



COVID-19 Managing your workforce

FAQs

24 March 2020

In such uncertain times, many employers are asking lots of questions about how to manage their workforce. We have therefore answered below a number of common questions to help your business steer through the coming months.

1. Can we ask employees to stay at home and not come to work?

You may ask employees not to come in to work and you should tell them what will happen to their pay in these circumstances (see below). The first step will be to look at whether they can work from home in which case they should be paid as normal.

If working from home is not possible or if there is no work for them to do employers will need to review the worker's contract to see if there is anything about lay-offs and/or short-time work. Such clauses are unusual and therefore employers may not have them. Where a contract does not include such a clause, unless you can get the employee's agreement to accept unpaid leave, holiday pay, reduced pay or no pay you must continue to pay even though you may be sending them home with no work to do. If you think lay-offs and/or short-time work is the course of action required, it is important to communicate with staff as early as possible. You may have to continue to pay even if the staff member is not at work until they can get agreement on pay, take steps to vary the contract legally and/or commence a redundancy process.

If you send employees home with no pay and without agreement of the contractual right to do so, then you may be vulnerable to claims

for unlawful deductions from wages, breach of contract and/or unfair constructive dismissal. Clearly if the Government requires workplaces to close different considerations are likely to apply (see below).

Since preparing this original briefing, the Government announced last Friday, 20 March 2020 that it would now offer the Coronavirus Job Retention Scheme. The scheme is essentially an alternative to laying off employees with no pay as a result of the Coronavirus crisis. Instead they are designated as 'Furloughed Workers' and the Government covers up to 80% of the employees' salaries (up to a cap of £2,500 per month). Please see an outline of this scheme at answer 12 below.

You can also require an employee to take his or her annual leave on particular days provided you give the employee the appropriate advance notice, which is usually twice as long as the amount of leave you are expecting the employee to take.

2. Can we require staff to tell us if they are in a category of worker who should stay at home?

Employers may ask their staff about their health where this is necessary not only to protect the employee/worker's health but also the health and safety of other staff. Therefore, it would be reasonable in our view to ask staff if they are in a category where the government has recommended that they should stay at home.

3. Can we ask people to work from home and what issues does that raise?

The individual contract may provide for working from home and if they can carry out work at home most employees will agree to do this in the current circumstances. In the absence of a contractual right or agreement, if an employee refuses to work from home that may be a failure to comply with a reasonable work instruction and could lead to disciplinary action. A homeworking policy is advisable if you do not have one.

The employee/worker should be asked to confirm if they have any health and safety concerns about working from home and a discussion should occur to seek to resolve any issues.

4. Is there a general right to lay staff off or put them onto short-term working?

There is a general right to tell most employees not to turn up for work but there is no general right not to pay them because work is not available. There is no general legal right to "lay-off" staff without pay or to put them onto "short-term" working to effect a proportionate reduction in pay. Each individual contract must be examined to see if this right exists. If you have the contractual right to "lay-off" then employees are entitled to a "statutory guarantee payment" of up to £29 a day from their employer. This is limited to a maximum of 5 days in any period of 3 months. If this applies further details should be obtained of the specific rules governing entitlement to redundancy pay. <https://www.lra.org.uk/resources/information-note/temporary-lay-and-short-time-working>

In the absence of the contractual right to lay-off, you should seek the agreement of staff to temporary lay-off or short-term work with a view to preserving the business and jobs in the future. If agreement cannot be reached then, in the absence of any new legislative provisions, you may need to consider dismissing and re-engaging your employees under new terms and conditions or the employees may need to be put at risk of redundancy, given their notice period and potentially a redundancy payment in due course.

Employees may be able to take parental leave (usually unpaid), or use holiday entitlement. Employees have a right to reasonable unpaid time off for emergencies involving dependents. This is intended to allow the employee to make arrangements for care, rather than doing the caring on a longer-term basis. However, in present circumstances it may not be practical for the employee to make other arrangements.

5. Can we amend the contracts of employment of our staff?

The terms of the individual contract should be reviewed as this may provide a process by which variations may be achieved.

Where substantial variations are being proposed to hours and / or pay then staff would need to agree. Therefore, staff should be written to and their written consent to the variation should be sought. If consent is not forthcoming, then it may be possible to terminate the contract

and re-engage employees under new contracts depending upon the variation involved. However, this may in reality constitute a potential redundancy situation and the employer would be required to pay notice pay and redundancy pay.

6. What happens about pay in the following circumstances:

a) Where the employee is diagnosed with Coronavirus

The employee/worker is entitled to sick leave, to Statutory Sick Pay and contractually agreed sick pay if any. The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations (Northern Ireland) 2020 provide for categories of people to be treated as incapable of work for the purposes of statutory sick pay (SSP). The Regulations provide that where a person is isolating themselves from others in accordance with advice on Coronavirus, they are deemed to be incapable of work. That guidance is published in digital form only on www.publichealth.hscni.net/news/covid-19-coronavirus.

The Government has indicated that employees/workers will be entitled to self-certify, and that during this emergency employers will not be able to insist on a fit-note from a doctor after 7 days. It has also indicated that SSP will be paid from day one, and that employers of fewer than 250 will be able to reclaim the statutory sick pay element for at least 14 days. Full details of how this will work are awaited.

You should be clear whether an employee is off sick and unfit for work, whether the employee/worker is unable to work from home and is self-isolating, or whether the employee/worker is self-isolating but is able to work from home. In the latter case, where the employee is fit to work, he/she will normally be entitled to full pay for work done.

b) Where the Government has advised/told a category of worker not to come in.

The Government is taking powers to enforce quarantine. Clearly if a worker is legally required not to come in, you cannot insist on attendance or work, unless work from home is possible. In accordance with the SSP Regulations mentioned above, it appears that SSP is payable in these circumstances. However, employees/workers may not be entitled to any contractual sick pay as they may not be sick. The terms of any sick pay policy would need to be reviewed. Alternatively you might consider placing the employee on furlough leave (see 12 below)

c) Where a doctor has advised the employee that they should not be at work.

In this situation then provided the worker qualifies they will be entitled to SSP, and any contractual sick pay. Many sick pay policies will include a requirement for the employee to obtain a fit note from a doctor. We strongly suggest that you use your discretion around the need for medical evidence for a period of absence where an employee is advised to self-isolate due to suspected COVID-19. As such, you may need to consider making exceptions to your usual sick pay policies.

Since originally issuing this briefing, the Government has introduced online Isolation Notes. Isolation notes will provide employees with evidence for their employers that they have been advised to self-isolate due to coronavirus, either because they have symptoms or they live with someone who has symptoms, and so cannot work.

For the first seven days off work, employees can self-certify so they don't need any evidence for their employer. After that, employers may ask for evidence of sickness absence. Where this is related to having symptoms of coronavirus or living with someone who has symptoms, the isolation note can be used to provide evidence of the advice to self-isolate.

According to Matt Hancock, the Health & Social Care Secretary, if an employee does not have an email address, they can have the note sent to a trusted family member or friend, or directly to their

employer. The service can also be used to generate an isolation note on behalf of someone else.

d) Where an employee is pregnant.

There is a general duty to carry out a risk assessment for pregnant employees/workers. Clearly this assessment should be updated in light of Coronavirus and government advice should be followed. Current advice is that pregnant employees should so far as possible practice social distancing, working from home if practicable. In this situation the pregnant employee will be entitled to SSP and any contractual sick pay.

Where there is an additional risk at work due to coronavirus on top of that outside work, and where it is not possible to avoid exposure to risks at work, then pregnant employees/workers have a right to be offered suitable alternative employment (i.e. work that could be done from home). In the absence of suitable alternative employment then there might be a need to suspend on medical grounds, which would be on full pay. If the suspension continues until the fourth week before the expected week of childbirth this may trigger the start of maternity leave. It is not clear whether this would constitute a medical suspension or sick leave.

e) Where the employee/worker is scared, or is reluctant to come into work for reasons to do with their own health.

Some people may be worried about catching Coronavirus and therefore be unwilling to come into work. If this is the case, you should listen carefully to the concerns of your staff member and, if possible, offer flexible working arrangements such as homeworking. Employees/workers can also request time off as holiday or unpaid leave but there is no obligation on employers to agree to this. If an employee/worker unreasonably refuses to attend work, you are entitled to take disciplinary action. However, dismissal is likely to be outside the range of reasonable responses and therefore unfair, at least in the current circumstances. In addition, much may depend on the particular circumstances-for example if the employee has a pre-existing medical condition that would put them at particular risk which might also amount to a disability requiring reasonable adjustments. Reasonable adjustments could involve working from

home. If the employee is not self-isolating for a reason as provided in government guidance but just does not want to come in, then they may not be entitled to pay or sick pay. However, the employer should give sympathetic consideration to the situation. It may be possible to use annual leave, or in some circumstances if qualifying, unpaid parental leave. A dismissal for refusal to come into work in current circumstances could well lead to a successful claim for unfair dismissal.

f) School closure

Schools in Northern Ireland are now closed to the majority of pupils until further notice. See the advice on www.nidirect.gov.uk/articles/coronavirus-covid-19-advice-educational-settings. There is a right to a reasonable amount of unpaid time off to deal with emergency or unexpected dependents needs (see more detail in 8 below). Many staff who are affected by this will likely be entitled to furlough leave.

g) Where the business has to close or lockdown?

If you decide to close permanently then you are required to comply with the redundancy provisions for staff. This would include notice pay and a redundancy payment. In many instances you may not be able to pay this and staff and employers will be seeking Government assistance. As an alternative to closure many businesses will endeavour to keep operating and avail of Government grants and loans where possible as well as furlough leave for their staff. It is anticipated that help for the self employed will be forthcoming soon.

The imposition of lockdown may be considered as a frustration of contract as the business is required to shut down due to unforeseen exceptional circumstances that essentially prevent employees from fulfilling their contracts of employment. You may be able to continue to run your business in a lockdown situation with employees working remotely. However, if you are not able to do so, the position on pay is unclear as this would be an unprecedented situation where employers would be forced to close to comply with Government requirements. It is possible that further amending Regulations may be issued to allow for SSP to be paid to employees in this situation. However we will have to wait and see how the Government and NI Assembly intend to deal with this situation as and when it arises. In

the meantime, many employers are placing their employees on furlough leave under the Government's Job Retention Scheme.

7. How do we reduce the risk to our staff?

It is good practice for employers to consider taking the following steps in protecting the Health and Safety of their employees:

- Keeping employees informed and updated with actions being taken to reduce risks of exposure in the workplace
- Encourage homeworking where possible
- Consider extra precautions for those employees who might be more vulnerable or example if someone is pregnant, has a long-term health condition, or aged 70 or over
- Ensure that staff members contact numbers and emergency details are up to date
- Encourage staff to be extra-vigilant and to wash their hands regularly
- Ensure as far as possible that staff observe the 2 metres distance
- Provide screens and personal protective equipment where possible.
- Provide hand sanitiser and tissues for staff, and encourage them to use them

Employers should also support their staff in keeping with current Government advice to try and stop unnecessary contact with other people – 'social distancing'. Employers might consider:

- agreeing to more flexible ways of working, for example changing start and finish times to avoid busier commuting times
- allowing staff to work from home wherever possible
- cancelling face-to-face events and meetings and rearranging to remote calling where possible, for example using video or conference calling technology

8. Should we restrict employees from travelling for work purposes?

The Foreign and Commonwealth Office has now advised generally against all non-essential worldwide travel, both to restrict the spread of Coronavirus, and also because of practical concerns about being

able to return home, being in quarantine or self-isolation. The EU is currently drawing up plans. The Irish Government has made clear that it will not be shutting the border with Northern Ireland.

In light of lockdown employers in a business which is not required to shut must ensure that travelling to and from work only occurs if a staff member cannot work from home.

If travel is essential then where possible you should encourage staff to avoid public transport and places where many people congregate and operate safe distancing.

In the current circumstances with the evident potential extra risk to health you should not insist on an employee/worker travelling for business purposes, especially to places known to have a higher risk of infection. Insisting, or even if the employee/worker agrees, may give rise to potential claims later.

9. Can we prevent staff from travelling for personal reasons?

In the absence of any contractual right it is unlikely that you can prohibit an employee/worker from deciding to travel - for example to look after a sick relative. You can point out that this may lead to a requirement that the staff member self-isolates on return.

10. What can we do about casual or agency workers?

You might consider reducing or terminating any contracts with your casual or agency workers to reduce costs. However, the employment status of such individuals should be carefully assessed on a case by case basis as they may qualify as 'employees' with statutory rights such as statutory redundancy pay and unfair dismissal. Specific advice on these contracts should be sought before termination.

11. What is the Coronavirus Job Retention Scheme?

The Government announced on 20 March 2020 that it will cover up to 80% of wages for retained workers (up to a total of £2,500 per month).

This extraordinary measure, which will be welcomed by many businesses and employees across the UK, raises many questions and issues. We hope the detail of the scheme will be clarified by the Government and/or HMRC very soon but here are the key points we know so far:-

- 1.** The Scheme applies to all UK employers - small or large, charitable or non-profit, including sole traders and LLPs.
- 2.** It only applies to PAYE.
- 3.** It is a measure for those who would otherwise have been laid off and workplace closures. It does not seem to cover those who are working reduced hours but this may change.
- 4.** The grant will be provided through HMRC (Hopefully the HMRC has the extra capacity to administer the scheme!)
- 5.** There is no limit on the amount of money payable through the scheme.
- 6.** Employers do not have to repay the grant.
- 7.** Employers can top up the employees' wages to 100% but there is no obligation on them to do so.
- 8.** The scheme will be backdated to 1 March for an initial period of 3 months but this may be extended if necessary.
- 9.** It is hoped the first grants under the scheme will be available within the next few weeks and by the end of April at the latest. So hopefully businesses can survive any cash flow problems until then.
- 10.** The Government has stated that to access the Scheme employers will need to

" - designate affected employees as 'furloughed workers,' and notify your employees of this change - changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation

- submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal (HMRC will set out further details on the information required)."

There has been much debate amongst employment lawyers over the weekend about what is meant by the term "furloughed". It is not commonly used in the UK and not defined in our employment legislation.

For the purposes of this Scheme, it appears to mean those workers that would otherwise have been laid off during this crisis.

It is understood that the wage subsidy will apply to businesses which have already had to lay off workers due to coronavirus. It is unclear at the moment what groups of workers the scheme will cover. Hopefully the Government will bring further clarity over the next few days/weeks.

Essentially the Government appears to be saying that employers will need to agree with an employee that they are going to be furloughed workers. In some employment contracts, there will be a right to remove work (e.g. a temporary lay off provision). If there is no right to lay off/remove work, the employer will need to agree with the employee that they will be a 'furloughed worker'. Clearly, it is likely that most employees would prefer to be a furloughed worker rather than being made redundant. Therefore, it is likely that most employees would agree to be a furloughed worker.

Once it is agreed the employee will be a furlough worker, the next thing for the employer to do is to submit information to the HMRC portal about the employees who have been furloughed and include details of their earnings. The HMRC will then reimburse the employer with up to 80% of furloughed workers wage costs of up to a cap of £2,500 a month.

If your business has already started to consult with staff regarding any reduced hours or potential redundancies, it may be prudent to hold off on any further consultation until details about the retention scheme are clearer.

See the following websites for up to date advice: -

<https://www.lra.org.uk/coronavirus-advice-employers-and-employees>

[www.publichealth.hscni.net/news/covid-19-coronavirus.](http://www.publichealth.hscni.net/news/covid-19-coronavirus)

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

This article does not constitute legal advice and specific advice should be sought in respect of particular cases.