunals will continue but with wider use of electronic communication methods, including skype for business and video conferencing technology where available, to conduct hearings of all kinds, where appropriate and subject to the availability of equipment and documents being available in a digital format.

In three-person tribunals, parties will be asked to consent to the case being heard with a two-member panel where one member cannot be present

Parties should try to send applications for directions or postponements electronically, because judges may not be working from the tribunal building and it will be easier to forward electronic documents to a judge.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

watershedhr.com

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