



## UK Employer Coronavirus (COVID-19) FAQs

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As the novel coronavirus COVID-19 continues, employers continue to face significant challenges to their business and their workforce. Employers are faced with numerous employment law changes – from changes to statutory sick pay to furlough – and many are now turning their minds to how they can get their workforce back into the workplace.

It is essential for employers to plan appropriately both to discharge legal duties to employees and the public and to minimise business disruption.

### 1. What steps should employers be taking?

It is important for employers to:

- Where practicable, continue to facilitate home working. Current guidance states that homeworking should remain standard wherever possible and employees in vulnerable groups should be *'strongly advised to work from home, if possible, and should be supported in doing so'*. Make sure that employees have all the necessary equipment and that contact details are up to date.
- Begin to plan for the return to work for those roles that cannot be done effectively from home. Consult with employees and trade unions to ensure 'buy in' to plans. Implement measures to make the workplace 'Covid-19 secure'.
- Implement adequate health and safety measures, including undertaking a risk assessment. Additional measures may be needed for pregnant employees or those with existing health vulnerabilities.
- Designate a person or team responsible for the Covid-19 response and for implementing emergency measures such as workplace closure.
- Keep on top of the latest UK Government guidance as it evolves.
- Communicate clearly and regularly with staff.
- Decide on an approach to home working and sick pay and notify staff of the government's recent business support measures if work is temporarily suspended.
- Plan how they will handle employees who are high-risk or subject to quarantine.
- Keep business travel planned for the coming months under review.

Some of these measures are considered in more detail below.

## 2. What health and safety measures should employers take?

Risk levels for Covid-19 will vary for different work environments and employers should conduct a risk assessment to identify and implement appropriate risk mitigation measures.

Employers may need to consider ways to physically rearrange workplace set ups to maximise social distancing such as moving desks to maximise space between workstations and enable back to back working. Employers may also want to provide additional cleaning materials in the workplace (tissues, hand-sanitizer, cleaning wipes, and so on) to encourage employees to take preventative steps.

It is sensible to remind staff of basic steps that can be taken to guard against illness, such as Public Health England's "Catch it, Bin it, Kill it" method of preventing influenza and other communicable illnesses ("Catch" any sneezes in a tissue, "Bin" any tissues immediately and "Kill" the virus by washing hands with soap and warm water).

### *Vulnerable Workers*

Additional considerations apply where employers are aware that particular employees may have increased vulnerability to Covid-19, such as pregnant workers or those with pre-existing respiratory problems or compromised immune systems. In these cases, a specific risk assessment should be undertaken and reasonable protective steps taken, in consultation with the staff involved and with occupational health input where appropriate.

For pregnant employees, where changes to working conditions cannot adequately mitigate risk, the employer may need to offer temporary alternative employment or suspend the worker on medical grounds (with full pay).

## 3. How should employers be preparing for the return to work?

As the UK begins to make tentative changes to ease lockdown, a wider range of employees are permitted to return to physical workplaces.\*

The default position under current government guidance is that homeworking should still be standard where possible. If your employees have been working effectively from home thus far, there should be no immediate rush to make changes.

However if there is a business need to reopen a physical workspace, there are some key points to consider.

- Stay on top of government guidance, in particular the 'Working safely during coronavirus' [guidance](#).
- Conduct a risk assessment to determine what steps are needed to comply with government guidance and make the workplace 'Covid-19 secure'
- Make the necessary changes to the workplace and working patterns
- Communicate with employees (including union representatives and health and safety representatives ) early and often - it is important to get employee 'buy in' to your plans, both to minimise the risk of any morale issues but also to minimise the risk of legal claims from disgruntled employees
- Be flexible - it may be appropriate to bring some teams back into the office but others may be able to continue with homeworking
- Consider your data protection obligations carefully, in particular in relation to any monitoring of employee health
- Be conscious of the differing needs of vulnerable employees - you may need to be flexible in continuing to permit homeworking or temporary changes to job duties.

\* Please note that this guidance refers primarily to businesses in England - lockdown measures are being eased at varying timeframes across the UK's four nations.

## 4. Do employers have to pay staff who are off work due to Covid-19?

In many instances of absence due to Covid-19, employees will be entitled to statutory sick pay (SSP), set at £95.85 a week from 6 April 2020. A number of changes to SSP have been implemented which, in broad terms, relax the rules to encourage employees to stay at home if they are at risk of spreading Covid-19.

The changes to SSP in response to the Covid-19 pandemic include:



- The normal requirement for three “waiting days” before SSP becomes payable has been temporarily waived for sickness absence after 13 March 2020, meaning SSP will be payable from the first day of absence from work. This is a blanket change and applies to sickness absence for non-Covid-19 related illness.
- From 13 March 2020, everyone who is either (i) self-isolating because they or someone in their household have Covid-19 symptoms (however mild) or (ii) shielding after receiving written notification from the government and in both cases, is unable to work from home, will be eligible to receive SSP.
- Individuals who are self-isolating because they or someone in their household has Covid-19 or are shielding are able to obtain an ‘isolation note’ from the NHS website or NHS 111, rather than being required to visit their doctor in person, which will act as evidence for employers in relation to sick pay entitlement.
- Businesses with fewer than 250 employees will be able to claim back from the government the cost of providing SSP for up to 14 days to any employee absent from work due to Covid-19 where the first day of absence fell on or after 13 March 2020. This reimbursement scheme is not yet operational as of 22 May 2020.

Entitlement to any sick pay in excess of SSP will be determined by the contract of employment of the relevant employees.

Other covid-19 related absences fall outside the scope of SSP. If an employee is unable to work because of a lack of childcare they may be placed on furlough or they may be entitled to take unpaid time off for dependants or parental leave. As workplaces reopen, there is an increased risk that an employee will refuse to return to work on grounds that they do not feel it is safe to do so – even if the employer has put in place measures to minimise risk. Whether the employee is entitled to pay in such circumstances is tricky and will depend on the individual facts.

The position is summarised in the table below.

Reason for Absence	Legal Right to Pay	Other Factors
<b>Actual or suspected COVID-19 infection</b>	<ul style="list-style-type: none"> <li>▪ SSP or contractual sick pay entitlement, whichever is more generous.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Usual sick pay rules apply. UK Government guidance is to relax requirements for medical evidence in view of its instruction to suspected carriers not to visit a doctor.</li> </ul>
<b>Self-isolating due to having covid-19 symptoms (or someone in the same household having symptoms) or shielding in line with government advice</b>	<ul style="list-style-type: none"> <li>▪ Entitled to SSP</li> <li>▪ Theoretically, no right to pay in excess of SSP (although there is some scope for argument).</li> <li>▪ However, if the employee is working at home by agreement or the employer has directed the employee to remain at home in these circumstances (which is likely and recommended), then they are entitled to full pay.</li> </ul>	<ul style="list-style-type: none"> <li>▪ There is a strong policy argument to paying for this absence, irrespective of the theoretical position.</li> <li>▪ ACAS guidance on Coronavirus confirms that payment would be considered best practice.</li> <li>▪ UK Government guidance is to relax requirements for medical evidence in view of its instruction to suspected carriers not to visit a doctor.</li> </ul>
<b>Employee fear/concern (no ill health, outside medical or UK Government guidance)</b>	<ul style="list-style-type: none"> <li>▪ No right to sick pay unless working at home by agreement.</li> <li>▪ If instructed to attend and refuses, then in most cases there will be no right to any pay unless home working by agreement.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Refusal to attend work when directed without lawful excuse is a disciplinary matter. However, employers will be expected to act reasonably. It is unlikely that harsh action will be viewed sympathetically by an employment tribunal.</li> </ul>
<b>Employer request</b>	<ul style="list-style-type: none"> <li>▪ In most cases, full contractual pay will apply, unless otherwise agreed with employees.</li> <li>▪ Specific contract provisions may change this position (e.g. for lay off or under zero hours contracts) but will be rare.</li> </ul>	<ul style="list-style-type: none"> <li>▪ ACAS guidance confirms that it will be best practice to pay in full.</li> </ul>
<b>Lack of childcare (e.g. school closure)</b>	<ul style="list-style-type: none"> <li>▪ No right to sick pay.</li> <li>▪ The statutory right to unpaid time off work for dependents is likely to apply (or any more generous contractual entitlement).</li> </ul>	<ul style="list-style-type: none"> <li>▪ The statutory entitlement is to a “reasonable” amount of time off work. This will be fact sensitive.</li> </ul>
<b>Travel disruption</b>	<ul style="list-style-type: none"> <li>▪ No right to pay unless home working by agreement.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Employers will be expected to act reasonably and explore sensible alternatives with the employee.</li> </ul>

\*The position may be different in parts of the UK outside England

## 5. Can employers continue to use the furlough scheme?

Yes. The furlough scheme has been extended until the end of October 2020. It will continue unchanged until 31 July. From August to October there will be more flexibility in the scheme to allow for things like a part time return to work. We also expect that employers will be expected to contribute to the scheme, though as of 22 May 2020 the details of these changes have not been published.

Under the Coronavirus Job Retention Scheme, the UK government will pay 80% of an employee's wages if the employee is temporarily suspended without work due to Covid-19 ("furloughed"), up to a maximum of £2,500 per month. Only employees who were on payroll as at 19 March 2020 will be eligible for furlough. Employers can also claim for reimbursement of employer National Insurance Contributions and mandatory employer auto enrolment pension contributions associated with that 80% of wage costs. The employer can choose to top-up wages in part or full if they wish. Employers are being encouraged to consider furlough instead of making redundancies if they are experiencing a business downturn.

The standard position in UK law is that employees cannot be "laid-off" without pay unless specific provisions are contained in their contract of employment. It is rare that contractual provisions of this type are in place and there are statutory constraints on how they can be used.

Employers may nevertheless be able to make use of the government's Coronavirus Job Retention Scheme to place employees on 'furlough' but should be conscious that employee consent will be required in most cases if employment contracts do not include specific "lay off" clauses.

You can read GQ|Littler's full guide to the Coronavirus Job Retention Scheme [here](#).

## 6. Should employers cancel or defer business travel?

Foreign Office (FCO) guidance on travel should be checked regularly [here](#). At the time of writing the FCO advice is to avoid overseas travel unless essential. There are certain areas where the FCO advises against **all** travel.

For the areas where the FCO is advising against all travel, business trips obviously should be cancelled or postponed. Failure to do this is likely to breach duties to the employee in question and potentially the broader workforce and others.

For the areas where the FCO is advising against all but essential travel, business trips should be cancelled or postponed, if possible. This decision will require a balancing of all relevant factors, including the destination, business needs and an individual employee's circumstances and concerns. Employees should be directed to follow self-isolation guidance in all cases.

Employers should take particular care in respect of travel if the employee (or someone they live with) is at higher risk of becoming seriously ill if they are exposed to Covid-19 because of age, pregnancy, or a pre-existing medical condition such as respiratory problems. A list of those considered to be particularly vulnerable to Covid-19 is included in government guidance [here](#). Employers should consult with the individual, their doctors, and in some cases, an occupational health specialist to assess whether travel can safely proceed.

## 7. How should employers communicate with staff?

Employers should consider in advance and notify staff of their general approach to company sick pay including self-isolation within UK Government guidance. Additional communications on the approach to office closures, home working and absence through school closures may also be sensible.

Employers should communicate with staff in an accurate and even-handed way. This may be a stressful situation for some employees and employers should avoid unnecessarily causing undue anxiety. In particular:

- Employers should stay informed of official UK Government guidance from the Department of Health and Social Care and the FCO
- Managers and HR should not provide medical opinions about the effects and spread of Covid-19; and
- In most cases, communications and advice should reflect only the UK Government or occupational health guidelines and other official sources. Misinformation should be corrected promptly if it arises.

## 8. Can employers send home employees who are at high risk of carrying Covid-19?

Employees should be sent home if their circumstances fall within current UK Government guidance triggering self-isolation (see [UK Government Guidance for Employers](#)) or who are otherwise advised by PHE or a doctor to self-isolate until they have been advised by doctors that the incubation period is over and all symptoms have cleared. There is a theoretical risk that sending an employee home when they are medically fit to work may be a breach of contract or even constructive dismissal. However, the practical risk of a successful claim being established is outweighed by the risks of allowing the employee to attend work.

Sending employees home in circumstances where UK Government guidance does not currently recommend self-isolation carries a higher risk and further advice should be sought.

#### 9. What personal information can employers collect and share about employees who may be carrying Covid-19?

Collecting and sharing information about the health of a worker is highly regulated under UK and EU law, including under the General Data Protection Regulation (EU) 2016/679 (GDPR).

Of course, if an employee is suspected of carrying Covid-19 then risks of immediate harm to your employees and public health, and of breaching the duties of care that you owe to prevent that harm, may need to take precedence over data protection considerations. But advance consideration of the issues may help you mitigate risk.

Employers should take heed of recent guidance from the UK Information Commissioner's Office (ICO) stating that the ICO will be taking an "*empathetic and pragmatic approach*" (within reason) to enforcement of GDPR in the UK as the Covid-19 pandemic continues. In particular, the ICO will relax the timeframes necessary to respond to information requests such as data subject access requests. Though this pragmatic approach by the ICO is welcome, it does not give employers a free pass to ignore data protection laws entirely and a reasonable approach should be taken.

As more employees begin to return to physical workplaces as lockdown eases, a whole host of new data protection concerns will arise in relation to health screening and the collection of.

Employers should continue to consider these headline points on GDPR compliance during the Covid-19 outbreak:

- A complete exemption from certain provisions of GDPR applies where serious harm to a person is likely and a health care professional has indicated that processing the health information is necessary to prevent that harm. This may apply if, for example, Public Health England is involved in tracing the contact chain of a carrier.

In other cases:

- Processing of health information which is necessary to prevent harm to employees and the public will be lawful under specific rules covering monitoring of epidemics and the discharge of legal duties.
- The usual requirements for processing data will apply, including as to proportionality and the existence of appropriate documents such as privacy notices, a data protection policy and data retention policies. Compliant employers will already have these documents in place.
- A risk assessment should be conducted and appropriate to mitigate the privacy impact should it be implemented. In some urgent cases, this may simply be impracticable but could be performed now in advance of need.
- In all cases, information should be anonymised, or a pseudonym used, if at all possible, i.e. where this does not defeat the purpose of the processing. In cases such as precautionary office shutdown, it will not usually be necessary to identify the carrier publicly and it is important not to do so.

#### 10. Can employers take action if employees do not perform their duties without good reason?

It is likely that some employees will be unwilling to attend work or undertake business travel, due to fears about Covid-19. Where these actions are outside the recommendations of UK Government guidance, they potentially amount to a breach of contract by the employee and grounds for disciplinary action.

However, knee-jerk reactions by employers are still likely to attract legal liability. In all cases, employers should speak to staff, try to understand and address their concerns and reach a sensible compromise. Consideration should be given to whether any special factors exist relevant to that employee that merit different treatment.

Any disciplinary action should involve an appropriate process in line with ACAS guidance.



### 11. Can employers stop employees from taking holidays to high-risk areas?

This is a grey area. Employers do not have a clear right to restrict travel to high-risk areas outside working time. However, employees can be required to notify travel to these areas to their employer and could potentially be required to take extra holiday or unpaid leave to cover any consequent self-isolation period. If the resultant extended period of leave is more than the employer can accommodate, then it may be possible to refuse the leave.

Consideration will need to be given to whether implementation of any such policy is indirectly discriminatory (see question 12 below).

### 12. Does Covid-19 present discrimination risks?

Employers should be conscious of the risks of discrimination in how both they and employees respond to Covid-19.

There have unfortunately been reports across the world of racist abuse being directed at those perceived to be Chinese. Employers may be liable for the discriminatory acts of employees and should be vigilant. If needed, employers should remind employees of their equality obligations by reference to appropriate policy documents and should take swift action if problems arise.

Any policies in response to Covid-19 should apply to all employees and be based on potential risks, as assessed in line with official guidance, otherwise employers risk direct discrimination claims. For example, if an employer were to target Chinese employees for additional precautions, rather than those with recent travel links to affected areas, this would be a very significant discrimination risk.

A policy requiring employees without symptoms who have recently travelled to certain countries to remain at home for 14 days may be indirectly discriminatory. This will be the case if it disproportionately affects staff of a particular ethnic origin (such as those whose nationality or ethnicity is linked to those countries). The same may be true of policies described at question 10 above). It will however be open to an employer to argue that the policy was a justifiable and reasonable step to take. Where policies are in line with UK Government recommendations, employers are very likely to be able to succeed in this argument. However, precautionary measures that exceed UK Government guidance should be carefully scrutinised to ensure that they are legitimate and proportionate.

Employers will also need to ensure that their decisions are consistent and proportionate in respect of home working, sick pay and action in respect of employees who do not attend work for reasons other than actual or suspected infection.

### 13. Where can employers find additional information?

- [UK Government Guidance for Employers](#)
- [ACAS Employer Guidance on Coronavirus](#)

If you need guidance on employment issues related to Covid-19, please contact your usual GQ|Littler contact.