

## Coronavirus insight for employers: our FAQs

### Can an employer suspend an employee suspected of having Coronavirus?

Due to an employer's duty to protect the health and safety of other employees, an employer may wish to keep such an employee away from the workplace until that risk has gone.

Whether suspending a particular employee is legal will depend on the organisation's employment contracts, policies, customs and practices. Regardless, it would be wise for an employer to handle the situation sensitively and proportionately. This helps reduce the risk of breaching the implied duty of trust and confidence and a constructive dismissal claim. As a general rule, providing an employer is acting reasonably and continues to pay the employee, suspension is likely to be lawful.

### What pay is due?

An employee's right to pay will depend upon the precise circumstances.

To be entitled to statutory sick pay (SSP), an employee must be absent from work due to incapacity or be deemed to be incapacitated. In certain cases, an employee who is in quarantine or (potentially) self-isolation may be regarded as being incapable of working for SSP purposes. The government has announced emergency legislation that will temporarily make statutory sick pay payable from the first day of sickness absence and reimburse small employers (under 250 employees) for any statutory sick pay they pay to employees for the first 14 days of sickness. If a business wrongly pays SSP, it is not yet clear whether that will be recoverable.

Whether any enhanced sick pay is payable depends upon the terms of the employer's policy and contract of employment.

In the event that the employee was diagnosed with coronavirus or was too sick to work, sick pay would be due and it would amount to sick absence. Where the employee is able to continue to work from home then, subject to any contractual provision to the contrary, they will continue to be entitled to their normal rate of pay. But if it is the employer who suspends or an employee self-isolates then it will depend on the particular circumstances. See below for general insight on a variety of scenarios.

The important question is, 'why are they self-isolating'?

- **If they are self-isolating simply because they have chosen to do so** and not at the request of their employer, a medical professional or official guidance, then they are not entitled to payment (unless you can agree some form of home working with them).

**If they are self-isolating because you have chosen to ask them to do so**, but there was no particular obligation upon you to ask, then they are 'ready, able and willing' to work. That means that, unless there is something to the contrary in their contract, they are entitled to full pay.

- **If they are self-isolating because:**
  1. Doing so is mandatory as a result of legislation
  2. Of an official request or notice in writing
  3. They:

- have symptoms of Covid-19, and are staying at home for ten days
- live with someone who is self-isolating (as above) and are staying at home for 14 days
- are already self-isolating (as the second bullet point above), develop the symptoms of Covid-19, and are staying at home for seven days
- are unable to work because they fall under the Government's 'extremely vulnerable' category and are advised to shield
- have been told to isolate under the 'Test and Trace' system

Then they are 'deemed to be sick', and therefore entitled to Statutory Sick Pay (SSP). SSP can be claimed from the first day of incapacity in respect of Covid-19 related absences from 13 March 2020. It is worth noting that SSP will only be payable if the employee has self-isolated for at least 4 days. So if an employee self-isolated for only three days because they were able to get a Covid-19 test and receive a negative result within that time, then they would not be paid SSP for any of the three days. Employers with fewer than 250 employees (as at 28 February 2020) can reclaim SSP paid in respect of the first 14 days of Covid-19 related sickness absence from 14 March 2020.

We envisage most employers will choose to treat this as sickness absence for contractual purposes as well. But any employer who has particularly generous sick pay provisions or any employee who thinks they should receive full pay, should seek further guidance on their own particular situation. Generally speaking, those who are not 'ready, able and willing' to work will not be entitled to full pay.

As ever, though, regardless of the situation, employers should bear in mind their obligation of 'trust and confidence' to employees. That means, in short, not being wholly unreasonable. An employee may consider the employer's treatment of them has breached the contract, resign in response and claim constructive dismissal. An employer may also have to show that it has acted proportionately if the self-isolation is because of a disability that puts the employee into a high-risk category. Otherwise, the employer could face a discrimination claim. More importantly, perhaps, is the risk of adverse publicity and poor staff relationships of mismanaging the situation. As with situations involving adverse weather, the best solutions are generally found by negotiation and agreement with each party understanding the other's predicament.

A blind adherence to the organisations' policy or what the contract says may not be appropriate. For instance, while a sickness policy may require an employee to return to work as soon as they are feeling well enough, a person suffering from the virus should not return to work until they have received medical advice confirming that they are unlikely to be infectious. A common sense approach should be used.

### What if employees refuse an employer's instruction?

In the event that an employee refuses a reasonable instruction not to attend work, attend places of risk or who negligently poses a risk to themselves or others, then they could be disciplined. However, employers should be careful not to discriminate. For instance, such a practice could amount to indirect race discrimination if it discourages employees visiting family or their country of birth or discrimination on the grounds of religious belief if it prevents them from attending religious services. In that case, employers should act proportionately. Certain dismissals related to the raising of health and safety concerns can be automatically unfair even when the employee doesn't have qualifying service. Penalising the employee can also lead to a variety of claims relating to health and safety.

### Can employees be made to take holiday?

Unless the individual's employment contract contains an express right for the employer to direct when their holiday is taken, it is doubtful that employers can force employees to take a day or more holiday without their consent, particularly when that 'holiday' is allocated as such after the event.

Employers may give notice ordering a worker to take holiday on specified dates. However, such notice must be at least twice the length of the period of leave that the worker is being ordered to take. This requirement often makes this right impractical. If an employer intends to deduct days from an employee's holiday entitlement, they must make this clear to staff at the earliest opportunity.

### What if employees are too worried to come to work?

An employee has a right to request flexible working. But there is no automatic obligation on an employer to agree to this.

An employer should listen to what the employee has to say and find out why they are feeling this way. The situation will depend on how high the risk is and what the government guidance is at the time.

Homeworking or an agreed alternative like taking holiday may be the answer. Unfortunately, this is not always possible and employers may need to assess whether there is sufficient staff cover to meet its needs. If the employee continues to refuse to attend work and an employer considers this to be unreasonable (for instance, the employee is not placed at undue risk) then disciplinary action may be considered. However, the employee may claim unfair dismissal or other claims. While in normal circumstances this might lead to disciplinary action, the importance of enforcing the rules may dwindle in comparison to the crisis. But provided an employer doesn't act unreasonably, the dismissal may be fair. Much will depend on the particular circumstances.

### What if an employee uses the situation as an excuse?

There may be a few employees who take advantage of the situation. An employer may have a concern that an employee is using the Coronavirus situation to avoid returning to work or working remotely. An employer may choose to investigate the matter further and consider disciplinary action. For example, it should be fairly straightforward to establish if an employee's flight was cancelled when they claim that it was or particular hotel was locked down. Equally, an employee who fails to attend work, claiming to be self-isolating could be disciplined if it is discovered that they are out at the shops or playing golf. There will be occasions where employers will need to monitor staff working remotely but they must do it in a proportionate way.

### Can employees be laid off?

Hopefully, it doesn't come to this, and the Government support under the Job Retention Scheme (see below) may help. But it is worth knowing what options may be available.

Laying off is a contractual provision that allows the employer to provide employees with no work (and no pay) for a period while retaining them as employees. Short-time working means providing employees with less work (and less pay) for a period while retaining them as employees. Instead of undertaking mass redundancies, laying off and short-time working is often an attempt at a temporary solution to a reduction in work.

An employee may, after 4 weeks of lay-off, issue a notice initiating redundancy. The employer then has an opportunity to raise a counter notice allowing a period of a further 4 weeks for business to pick up. If the employee's services are still surplus to requirement after this time, the employee is entitled to a redundancy payment.

It will constitute a breach of contract for an employer to lay off employees or put them on short-time working without pay when they do not have an express or implied contractual right to do so. Employees may resign in response and claim constructive dismissal. If the dismissal is for redundancy then the employees may also claim a statutory redundancy payment.

Provided the employment contract is not broken during a period of lay-off or short-time working (so that the employee remains 'on the books' rather than being dismissed and re-engaged), statutory holiday entitlement is unaffected.

ACAS has also further guidance on lay-offs and short term working - [available here](#).

Of course, there are alternatives that employers may consider, such as:

- Paying employees in return for their agreement that they will make up the time on their return
- Agreeing with the employee that they will take the time off as paid holiday
- Splitting the employee's time spent off as 50% (un)paid leave and 50% holiday
- Where facilities exist, allowing the employee to work from home
- Furlough Leave / Job Retention Scheme.

### How does the Job Retention Scheme work?

Employers can agree to "furlough" their employees under the Job Retention Scheme. But employers need to be careful how they make use of Furlough Leave. Employers can find out more about the Job Retention Scheme in our insight article available on our website.

### How we can help

Please get in touch with our Employment & Pensions Law team if you or your organisation would like further advice or assistance on this topic.