

Covid-19 Information Sheet – Guidance for Employers

This information sheet has been produced by students from BPP's Pro Bono Centre under the supervision of legally qualified staff members. The information contained in this document is accurate as of 8th April 2020.

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Statutory Sick Pay

What are the new rules on Statutory Sick Pay ('SSP') regarding COVID-19 and what do I need to do?

Normally, an employer is required to pay SSP to their employees from day 4 of their sickness absence. As part of the COVID-19 response, if the employee's sickness absence is due to COVID-19, they must be paid SSP from day 1 of their sickness absence. It is recommended that employers maintain records of staff absence and payments of SSP. Absence due to COVID-19 includes:

- Where the employee has COVID-19
- Where the employee has COVID-19 symptoms
- Where the employee is required to self-isolate because a household member has COVID-19 or has been advised to self-isolate by a doctor or NHS 111

This change came into force from 13 March 2020 and has retrospective effect.

Employers do not require a 'fit note' (a statement of fitness for work) from an employee's GP if they are absent for more than 7 days and have taken sick leave because they are self-isolating due to COVID-19. Employers can instead expect to receive an 'isolation note' from their employee, which will act as evidence of the employee's inability to work due to their self-isolation. An employer can insist on an isolation note after their employee's first 7 days of absence. Isolation notes can be found at: <https://111.nhs.uk/isolation-note/>.

More information about SSP can be found in BPP's COVID-19 Guidance for Employees Factsheet.

Guidance on employees working from home

Can an employer require an employee to work from home?

On 23 March 2020, the government advised that all employees should work from home where possible. Employers should discuss working arrangements with their employees and take steps to facilitate working from home. Commuting to work is only permitted where it is impossible to work from home.

If there is already an established requirement in the workplace to work from home where instructed to do so, it is unlikely that enforcing that obligation will be an issue. However, if there is not an established practice, requiring an employee to work from home could arguably constitute a variation of an employee's employment contract which would require the employee's consent.

If the requirement to work from home is being newly introduced, the employer should ensure that the health and safety implications have been considered and that necessary steps to put in place the equipment needed to allow remote working have been taken.

Are there special categories of people who should work from home?

The government advice for working from home applies to everyone generally. Only those who are unable to work from home may continue to travel for work purposes (changing commute options to avoid public transport is advisable).

However, there are certain individuals who fall under a special category and have been strongly advised to stay at home as they are more vulnerable to COVID-19. Employers should think carefully about requiring these individuals to come into work. Those who are strongly advised to stay home include: Individuals over 70; pregnant women; and those with underlying health conditions. A full list can be found at <https://111.nhs.uk/covid-19/>.

Employees who fall into this category may be entitled to SSP or contractual sick pay if applicable. However, employers should be aware that where those employees cannot work remotely, requiring them to remain at home on SSP could be discriminatory. For these reasons, employers may choose to continue to pay such employees in full. Equally, dismissing an employee who refuses to go into work because of a protected characteristic (age, gender, disability) which places them in a vulnerable category may also be discriminatory. Employers should seek to make reasonable adjustments, such as allowing for working from home, in order to support such employees remaining in work.

Can the employer require their employees to come into work if their role cannot be carried out remotely?

All members of the public must stay at home except in very limited circumstances. If the employer is one which is permitted to continue operating, they should consider their position very carefully before requiring an employee to come into work. This could breach their duty of care to the employee and could result in a claim for constructive dismissal or discrimination. A vulnerable employee who contracts COVID-19 due to being required to go into work could potentially have a claim against their employer for personal injury.

If employers require employees to come into work and these employees refuse to do so, employers may arrange for employees to take time-off as holiday, or alternatively as unpaid leave. Employers do not have to agree to this and if an employee refuses to attend work

without a valid reason, disciplinary action may be taken. Employers who require employees to take their holiday must provide these employees with adequate warning, and clearly explain the reason for this.

Following the Government's decision to close all non-essential businesses to the public, a category of 'key workers' has been identified. These include Healthcare professionals, those working in education and people providing an essential public service (including supermarkets). A full list can be found in the Further Information section below. These 'key workers' are permitted to travel to work if they are unable to work remotely.

Employers that do not provide an 'essential service' that continue operating in contravention of government advice will be committing an offence. Any breach of government advice will be subject the business to prohibition notices and fixed penalty notices. Businesses that continue to contravene the measures will be forced to close.

What should employers do regarding working arrangements during COVID-19?

Employers should consider some simple steps to make sure they continue to provide their staff and customers with a safe environment. This includes:

- Ensuring all employees practice social distancing if they come into the workplace
- Using technology such as remote call meetings and avoiding travel as much as possible
- Ensuring managers are informed on how to spot symptoms of Covid-19 and are clear on any relevant processes, for example sickness reporting and sick pay, and procedures in case someone in the workplace shows symptoms
- Ensuring there are facilities for hand washing and encouraging employees to wash their hands regularly for 20 seconds
- Ensuring everyone's contact numbers and emergency contact details are up to date
- Updating employees on the actions being taken to reduce risks of exposure in the workplace

Redundancy and Continuity of Service

What if I need to make redundancies?

In light of COVID-19, many businesses will be suffering economic hardship and may consequently need to consider making alterations to their workforce. This may include making part, or all, of their workforce redundant. This is particularly the case where the economic hardship that a business is undergoing will have a longer-term impact such that when the business reopens, it may need to permanently reduce its employee headcount and would then consider redundancies.

A redundancy is a dismissal which is wholly or mainly attributable to the employer. There are three types of redundancies resulting from either business closure, workplace closure or reduction of workforce. Employers have specific duties and obligations when making employees redundant such as a duty to inform and consult employee representatives and to notify the Secretary of State, breaches of which may result in fines. Where an obligation to consult exists, employers will need to ensure that they have followed a fair procedure in order to avoid claims for unfair dismissal. To make redundancies fairly, employers should consider whether they can avoid or limit the number they make.

What are the alternatives to redundancy?

There are alternatives employers should consider before resorting to redundancy. Depending on employment contracts, employers could consider short-time working, which consists of providing employees with less work and consequently less pay, or lay-offs, which consist of providing employees with no work for a certain period. Both measures are temporary, and employees would still be retained. Employees who cannot work because of sickness or medically advised self-isolation cannot be laid-off.

In response to the risk of significant redundancies arising as a consequence of COVID-19, the Government has introduced the Coronavirus Job Retention Scheme (CJRS). Under this scheme, HMRC will reimburse 80% of employees' wages, up to £2,500 a calendar month, as long as employers keep them on their payroll. Employers may choose to pay the remaining 20% of employees' wages but are not obliged to do so. More information on what this is and how this is calculated is included in BPP Pro Bono Centre's Information for Employees Factsheet.

What do I need to do as an employer for this scheme?

You, as an employer, will need to designate any affected workers as "furloughed workers". This means that these workers will not be carrying out any work for you but you will still pay them 80% of their salary under the scheme. Your employees are not being dismissed or made redundant, so most of their employment terms and conditions apply, and their continuity of employment will be preserved. Employees must be told about, and agree to, this change of employment status in writing.

If employees are on furlough leave, they can undertake volunteering or training, provided it does not generate any money for their employer. You are not able to ask your employees to complete any tasks that would ordinarily be part of their employment if you have placed them on furlough leave.

Will self-isolating affect my employees' continuity of employment?

If your employees are self-isolating due to Covid-19 symptoms, any weeks absent will not affect their continuity of service. This is because where employees are genuinely incapable of doing their work due to illness, the weeks absent will count towards continuity. However, continuity will be interrupted if the incapability lasts longer than 26 weeks and the original employment contract has been terminated. Therefore, if the original employment contract has been terminated, but the employee recovers sufficiently to return to work after a 28-week break, they will not have continuous employment. This does not apply where a contract of employment remains in existence.

If my business has had to close and my employees are therefore absent from work, does this impact continuity of service?

Continuity of service continues to apply where an employee is absent due to a temporary cessation of work. There must be a cessation of work and the employee must be away due to this cessation; service will not be continuous where the employee has left for another reason. Finally, although this cessation must be temporary, there is no statutory limit to this period. This does not apply where a contract of employment remains in existence.

If an employee is re-employed under a new contract, the offer of which was made under the previous contract, the employee will not be regarded as dismissed and the continuity of service will not be broken (for the purposes of statutory redundancy payment). The renewal or re-engagement must take effect within 4 weeks of the termination of the old contract.

In relation to future claims for statutory redundancy pay, continuity of service will be severed by the receipt of a statutory redundancy payment. However, continuity will be maintained where they are reinstated/re-employed having been dismissed on terms including a provision for the employee to repay the redundancy payment; the payment must actually be repaid.

Note: payment of a redundancy payment will break continuity for the purposes of the statutory redundancy scheme but not for any other purpose.

Apprentices

I have apprentices in my business. How is COVID-19 going to affect them?

The government remains committed to supporting apprentices and their employers during this challenging time. The Education and Skills Funding Agency (ESFA) is taking steps to ensure that wherever possible, apprentices can continue and complete their apprenticeship, despite any breaks they may need to take as a result of COVID-19.

What support is available to employers and apprentices?

The support provided by the ESFA includes:

- confirming apprentices on furlough can continue their training as long as it does not provide services or generate revenue for their employer
- encouraging both training, and assessment, to take place remotely
- granting extensions, where appropriate, to the timetable for assessments
- allowing breaks in learning, and explaining how they should be recorded
- stating HM Treasury will not be pausing apprenticeship levy payments for employers

Further information can be found here <https://www.gov.uk/government/publications/coronavirus-covid-19-apprenticeship-programme-response> and below.

How can an employer minimise any disruptions to training?

Where an apprentice may be unable to attend training due to illness, self-isolation, caring responsibilities etc., employers should ensure that apprentices continue and complete their training by:

- Providing and making use of distance-learning tools where possible and enforcing an approach to record the apprentice's off-the-job training activity
- Report any breaks in learning of more than 4 weeks as a formal break in learning in order to suspend any payment to the training provider for the duration of this break
- Consider a break in learning where the apprentice is placed on unpaid leave or where the employer can no longer support their apprenticeship

What counts as off-the-job training?

All off-the-job training must be directly relevant to the apprenticeship which can be delivered using remote working. Employers can set tasks which are not linked to the apprenticeship where their apprentice is working from home but this cannot be classified as off-the-job training.

Training can also be done as a block if agreed between the provider and the employer but it must satisfy the 20% minimum off-the-job training over the length of the apprenticeship.

What happens when there is a disruption to an apprenticeship?

If an apprentice is moved to a role not related to their apprenticeship, they may not be able to continue training as an apprentice. A break in learning should therefore be considered. Employers can now temporarily also report and initiate a break in learning where the interruption to learning is greater than 4 weeks. However, if an apprentice is moved to a role connected to their apprenticeship, they can remain on the scheme, as long as they continue to fulfil the off-the-job training requirement.

A furloughed apprentice can still undergo training where the employer is able to deliver training remotely. However, they cannot participate in any services that will generate revenue for, or on behalf of the employer. If the apprentice is still undertaking training, at the request of their employer, employers are entitled to pay at least the National Living Wage/National Minimum Wage during this time. Usually, 80% of the workers' wages, up to the value of £2,500, will provide sufficient monies to cover the training hours. Where the furlough payment does not meet the appropriate minimum wage for the training hours, employers will have to pay additional wages.

Pensions

Do I still need to make pension contributions?

Yes. The Pensions Regulator has extended reporting late payments from 90 days to 150 days as a result of the pandemic, but this does not affect an employer's responsibility to make contributions.

The CJRS will cover an employer's minimum automatic enrolment pension contributions during the COVID-19 crisis. This means that, for furloughed employees, the contribution will be set at the minimum 3% and capped at the CJRS maximum salary cap of £2,500, so the maximum Government pension contribution will be £59.40 per month. Employees will still need to pay 5% into their pension to get the Government contribution. If, as an employer, you usually make a higher pension contribution, you may decide to continue with that higher contribution, but are not obliged to do so.

What if I am unable to make any or full pension contributions at the moment?

Employers are encouraged to contact the Pensions Regulator if they cannot pay contributions. The Regulator will take a proportionate and risk-based approach towards enforcement decisions. Regarding direct benefit pension schemes, the Regulator's position is that they will be pragmatic where previously unforeseen arrangements are requested, provided:

- The need for this can be justified
- A plan is made for deferred scheme payments to be caught up
- A plan is agreed for mitigating any detriment caused to the scheme

- The scheme is being treated fairly compared with other stakeholders

If employers experience difficulties paying their employer's NICs, they may be eligible to receive support on a case-by-case basis through HMRC's 'Time to Pay' arrangements. Those concerned about being able to pay their taxes due to COVID-19 should contact HMRC through a dedicated helpline: 0800 0159 559.

Employers are encouraged to document their position regarding the treatment of their schemes.

How does an employee taking emergency leave affect their pension?

Workers who have been certified to act as emergency volunteers in health or social care have a right to take emergency volunteer leave in blocks of 2, 3 or 4 weeks. During emergency volunteer leave, the period of absence will not be deemed to have any effect on the worker's pension or benefit entitlements.

What about employers' National Insurance Contributions for furloughed employees?

Employers with furloughed employees are entitled to reimbursement of employer's NICs payable on the capped 80% of wage costs covered by the government under the Job Retention Scheme.

Employers' NICs remain payable on the earnings of any non-furloughed employees, as well as any amount that employers continue paying to furloughed employees for which they are not reimbursed under the Job Retention Scheme.

Further Information

BPP Pro Bono Centre has produced a series of Factsheets looking at how COVID-19 impacts on a range of different people. All of our factsheets can be viewed on the Pro Bono Centre Blog here: <http://probono.bppuniversity.ac.uk/blog/>

Further information on which individuals are key workers within the key groups can be found at: <https://www.gov.uk/government/publications/coronavirus-covid-19-maintaining-educational-provision/guidance-for-schools-colleges-and-local-authorities-on-maintaining-educational-provision>

Help and Advice

Citizens Advice – To find your local Citizens Advice, use www.citizensadvice.org.uk/

Carers UK – 0808 808 7777 (Monday and Tuesday, 10am-4pm) <https://www.carersuk.org/>

Information and Updates

The UK Government publishes a number of documents and updates as part of the ongoing response to Covid-19. These can be found on the UK Government website here: <https://www.gov.uk/coronavirus>

Wellbeing

This is an extremely difficult time for everyone. There is much uncertainty and a lot of anxiety. Along with your physical health, it is important to look after your emotional wellbeing during this period. There are a number of organisations that can help you during this difficult time.

Mind - 0300 123 3393 (Monday to Friday, 9am to 6pm) www.mind.org.uk

Samaritans – 116 123 (24 Hours, 365 days a year) www.samaritans.org

CALM – 0800 58 58 58 (Nationwide), 0808 802 58 58 (London) (5pm to Midnight, 365 days a year) www.thecalmzone.net/

Young Minds – 0808 802 5544 (Monday to Friday, 9:30am to 4pm) www.youngminds.org.uk/

Anxiety UK – 03444 775 774 (Monday to Friday, 9:30am to 5:30pm, during COVID-19, extended helpline hours over the weekend from 10am to 8pm). Text Service: 07537 416 905 www.anxietyuk.org.uk

No Panic – 0844 967 4848 (10am to 10pm, 365 days a year) www.nopanic.org.uk