

Work in the Time of Corona

A ‘need to know’ guide for the workplace

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This article answers some questions which employers and employees may have regarding the ongoing global outbreak of the Coronavirus (COVID-19), with the aim of complying with legal obligations and maintaining business continuity. The scale of the challenge facing business can hardly be over-estimated. The disruption faced in the UK and elsewhere is unlike anything seen in 70 years. Even the most conservative estimates place the disruption of coronavirus as lasting for most of this year, potentially returning in waves for years to come.

The actions and advice of the government changes day to day and should be followed closely for the most recent updates on proper practice. However, the below may be a useful guide for some overarching legal issues. This article does not give advice on coronavirus symptoms or on how to prevent the virus spread; such advice should be taken from the NHS and Gov.UK websites.

Q1 – Do employers have to allow employees to work from home?

There is currently no legal obligation on employers to allow workers to work from home if they ask for it. However, for the sake of business continuity, it makes good commercial sense for all employers to have systems established to facilitate this in the likely event that the government closes all workplaces or that individuals are asked to self-isolate. Any business without this contingency in place is putting itself at a grave risk. When working from home, or if asked to stay away from the premises due to coronavirus concerns, employees should still receive their usual pay. However, we are aware that this is not possible for every business and that some employers are asking their employees to take unpaid leave or sick leave. This is a difficult step, requiring the employer to balance its business costs against the well-being of its workforce, whilst remembering that it will need the goodwill of employees once the business re-opens or otherwise reverts to its usual arrangements. To protect themselves, businesses should keep informed about the government’s plans to provide £330bn in emergency aid to business in the coming months which may help with losses sustained due to business closure and interruption.

Q2 – How should employers respond to an employee’s request to self-isolate?

The NHS is advising those with cold and flu symptoms to self-isolate for 7 days. The Government announced that from 21st March 2020, the entire population is encouraged to practise social distancing, which includes measures such as working from home and avoiding social gathering. Those over 70, those with underlying health conditions, those living or working in London and those who are pregnant are especially encouraged to do so. If an employee informs you that they are self-isolating and wish to continue to work remotely (for instance, they have returned from an affected region or were potentially exposed to an infected person), it makes commercial sense to encourage them to do so. You could ask them to take the time as sick leave, however they are then not required to continue performing their duties. The decision therefore is one of practicality. Working from home is of course not possible in every profession.

If the employee is self-isolating and is experiencing severe Coronavirus symptoms, you should not ask or reasonably expect them to continue working while at home. They should take the time off as

sick leave and will then be able to receive Statutory Sick Pay (see question 6) or contractual sick pay, as applicable.

Dismissing an employee who is affected by coronavirus in some way (including being asked to self-isolate, without any symptoms) may constitute unfair dismissal. Offering remote working is a way to help mitigate losses in this regard.

Q3 – Do employees have to declare if they are experiencing coronavirus symptoms?

By law, the answer is no. However, employees do have an obligation to follow reasonable instructions from their employer or managers. In a time such as this, it is perfectly reasonable to require that anyone experiencing symptoms of coronavirus must declare it so appropriate steps can be taken to protect their colleagues and the business continuity. Employees should therefore be encouraged to notify you if they are experiencing symptoms, and will be more inclined to be open about this if they are not concerned that it will result in a period of unpaid leave or statutory sick pay. The government now asks anyone with a cough and/or fever to self-isolate. Identifying cases early on is the best way by far to mitigate losses to your business and employees should be assured of fair treatment in the event that they have to self-isolate. Creating an environment where employees are fearful of taking time off is almost guaranteed to increase the risk of mass absences and business disruption.

Q4 – What are employers’ duties to protect workers from coronavirus?

You must not allow someone with coronavirus or someone who has been asked to self-isolate onto your premises or to come into physical contact with employees. Failure to take reasonable steps to protect your workforce may put you in breach of Health and Safety legislation and potentially financially liable in damages to employees who are exposed. You may also be liable to members of the public if your employees are in client-facing roles or if they engage with vulnerable people, such as the elderly. Changing workplace practices in line with NHS and government advice is the best way to mitigate any potential claims for breach of health and safety obligations and to uphold your common law duty of care towards employees.

Q5 – What if we need to close our workplace?

Contingency plans should already be in place for this kind of event. The Government’s advice is now that everyone should work from home if they can. Employees should be given advance notice if possible to allow them to make the necessary arrangements. Working from home, call redirects and video conferencing in place of meetings are some of the main features of business contingency plans.

It is crucial that payroll continues to operate when the workplace is closed. Clear communication lines should be maintained with employees with updates on when they are instructed to return to their posts. A number of employers may have begun considering lay offs, and redundancies are also an option being explored by some organisations. In such cases, employees’ broader employment rights must be upheld, including the right to proper processes, consideration of alternatives to redundancies and lay offs, and ensuring that all required payments are made, including for notice pay. Advice should be taken in this regard to ensure that employers are following proper procedures. There is an element of risk here of course; the pandemic is hopefully temporary and recruiting a new workforce when the panic clears may itself be a costly and time-consuming endeavour.

Data protection and confidentiality obligations continue in the event of employees working from home. Proper policies and procedures should be in place to ensure that individual data is not at risk of breach due to employees carrying out work away from the office.

Q6 – What are the requirements of Statutory Sick Pay (SSP)?

If an employee has to self-isolate or quarantine due to being diagnosed with coronavirus, showing the symptoms of it, returning from an affected area or for some other reason, they will be entitled to Statutory Sick Pay (SSP) subject to the usual qualification requirements, as recently varied by the government. They may also be entitled to more than this based on their own contract of employment. The recent UK Budget extended SSP to all those ordinarily eligible for SSP who have been asked to self-isolate and who are unable to carry on work (see <https://www.gov.uk/government/news/chancellor-delivers-budget-2020> for more information). It is intended that this will be available from the first day of not being in work.

If the employee does not have any symptoms, it is worth discussing with them whether they are able to work remotely. You would have to pay them at the full rate, but this would help maintain continuity of business.

While normally you would require a sick note from employees taking time off sick for longer than 7 days, the present situation dictates that this may not be possible for everyone due to the heavily inundated nature of health services. Indeed, many GP surgeries are now no longer seeing their patients in person. The government has announced its intention to change the law to allow sick notes relating to Coronavirus absence to be obtainable from the 111 NHS online service. This may be retrospective for current cases. Therefore, some leniency is encouraged when obtaining proof from employees.

Q7 – What if an employee needs time off to look after a dependant?

Employees are entitled to ‘reasonable’ time off work to care for a family member in emergency situations. Most employment contracts and employee handbooks specify a business’ exact policy in this regard under ‘compassionate leave’ or ‘dependents’ leave’ and should be looked at in the first instance. ‘Reasonable’ is usually classed as a few days, but this is dependent on the circumstances. Ultimately, it will depend on how much care is actually needed and courts have interpreted the reasonableness criteria broadly.

As of the UK Budget delivered on 13th March 2020, the government has extended SSP to those who must take time off work to care for those showing symptoms of coronavirus. In such circumstances, the same individuals may also have been told to self-isolate. This change took effect on 15th March.

Q8 – Can an employer force an employee to be subject to a medical exam?

Unless this is provided for in the employee’s contract of employment, no. You may nonetheless ask them to do this, however their consent must first be obtained. It is worth noting that tests for coronavirus are being administered by the NHS only usually in hospital settings as they are expensive, and they are also being limited to those who meet strict criteria. Furthermore, a medical examination may only determine that the employee is suffering from cold or flu-like symptoms and will not be conclusive as to whether they have coronavirus.

Additionally, many health workers are actively avoiding non-essential medical exams for the duration of the outbreak. It is not advisable to overload the health services needlessly and it should be remembered that by sending an employee to a health clinic, you may be subjecting them to a higher risk environment. In any event, you are entitled to ask an employee to self-isolate and work remotely if you suspect they are at risk of infecting others.

Q9 – What are an employer’s obligations if an employee is diagnosed with coronavirus?

If the employee has been present in the workplace, you must contact your local Health Protection Team who will advise on what steps the organisation must take. Contact details of these based on English regions can be found online at (<https://www.gov.uk/guidance/contacts-phe-health-protection-teams>). In Scotland, you must contact your local health board (<https://www.scot.nhs.uk/organisations/>) and in Wales, you should contact Public Health Wales (<https://phw.nhs.wales/topics/latest-information-on-novel-coronavirus-covid-19/>).

It may not always be necessary to close your workplace, however you should be prepared at the very least to isolate specific areas, equipment or stock the employee was working with and inform any employees, clients, delivery workers, members of the public, etc. who came into contact with them. It is highly likely that employees who were in close proximity to the infected employee will be told to self-isolate regardless of whether they have symptoms.

An affected employee must be asked immediately to stay away from the premises. The health services will be able to advise them more fully in light of factors such as their age and overall health. They should only be allowed to return to the premises when the health services advise they may do so. An employee who persists in staying on the premises with coronavirus or the symptoms of coronavirus should be subject to later disciplinary procedure for failing to uphold health and safety standards. The Health Protection Team should provide immediate assistance in this regard. The emergency legislation proposed by the government looks to introduce emergency detention measures for those even suspected of having Coronavirus who refuse to self-isolate themselves.

Q10 – How should we discuss an employee who has coronavirus?

Information concerning individual health is a ‘special category data’ under the GDPR and accordingly must be handled with utmost sensitivity. You should avoid giving other employees any details of which of their colleagues may have contracted the virus, but are fine to state that someone in the workforce has contracted it (and indeed this is required). Employees will usually be able to discern who the infected employee is, but as an employer, you should avoid unnecessarily disseminating this knowledge, in accordance with your obligations under GDPR. The Information Commissioner has advised that you should refer to the ‘infected employee’ as such and not use their name, even if this is otherwise apparent.

There may also be some occasions where the health authorities or government require information about those with Coronavirus. In these circumstances, data protection law does not prevent organisations from responding to these requests.

Q11 – How can we protect ourselves against claims of discrimination?

Reports have been made of discrimination against workers from China and other coronavirus hit areas. Employers may be liable for acts of discrimination committed by their employees, as they are under a duty to protect employees and recipients of services from discrimination due to race or ethnicity under the Equality Act 2010. If for instance, you would like employees to notify if they have visited an affected region (China, northern Italy, etc.), you should list all regions affected and not single out one in particular. . Employees who act in discriminatory ways should be subject to the full disciplinary procedure.

The government announced plans on 14th March that it is likely to ask all those aged over 70 to self-isolate for up to a period of 4 months. In such circumstances, any employees over this age may find

themselves with no option but to stay away from their workplace. It has not yet been announced whether the government will offer any specific relief to such employees or the organisations employing them beyond the £330bn overall package to help businesses. This is a very fluid current situation.

Care must be taken at this early stage not to single out or discriminate against employees over the age of 70. Such conduct could constitute unlawful age discrimination. They could have strong claims for unfair treatment or unfair dismissal based on age discrimination if they are treated any differently as a result of the government's decision. If possible in the line of work, those aged over 70 and all those with similar roles should be offered the ability to work from home in keeping with the organisation's business continuity plan.

Similar sensitivity should be shown to those in high-risk categories, such as those with underlying health conditions or pregnant women, who are also being asked to self-isolate. Bear in mind that pregnant women and those with disabilities will have additional employment law protections under the Equality Act 2010.

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