

# Coronavirus in the Health and Social Care Workplace – FAQs

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 06 March 2020

**Please note: the information contained in this legal update is correct as of the original date of publication**

In the last week or so we have seen the World Health Organisation raise its global risk assessment of COVID-19 from high to very high and we are now seeing an increasing number of cases of coronavirus in the UK. The UK Chief Medical Officers have raised the risk in the UK from low to moderate. All business are now turning their minds to the fact that if the disease continues to spread there will be a disruption to normal working patterns and should have contingency plans in place to cater for this. In the health and care sectors this creates challenges for those engaged in front line services as employers need to have adequate protection in place to manage the risks associated with contracting the virus, and also continue to provide care to patients.

We've set out below some answers to some of the most commonly asked workplace queries. These answers are based on a combination of employment law and current government guidance:

## **What particular legal duties should employers have regard to when responding to COVID-19?**

- Employers have duties under the Health and Safety at Work Act 1972 (HASAW) and associated legislation which requires employer to protect the health, safety and welfare of the workforce and others affected by their operations
- Duties under common law to take reasonable care for the health and safety of the workforce
- Contractual requirements in contracts of employment and other contracts of performance of work or services. Employers should be mindful that in addition to express provisions the implied duty of trust and confidence also needs to be considered.
- The provisions in the Equality Act 2010 which sets out the duty not to discriminate against employees or workers with protected characteristics and the duty to make reasonable adjustments for the disabled.
- The Working Time Regulations set out requirements for hours worked (unless individuals have opted out of the WTR) and compensatory rest arrangements which will be relevant if employers need to ask others to step in to cover absence in the event of shortfalls in the workforce.

## **What guidance should employers in the health and care sector have regard to?**

- The ACAS guidance issued on <https://www.acas.org.uk/coronavirus>
- Public Health England guidance on COVID-19 issued on 25 February 2020 which provides advisory rather than mandatory guidance for employers and business  
- <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-covid-19>
- The government's press release with regards to temporarily amending sick pay legislation during the outbreak - <https://www.gov.uk/government/news/sick-pay-from-day-one-for-those-affected-by-coronavirus>

## **Some workplaces in the UK have closed – is this necessary?**

Closures have taken place where there has been a diagnosis of COVID-19 to on occasion allow for deep-cleans to take place or, in some cases, as a precautionary measure where a member of staff returning from a higher-risk area has experienced potential symptoms. Some employers are choosing to allow employees and workers (hereafter, for ease of reference, “employees”) to work from home, where this is possible. However, the Government is not advising more widespread closure at this stage.

## **Should travel be restricted?**

Employers should adhere to the guidance issued by the Foreign and Commonwealth Office in respect of travel bans and restrictions. Employers should also make sure that employees who are required to travel as part of their role are aware of up-to-date guidance and advice as to how to minimise any risks.

However, some employees will be concerned about the risks of becoming stranded (or quarantined) abroad if there are further concentrated outbreaks. Employers should therefore consider carefully whether travel is genuinely necessary and risk assess the need for overseas trips.

## **Should large-scale work events be cancelled?**

The Government is not currently advising that large-scale public events need to be cancelled and so the same logic would apply to work-related events. However, when considering risk levels, employers should bear in mind that if there was an attendee who has contracted COVID-19, such events may have the effect of spreading the infection more widely across the workforce. As with overseas trips, it would be sensible to risk assess the need for events during this period.

## **When should employees self-isolate?**

Individuals will need to self-isolate if they have returned from certain high-risk areas, even if they have no symptoms, and certain other specified areas if they are suffering from some symptoms. For a list of these areas, [click here](#).

## **What if an employee returns from one of the listed areas and displays symptoms at work?**

The employee should be asked to self-isolate and seek medical advice by telephone so that they can be assessed and tested. There is also [online 111 advice](#) available.

The employer will need to consider whether the employee's actions in attending have increased the risks for other employees; whether any wider self-isolation is required, pending confirmation of the first employee's infection-status; and whether any deep-clean or other action is required.

## **What if an employee advised to self-isolate attends work?**

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In many cases, an employer may not know that an employee has been advised to self-isolate. However, where it is aware (for example, the employee has returned from a business trip from a high-risk area, or from a trip which has received press coverage) then it should instruct the employee to leave the workplace and advise them to return to self-isolation. As above, the employer will also need to consider whether the employee's actions in attending have increased the risks for other employees; whether any wider self-isolation is required, pending confirmation of the first employee's infection-status; and whether any deep-clean is required.

The Government has confirmed that in extreme circumstances the new Regulations relating to Coronavirus give the police the power to arrest those who are ill or who are suspected of having COVID-19 and who have refused to self-isolate.

## **What if employees wish to self-isolate in other circumstances as a precaution?**

In line with recent ACAS guidance, employers should seek to understand from the individual why they believe this would be necessary and should handle genuine concerns raised by employees and try to resolve them to protect the health and safety of their staff.

As with any other illnesses, as part of normal risk assessments, employers should assess the risks to employees generally, and any increased risk for particular employees (such as pregnant employees, disabled employees or those with compromised immune systems). If there are no particular increased risks for the workforce (i.e. no confirmed or suspected cases), then employers could consider home-working, short-notice annual leave, or periods of unpaid leave for employees who are still concerned about attending. However, given that the risks of COVID-19 could continue for some time, such measures may not be feasible for staff providing direct clinical treatment or care in which case working from home may not be an option. Therefore, in this situation, we reiterate the above points regarding listening to the member of staff's concern and assessing in particular, whether they fall into any of the high - risk categories, whether the concerns are genuine and whether there are other ways to perform the activities.

Employers will also need to be mindful of their obligations to consider reasonable adjustments for disabled employees who believe that their disability may place them at greater risk than non-disabled employees.

In the extreme scenario where an employee has not been diagnosed with coronavirus, does not fall into a high - risk category and/or does not have a disability, but refuses to work, an employer will need to consider very carefully how they respond and whether the matter can be dealt with

under any disciplinary policy and specific advice should be obtained in those cases. It is important for employers to bear in mind and be responsive to the fact that, in some cases, individuals may feel so anxious that their anxiety renders them unfit to work and may lead to them being diagnosed as too unwell to work in which case they will be entitled to sick pay.

## **Are employees entitled to pay if they are self-isolating or in quarantine?**

If an employee has COVID-19, they will be entitled to the same sick pay as they would for any other type of illness – SSP if they meet the eligibility requirements and potentially contractual sick pay if available.

If an employee was travelling for work and has been quarantined abroad, it is highly likely that they would remain entitled to full pay.

If an employee has been advised to self-isolate at home (either due to their travel or because they have come into close contact with someone infected with COVID-19), then there has been some speculation as to whether these individuals would be entitled to sick pay (as potentially, they may not be ill at all). Entitlement to contractual sick pay will depend upon the particular contractual wording which applies.

Entitlement to statutory sick pay does not just apply when a person is actually incapable of attending work – it also applies when they are deemed to be incapable of attending and this includes circumstances where they are excluded or they abstain from attending work as a result of a request or notice issued under an enactment. If they are self-isolating (or detained) as a result of the detention provisions under the Health Protection (Coronavirus) Regulations 2020, then this requirement would appear to be met (although these Regulations only apply to England). The stance taken by the Government is that SSP will apply. It indicated in the press briefing accompanying its Coronavirus Plan that this area would remain under review and, although there have not yet been any announcements about extending the scope of who is potentially eligible for SSP, the Government has confirmed that the scheme will be extended to give an entitlement to SSP from day 1 to those who are eligible.

If an employee is seeking to self-isolate in circumstances where they have not been advised or required to do so, then they would not be entitled to contractual or statutory sick pay.

If an employer requires employees to self-isolate in circumstances where those employees have not been advised or required to do so, then employees would remain entitled to full pay.

## **Should absences in respect of self-**

# isolation be treated as normal absences under an attendance procedure?

Employers will need to take a view on this. Strictly speaking, if an employee is off sick, these absences can be taken into account. However, employers may wish to remove any barriers against self-isolation as the potential consequences of COVID-19 being spread within the workplace are likely to be more significant than discounting self-isolation periods under an attendance procedure.

## Are employees entitled to time-off to look after others?

Employees (but not workers) have a statutory right to take reasonable time off for dependents in certain circumstances, including where a dependent falls ill or there is an incident at school (such as closure). This right is, however, unpaid and is typically intended for short-term periods to allow for alternative arrangements to be made.

Any wider rights would depend on the individual's contract.

## Are there any other precautions employers should consider?

- Ensure that you have been clear regarding your organisation's communication regarding the need for self-isolation and hygiene practices in respect of COVID-19 and whether you are seeking employees to comply with the specific PHE guidance. Employees need to clearly understand management instructions, the ramifications for not doing so, and will enable employers to tackle any breaches of reasonable management instructions.
- Consider your attendance management policies and whether your organisation would wish to adopt the approach recommended in PHE guidance which is that periods of absence caused by COVID-19 infection/self-isolation will not be taken into account in considering triggers for management action under the policy.
- Employers should also consider whether they have appropriate absence continuity plans in operation. The Government has indicated that, at its peak, COVID-19 could result in 20% of the working population being off sick. In addition to this, other employees may seek leave to care for dependents. As a result, employers may need to keep under review work levels to ensure that employees remaining at work are not over-burdened covering for absent colleagues. There has been some speculation in the media regarding the government re-calling retired doctors and nurses, along with UK officials allegedly investigating whether criminal

retired doctors and nurses, along with UK officials allegedly investigating whether criminal records checks could be loosened or relaxed to fill vacancies left by sick carers.

- Some organisations are asking employees to increase their hours in their existing roles or to work in other areas in order to accommodate the temporary increased demand on services. Contractual provisions will need to be considered if employees are unwilling to assist on a voluntary basis and employers need to be mindful of the fact that express provisions need to be clear in order to rely upon them. Employers should also be mindful of the implied term of trust and confidence.

Lastly, employers should take steps to ensure that no employees are being targeted or treated less favourably on the grounds of their ethnic origin as a result of concerns or fears about COVID-19. Reminders in respect of appropriate behaviours and steps to tackle such behaviour may be required to ensure that employees are not subjected to discrimination or harassment.

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