

**The guidance contained in this factsheet is subject to change in accordance with updates in Government, Public Health guidance and legislative changes. This factsheet was last reviewed and updated on 13.3.2020.**

## **THE CORONAVIRUS: GUIDANCE FOR EMPLOYERS**

A new strain of coronavirus that had not been previously identified in humans (Covid-19) was first reported in Wuhan, in the Hubei province of China, in December 2019. The coronavirus causes respiratory illness in humans, usually resulting in mild symptoms including runny nose, sore throat, cough and fever. Some individuals experience more severe symptoms and it can lead to pneumonia and breathing difficulties and, in rare cases, death. More susceptible individuals at greater risk of becoming seriously ill include older people, those with pre-existing medical conditions and possibly also pregnant women.

The government has upgraded the overall risk in the UK from moderate to high.

### **Employers' Duties**

Employers have a duty under health and safety legislation to take steps to ensure the health, safety and welfare of all their employees, so far as reasonably practicable, including those who are particularly at risk for any reason. Employees also have a duty to take reasonable care of their own health and safety and that of people they work with. They must cooperate with their employer to enable it to comply with its duties under health and safety legislation. Employees who refuse to cooperate, or who recklessly risk their own health or that of others in the workplace, could be disciplined where this is appropriate. Where, for example, employees attend work but the employer reasonably believes the employee has symptoms that would require them to self-isolate in accordance with current government advice (i.e. where they have a new persistent cough and/or high temperature), it is likely that the employer has a duty of care towards other staff to require the employee displaying those symptoms to stay at home and self-isolate for a period of 7 days. Employees will be entitled to SSP in this scenario under new temporary SSP Regulations (see below). Alternatively, where employees are fit enough to carry out some work whilst self-isolating and it is practicable for them to do so, employees would be paid their normal wages for the period they are carrying out work.

Individuals in self-isolation must follow the published advice from Public Health bodies on how to self-isolate effectively. This includes, not having visitors to their home and requesting that friends, family or delivery drivers drop off deliveries at the doorstep.

Employers are advised to keep an eye on the current government advice and to refer employees to it where they may be concerned about their individual risk. The advice is reviewed by the government on a daily basis:

<https://www.gov.uk/guidance/wuhan-novel-coronavirus-information-for-the-public>

The government has produced guidance for employers, which can be accessed here:

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-covid-19>

## **Government and Public Health Advice on Self-isolation**

Previous government advice was that individuals returning from category 1 areas/countries should self-isolate for a period of 14 days from their return even where symptomless, with those returning from a category 2 area being required to self-isolate for 14 days only where they develop symptoms of the coronavirus. This advice has been replaced by the current advice on self-isolation:

- Anyone who develops a high temperature (37.8 degrees and above) and/or a new, continuous cough must self-isolate for 7 days. They must stay at home and avoid all but essential contact with others for 7 days from the point of displaying those symptoms, to slow the spread of infection.
- Individuals do not need to call NHS 111 to go into self-isolation. Where their symptoms worsen during home isolation or are no better after 7 days, they should contact NHS 111 online at 111.nhs.uk. For individuals without internet access, they should call NHS 111. For a medical emergency they should dial 999.
- In Scotland, individuals should phone their GP or NHS 24 on 111 out of hours. Individuals in Northern Ireland should call 0300 200 7885.

Additionally, the government has advised schools to cancel trips abroad and for people over 70 with pre-existing health conditions not to go on cruises.

In the coming weeks, the government will be introducing further social distancing measures for older and vulnerable people, asking them to self-isolate regardless of symptoms. This factsheet will be updated once further measures are announced.

## **Statutory Sick Pay where employees required to self-isolate**

Employees who develop symptoms of the coronavirus or symptoms which require self-isolation will of course be unfit for work. They will be entitled to SSP subject to meeting the qualifying criteria.

## **Temporary Reform of the SSP Rules**

In response to the coronavirus outbreak, new Regulations known as The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 came into force on 13 March 2020. These will remain in force for a period of 8 months. These Regulations amend the Statutory Sick Pay (General) Regulations 1982 and provide that:

- Individuals who self-isolate to prevent infection or contamination with coronavirus disease in accordance with guidance published by Public Health England, NHS National Services Scotland or Public Health Wales (i.e. advice from the public health bodies in Great Britain) and are unable to work for that reason will be entitled to SSP.

In other words, this extends the current entitlement to SSP to those employees who are self-isolating for 7 days in accordance with Public Health advice due to having a fever and/or new persistent cough. This is subject to employees meeting the qualifying criteria for SSP.

For SSP purposes, the employer cannot require a medical certificate for the first seven calendar days of sickness absence. If employees need to provide evidence to their employer that they need to stay at home due to coronavirus, they will be able to get it from the NHS 111 Online instead of having to get a fit note from their doctor. The government has announced this online service is currently under development and will be made available soon.

These Regulations have been passed in order to encourage self-isolation and to minimise the risks to public health arising from coronavirus disease. It is likely that Northern Ireland will follow suite and introduce equivalent legislation in due course.

It was announced in the Budget on 11 March 2020 that further reforms to the SSP rules will be introduced as follows, although it is not yet known when these will come into force:

- People who cannot work due to coronavirus and are eligible for SSP will get it from day one, rather than from the fourth day of their illness (i.e. the 3 waiting days for SSP will be removed). The government intends to legislate so this measure applies retrospectively from 13 March 2020 i.e. from the introduction of the new requirements around self-isolation for fever and cough symptoms.
- The Government will reimburse small and medium employers (i.e. those employing fewer than 250 employees, as determined by the number of people they employed as of 28 February 2020) any statutory sick pay they pay to employees for the first 14 days of sickness as a result of coronavirus.
- Under the new rules, employers should maintain records of staff absences, but should not require employees to provide a GP fit note.
- As the Temporary Threshold Scheme which previously permitted small businesses to reclaim SSP from the Government was abolished in 2014, the government will set up a new repayment mechanism for employers for reclaiming SSP in due course.

For individuals who are not entitled to SSP, such as the self-employed and those that fall below the Lower Earnings Limit, a 'new style' Employment and Support Allowance through the welfare system will be payable for people directly affected by coronavirus or who are self-isolating according to government advice, from the first day of sickness or self-isolation.

### **Contractual Sick Pay**

Employees that offer enhanced contractual sick pay over and above SSP rates, should consider whether or not they will revise their contractual sick pay eligibility criteria for contractual sick pay or exercise discretion to include employees who are self-isolating as a result of coronavirus but not unwell, or whether to pay SSP only in this circumstance. Employers considering amending their enhanced sick pay schemes as a financial measure (including on a temporary basis) in view of the likely increase in staff sickness levels due to coronavirus and the new Government guidance on self-isolation should bear in mind the following points:

- Employers with discretionary sick pay schemes whereby the employer operates the SSP scheme but may exercise their discretion to pay more than SSP in any particular case must exercise their discretion fairly and reasonably and not arbitrarily or capriciously. In particular, to maintain mutual trust and confidence, the employer should ensure consistency in their decision making and must not discriminate against a particular employee because of their disability.
- Employers with contractual (enhanced) sick pay schemes can only lawfully change the criteria for payment (including on a temporary basis during the coronavirus outbreak) with employees' agreement, or in accordance with any contractual flexibility clause. This means that a failure to make a payment in accordance with the rules of the scheme would amount to a breach of contract and, depending on whether the breach is sufficiently serious or not, it may entitle the employee to claim constructive dismissal (in the latter case, subject to the employee having at least 2 years' service, or 1 years' service in Northern Ireland).

**Should employees be required to wear face masks to protect themselves from infection?**

Employees are not recommended to wear facemasks (also known as surgical masks or respirators) to protect against the virus other than in health care settings or where protective face masks might help employees working in particularly vulnerable situations. Face masks are only recommended to be worn by symptomatic individuals (advised by a healthcare worker) to reduce the risk of transmitting the infection to other people. Public Health bodies recommend that the best way to reduce any risk of infection is good hygiene and avoiding direct or close contact (closer than 2 metres) with any potentially infected person.

Any member of staff who deals with members of the public from behind a full screen will be protected from airborne particles.

Face masks play a very important role in clinical settings, such as hospitals but there's very little evidence of widespread benefit from their use outside of these clinical settings. Facemasks must be worn correctly, changed frequently, removed properly and disposed of safely in order to be effective. The advice from the World Health Organisation states that if you are healthy, you only need to wear a mask if you are taking care of a person with a suspected coronavirus infection.

**Are employees entitled to pay where employers require them to stay away from work?**

Employers may choose to go further than the advice from the Public Health bodies and, as a precautionary measure, ask require employees to stay away from work when they are not sick or are not self-isolating in accordance with current Public Health advice. In those cases, employers will need to pay employees their normal salary for this absence. This is because the absence is at the employer's request and is not sickness absence. Alternatively, employers may choose to ask employees to work from home if this is an option in which case, of course, they would receive their usual pay.

**How should employers respond where employees refuse to work?**

However, their Employees may be anxious about the risks of being exposed to the virus due to travelling to work on public transport or by attending the workplace. They may even refuse to attend work on this basis. Whilst their absence in this circumstance is likely to be unauthorized, again, unless there is clear evidence that the employee's concerns are not genuinely held, the best approach would be to assuage employees' anxieties by referring them to published advice from Public Health bodies. It is unlikely to be reasonable to treat absences from work in those cases as unauthorized or as a disciplinary matter unless the employer has reasonable grounds for believing, based on compelling evidence, that they are using the virus as an excuse not to attend work.

Employers may choose to be cautious about permitting those employees to work from home or otherwise stay away from the workplace where they do not wish to set what employees may construe as "a precedent" by doing so; and where there is no good public health reason for them to stay away from the workplace.

**Employees who are unable to attend work due to school closures or due to dependants self-isolating**

The government has now moved to the "delay" phase of its action plan to help slow down the onset of an epidemic. The government announced that during this stage it may consider closing schools, encouraging greater home working and possibly reducing the number of large-scale public gatherings. The government has not yet recommended the closure of schools or other measures. However, if schools are closed, this will impact on childcare arrangements and employees' ability to attend work. In this scenario, it is also likely to be more difficult for employees to find replacement childcare cover. Elder care arrangements may also be adversely affected. The government's new guidance on self-isolation, which has been implemented by schools, will also have a potential impact

on childcare where children are required to self-isolate for 7 days and to not attend school where they have a new, persistent cough, or a fever.

Section 57A of the Employment Rights Act 1996 gives employees the right to a reasonable amount of unpaid time off work because (amongst other reasons) of the unexpected disruption or termination of arrangements for the care of a dependant. This statutory provision may apply where employees have children they need to arrange childcare for because their child's school is closed, or to arrange care for their child or another dependant if they're sick, or need to go into isolation. An employee may complain to an Employment Tribunal where their employer has failed to permit them to take time off under this provision. Employees also have the right not to be subjected to any detriment for reasons relating to time off for dependants and any dismissal on these grounds is automatically unfair, regardless of the length of the employee's employment.

As the statutory regime does not apply to planned time off to care for dependants, it is unlikely to apply where school closures are known about in advance (for example, it may only apply to the first couple of days of a school closure, whilst longer-term childcare arrangements are put in place). Also, the statutory right is to a "reasonable" amount of time off only, so it may not extend to a 14-day self-isolation period, or longer period of school closure.

However, the Government announced at the Budget on 11 March 2020 that SSP will be extended to those caring for others who self-isolate as a result of coronavirus (presumably for up to 14 days), such that employers would treat this as sick leave. Details of this have not yet been published and the temporary reform to the SSP rules has not yet been enacted.

Where this is practicable, employers should be flexible by permitting affected employees to work from home, or to alter their working hours on a temporary basis in the event of school closures or a temporary breakdown in existing childcare arrangements or arrangements for care of elderly dependants. Alternatively, the employer may consider agreeing with the employee a period of unpaid leave or paid annual leave to cover the time off work.

### **Lay Offs and Short Time Working**

Some businesses have been affected by a downturn in work caused, for example, by customers cancelling travel and hotel bookings, or by current or potential customers "social distancing" as a result of public anxiety around contracting the virus. At the Budget on 11 March 2020, the Government announced measures it will introduce to support businesses that experience increased costs or disruptions to their cash flow as a result of coronavirus, including a Coronavirus Business Interruption Loan Scheme and a dedicated HMRC helpline for those who need a deferral period on their tax liabilities.

Lay-offs and short time working can be put in place as a useful way of handling temporary work shortages without having to resort to redundancy. However, employers can only lawfully take this action to avoid potential unlawful deductions from wages claims or breach of contract claims where employees agree to being laid off or kept on short-time working, or it is provided for in the contract (e.g. the contract contains a "lay-off" and/or "short-time working" clause). Please refer to our factsheet on Lay-offs, Short Time Working and Guarantee Payments for further guidance.

### **Variations of Contract**

Businesses affected by a downturn in work may also consider putting in place other temporary measures to avoid the need for redundancies, such as introducing a temporary reduction in pay, working hours, or removing/reducing certain contractual benefits. Employers will need to consult with staff to obtain their agreement to these measures in the absence of any relevant contractual flexibility clauses or short time working clauses. Please refer, for example, to our template Letter Seeking Agreement to Vary Terms of Contract of Employment. On the other hand, there is likely to be a significant increase in workload for staff that are able to continue working during the coronavirus outbreak, particularly in certain sectors such as healthcare and social care. Employers need to

consider what measures they can put in place to support those staff in helping them to manage increased workloads. In the absence of existing contractual overtime provisions, employers will need to seek staff agreement to working overtime.

### **General measures in the Workplace**

Most employers have already placed restrictions on work-related travel. Employers should continue to monitor the latest travel advice from the Foreign & Commonwealth Office as this advice is rapidly changing.

The UK government is not currently advising companies that working from home is to be encouraged beyond existing home working patterns, although some employers have put this in place as a risk control measure.

Please refer to our factsheet, *Employment Law Issues During a Pandemic Virus* for guidance on workplace health and safety measures. In addition to informing staff of the new government requirements around self-isolation, the best way to protect employees and others from infections like coronavirus is to remind staff (such as through written notices displayed in the workplace) to adhere to the following hygiene practices:

- Washing hands frequently with soap and water for at least 20 seconds and to use an alcohol-based sanitiser gel where this is not available; as well as carrying tissues and using them to catch coughs and sneezes and disposing of used tissues in the bin straight away.

Employers should ensure that soap and running water is readily available in the workplace. It is also good practice to make available supplies of alcohol-based sanitisers, particularly for mobile workers who may not always have access to soap and water. Employers should ensure that all potentially high-contact work areas, such as toilets, door handles and shared office equipment are regularly cleaned using household type detergents.

Employers should remind employees of any existing risk assessments for reducing the risk of infection in the workplace and should ensure that these are still relevant and sufficient.

A Government campaign has been launched to provide advice on how to slow the spread of coronavirus. The poster can be displayed in public areas and can be accessed at the following link:

<https://assets.publishing.service.gov.uk/media/5e35b25740f0b609169cb52a/coronavirus-public-info-poster-2.pdf>