



# WOODFINES – CORONAVIRUS UPDATE

## COVID-19: FREQUENTLY ASKED QUESTIONS

### SELF-ISOLATION & PAY

#### What pay is an employee in self-isolation entitled to receive?

The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 have been made and brought into force as of the 13 March 2020. These regulations amend Reg 2 of the Statutory Sick Pay (General) Regulations 1982, which defines 'persons deemed incapable of work' for the purpose of sick pay entitlement.

The definition now includes a person who is 'isolating himself or herself from other people in such a manner as 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 and effective on 12 March 2020; and who by reason of that isolation is unable to work'. This means that for those who self-isolate in accordance with public health guidance on coronavirus are deemed to be incapable of work, for the purpose of claiming statutory sick pay.

These Regulations do not, however, affect S.155 of the Social Security Contributions and Benefits Act 1992, which provides that statutory sick pay is not payable for the first three qualifying days in any period of incapacity. The Government has announced that it will bring forward emergency legislation to provide that sick pay will be available from the first day of sickness absence, but that legislation has not yet been published.

#### Where an employee is ordered to self-isolate or quarantined under the Coronavirus Regulations, can they continue to work from home/the quarantine location?

This would depend upon the terms of the order under the Coronavirus Regulations. If they have the facility to work from the location to which they are quarantined, and they are well enough to do so, then this should be possible provided that the restriction imposed upon them under the Coronavirus Regulations does not explicitly or implicitly prevent them from working.

#### Where an employee is ill and self isolates, does the employer still need to adhere to their sickness policy?

The employer should continue to follow their sickness policy where an employee has to self isolate due to the coronavirus.

#### Where an employee is not ill, but they have to self-isolate because a member of their family is ill, what should the employer pay the employee?

Where the employee does not have the coronavirus, but they need to self isolate due to their family member having the coronavirus, then the position depends on whether or not the employee can work from home in those circumstances. If they cannot work from home, then the employer could consider granting the employee another type of leave in line with their leave policies (for example, time off for dependants leave or unpaid leave).

## DISABILITY / HIGH RISK INDIVIDUALS

**What happens where an employee refuses to attend work because they have a disability which they believe puts them at high risk of serious illness if they catch coronavirus. Is the employer entitled to dismiss them, or if not, is the employer obligated to pay the employee?**

Those individuals who suffer from pre existing health conditions are unfortunately at higher risk of serious illness or death if they contract the coronavirus. The employer should therefore bear this in mind and take measures.

If an employee is self isolating because of a disability that puts them into a high risk category (e.g. if they have an auto-immune disease, cancer or respiratory condition) then disability discrimination issues may arise if those employees are required to continue travelling and to go into work, are not paid, or if the employer decides to dismiss them due to their absence in this situation. These actions could amount to discrimination.

**What about indirect discrimination?**

If an employer makes it a provision, criterion or practice (PCP) of requiring all employees to attend work during a pandemic, this could amount to indirect discrimination against the disabled employee. In such a case, the employer should consider whether the PCP can be justified as a proportionate means of achieving a legitimate aim.

**What about reasonable adjustments? Does the employer need to make any?**

As the coronavirus has been classified as a pandemic, if a disabled employee requests to work from home (where they are able to do so), the employer may be liable for failure to make reasonable adjustments if it does not agree with this request. Although, where the disabled employee is not set up for homeworking, it will not necessarily be a failure to make a reasonable adjustment for the employer to not continue to pay a disabled employee who self-isolates before seeking medical advice.

However, where an employer decides not to pay a disabled employee who self-isolates, it could potentially be seen as pressurising the employee to attend work as few employees can afford to remain employed without pay for long periods of time.

## TRAVEL

**Can an employer require an employee to undertake work-related travel overseas?**

Employers should keep up to date with the FCO advice on travel. If it has been advised not to travel to a specific country, then employers should take precautions and bear this in mind. In most circumstances, it would be unreasonable to require an employee to travel to a country that has been advised against by the FCO. If an employer makes an employee travel to a place which has been advised against by the FCO, then it could be seen as a breach of the employer's obligation of trust and confidence. Not only that, but it could also pose a health and safety issue. Another point to consider is that if an employee contracted the COVID-19 whilst overseas on work related travel, this could result in a personal injury claim against the employer.

**What is the position where an employee is stranded overseas on a work trip?**

If an employee has contracted COVID-19 and is unable to travel back home due to this, the employer could treat them as being on sick leave in terms of pay. However, the employer should also consider additional expenses which have been incurred by the employee as a result (e.g. accommodation and flights) to be reimbursed to the employee. If medical assistance is required, the employer should ensure that the employee is able to access its business travel insurance policy, and that such other assistance as may be appropriate is provided.

## HOMWORKING

### Are we entitled to require an employee to work from home?

If there is already an established requirement to work from home where appropriate or where instructed to do so (or in the case of a business continuity issue such as a pandemic), then there is unlikely to be an issue in applying that obligation in an effort to contain the spread of COVID-19.

If not, imposing home working would arguably constitute a variation of the contract requiring employee consent. However, where an employee is faced with either being on SSP or nil pay as an alternative, they may well be willing to consent to working from home as a way of preserving pay. There are alternative methods of changing terms and conditions of employment but in the circumstances and given the time sensitive nature of the COVID-19 outbreak, employee consent is likely to be the most realistic means of validly imposing a home working requirement where none previously existed.

Where home working is being newly introduced, or expanded, the employer should ensure that the health and safety implications have been considered and that the necessary infrastructure is in place.

### Are there any home-working health and safety issues we should consider?

An employer is responsible for the health and safety of its employees for so far as it is reasonably practical, therefore the employer should conduct a risk assessment of all work related activities. The following points are of importance when assessing the health and safety risks of home working:

- **Stress** – some employees may have difficulty in establishing boundaries between work and home life, which could lead to increased stress. It is also possible for workers to become isolated and to lack the support system which they would otherwise be exposed to in an office environment. An employer should recognise this and work to include the homeworker in a team environment e.g. regular team meetings for them to attend, skype meetings etc.
- **Equipment** – equipment supplied by the employer must be fit for its purpose, maintained in good working condition and inspected regularly. The employer must also ensure that sufficient and suitable lighting is provided in the home.
- **Electricity at work** – the employer is responsible for the equipment it supplies. However the homeworker's domestic supply, including electrical sockets, remains their responsibility and they should be reminded of this.
- **First aid** – the employer must supply appropriate first aid provisions and supplies to all employees, including homeworkers.
- **Accidents** – a serious accident must be reported to the employer whenever it occurs, therefore the employer should put in place a reporting procedure to allow the homeworkers to effectively report accidents e.g. online portal, email, phone etc.

### What other considerations can we have?

- Insurance – does the company's insurance cover company property?
- How should the employee keep in contact with their manager/team?
- Please also see the data protection considerations below.

## ANNUAL LEAVE

### Can an employer make an employee take annual leave?

As the employer you can make an employee take annual leave, although the employer has to give the employee two days' notice for every day they want you to take. So if you are telling your employee that they must take four days' holiday, then you will need to give you eight days' notice of this.

### Can an employer force an employee to take unpaid leave?

In circumstances where the employer has a contractual right to make the employee to take unpaid leave, then the employer could exercise this provision. However, where there is no contractual provision allowing this, then the employer cannot force an employee to take unpaid leave.

## LAY-OFF AND SHORT-TIME WORKING

### As an employer can I implement lay off or short time working to all employees?

Laying off employees essentially means that the employer does not provide the employee with work, or pay for a certain amount of time, whilst still being able to retain the employees. Whereas short-time working means providing employees with less work (and less pay) for a period while retaining them as employees.

Where, there is a 'lay off' or "short term working" provision within the contract of employment, the employer will have a contractual right to implement this. However, if there is no provision in the contract and the employer enforces this, then this would be a fundamental breach of contract (which may entitle the employee to resign and claim constructive dismissal).

## RIGHTS OF AGENCY WORKERS

### Where an employer decides to shut down an office and send all employees home on full pay, are its agency workers entitled to receive equivalent pay?

Agency workers are entitled to "the same basic working and employment conditions" as employees recruited to do the same job (regulation 5(1), Agency Workers Regulations 2010).

Pay is included as a "relevant terms and condition" and is defined as "any sums payable to a worker of the hirer in connection with the worker's employment, including any fee, bonus, commission, holiday pay or other emolument referable to the employment, whether payable under contract or otherwise but excluding any payments or rewards".

The Agency Workers Regulations guidance provides the following non-exhaustive list of pay for these purposes:

- Basic pay.
- Overtime pay.
- Shift or unsocial hours allowance or risk payments
- Payment for annual leave.
- Certain bonuses or commission payments.
- Certain vouchers or stamps with a monetary value.

It could potentially be argued that discretionary pay in the event of a business closure amounts to "basic pay". However, this term is clearly meant to apply to the normal situation where an employee is paid in exchange for work done, which is not the situation here. Conversely, discretionary pay does not fit squarely within any of the list of exclusions to "pay" under the AWR either. The payment would not qualify as a guarantee payment because the employees are being paid in full.

As the legal position is unclear, it may well end up being a practical issue for the employer to consider with the temporary work agency, bearing in mind any internal relations issues if the agency workers are treated differently to the permanent staff.

### Are agency workers entitled to Statutory Sick Pay?

Agency workers are likely to qualify for SSP if the following applies:

- they have three months continuous employment with the agency;
- their normal weekly earnings exceed £118; and
- If they are absent from work due to illness for at least four consecutive days

## DATA PROTECTION ISSUES

### Are there any data protection issues that the employee may have if they are working from home?

The employee working from home will be subject to the same requirements under Data Protection legislation as any other employee working in the office.

The risk with homeworking is that it is not as easy for the employer to regulate the employee's conduct and how they are managing their data. In order to minimise the risk of homeworking and data protection, it is advisable for the employer to carry out a data privacy impact assessment of the data implication of employees working from home, this could include:

- Who will have access to the employee's computer and personal data stored on it? Specific security measures should be in place to ensure that members of the household do not have access to personal data held on the computer. The most practical route is for the employer to forbid access by other members of the household.
- Will the employee's home be left unattended for regular periods? If so, is it properly secured?
- Does the remote working system permit the employee to encrypt and/or password-protect information; is sharing of passwords clearly forbidden?
- Are employees instructed to change their passwords at regular intervals?
- Where paper files are kept, are there suitable systems for storage such as secure filing cabinets?
- How is information moved between home and office, both in terms of physical transfer by post or courier and data transferred electronically?
- Are employees given guidance about what data it is appropriate to transfer?
- Are there rules on retention of documents, proper disposal (for example, shredding) of paper-based records and storage and deletion of computerised personal data? Is equipment provided for effective shredding of paper records?
- What measures will need to be taken against accidental loss, destruction or damage?
- Have employees been given training and guidance and are regular reminders sent to staff about their obligations to safeguard personal data?

### Do employees have the right to be notified if a colleague develops the virus?

The Data Protection Act 2018 defines information about an employee's health as a "special category of personal data". This means that it can only be processed by the employer in defined and restricted circumstances.

Employees must be notified of the infection risk as soon as possible. However, the identity of the individual should not be disclosed. An employer should simply advise that an employee who has been in the workplace has been infected and that appropriate precautions should be taken.

## FURTHER GUIDANCE

**ACAS** - <https://www.acas.org.uk/coronavirus>

**GOVERNMENT GUIDANCE** - <https://www.gov.uk/government/news/coronavirus-covid-19-guidance-for-employees-employers-and-businesses>

**WORLD HEALTH ORGANISATION** - <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen>

