

## Employees and Sick Pay

### Q and A

**What happens if an employee is unfit for work or told to isolate?** If they are 'unfit for work' or deemed sick for SSP purposes (see below) they would get sick pay (SSP or company sick pay depending on their entitlement).

**Can we suspend employees if we suspect a risk?** Yes, but go careful (see below).

**As a precautionary measure if it gets to the point the business feels people need to work from home are we allowed to tell people they must do that or do we have to give them an option?** You can require them to work from home and could enforce this. If they are fit for work, they would be paid as normal.

**If we do have to give the option, I assume if we had a confirmed case with an employee we would be allowed to enforce employees to work from home?** You can force employees to stay at home, especially if they tested positive (or it was highly likely that they had contracted the virus or been in direct contact with someone).

**If employees need to work from home but they don't have the facilities needed what do we do in this instance, would they need to take holiday or do we have to pay them full pay?** If they can't work at home but are 'fit for work', it would be classed as paid leave (as you are suspending them) - you pay them in full. It would be better to make sure that all employees can all work from home (where possible).

**We have previously paid our employees full pay while being off sick (at the discretion of the business), would we now be able to pay SSP in the event of cold/flu type illness or coronavirus related?** You could pay company sick pay or SSP. It is your choice and this is a unique situation, so SSP would be justified.

**Where an employee refuses to attend work due to fears about coronavirus, what action can the employer take and what pay are they entitled to?** If the employee can work from home then this may well resolve the issue. If not, the employer would need to consider the current public health advice, the specific reason that the employee is concerned about attending work and whether it would be discriminatory to refuse home working, take disciplinary action, or withhold pay in light of the employee's refusal.

**Do they need to provide a sick note?** Medical evidence is not required for the first 7 days of sickness. After 7 days, it is for the employer to determine what evidence they require, if any, from the employee (see below).

### **The Background law...**

#### **Health and safety**

In the event of a pandemic, employers have a duty to protect the health and safety of employees. During a pandemic, employers will face a conflict between the need to keep genuinely sick employees away from the workplace and the need to prevent unauthorised absence. However, in these circumstances, concerns about whether someone is a malingerer should give way to the very real need to prevent the spread of the disease.

### **Right to suspend?**

If there is an **identified risk** that an employee may have been exposed to coronavirus then it is understandable, in light of an employer's duty to protect the health and safety of other employees, that the employer would wish to keep that employee away from the workplace until the risk has passed. Ultimately, the employer may regard the risk of allowing the employee to remain at work as outweighing any employment law risk which could exist in suspending them.

In terms of the employment law position, the employer should consider whether it has an express right to require the employee to stay at home.

The question is then whether there is an express or implied right for the employee to attend work in these circumstances. It would be unusual for the employer to have provided the employee with an express right to attend work regardless of circumstances, and there is no general implied term requiring an employer to provide work provided it continues to pay the employee's wages. It is therefore unlikely to be a breach of implied duties to require an employee to stay at home in these circumstances, assuming there are reasonable and non-discriminatory grounds for concern, and the matter is dealt with appropriately, proportionately and sensitively.

It is worth noting the importance of dealing with suspension in this context sensitively and proportionately, as mentioned above. A failure to do so could amount to a breach of the implied duty of trust and confidence.

### **Right to pay?**

In terms of pay, consideration would need to be given to the terms of the contract of employment. If the employee is **fit for work** (at the point they are suspended), then it is **unlikely that they are entitled to statutory sick pay** (SSP) or company sick pay.

For the purposes of SSP, a day of incapacity is defined as:

"A day on which the employee concerned is, or is deemed in accordance with regulations to be, incapable by reason of some specific disease or bodily or mental disablement of doing work which he can reasonably be expected to do under that contract".

*(Section 151(4), Social Security, Contributions and Benefits Act 1992 (SSCBA 1992).)*

If an employee was diagnosed with coronavirus, or otherwise became too unwell to work, then the position would, of course, be different (SSP or company sick pay – depending on the contract wording).

Where an employee is being suspended on health and safety grounds, because of a **possible risk of infection**, it is likely that they have the right to continue to receive **full pay** (in the absence of a contractual provision to the contrary). As we state above, the employer is not obliged to provide the employee with work provided it continues to pay wages but it could of course, ask the employee to simply continue working from home (unless they are too ill to work).

### **Certifying absence from work**

Medical evidence is not required for the first 7 days of sickness. After 7 days, it is for the employer to determine what evidence they require, if any, from the employee. This does not need to be fit note (Med 3 form) issued by a GP or other doctor.

Your employee will be advised to isolate themselves and not to work in contact with other people by NHS 111 or PHE if they are a carrier of, or have been in contact with, an infectious or contagious disease, such as COVID-19.

The government announced that a temporary alternative to the fit note will be introduced in the coming weeks which can be used for the duration of the COVID-19 outbreak. This system will enable people who are advised to self-isolate to obtain a notification via NHS 111 which they can use as evidence for absence from work, where necessary.

We strongly suggest that employers use their discretion around the need for medical evidence for a period of absence where an employee is advised to stay at home due to suspected COVID-19, in accordance with the public health advice being issued by the government.

### **Carers and family members**

The government indicated an intention to also extend SSP to those caring for those within the same household who were exhibiting symptoms of COVID-19, but this is not explicitly covered in the new regulations. **The carer would only be covered by the new rule on deemed incapacity if the public health guidance also required them to self-isolate.**

### **SSP – Government backed**

Statutory sick pay (SSP) will be available from day one to everyone advised to self-isolate, and those caring for others in self-isolation.

For businesses with fewer than 250 employees, the cost of providing COVID-19 related SSP for up to 14 days will be refunded in full by the government to cover the costs of large-scale sick leave.

The rate of SSP is £94.25 per week

### **Holidays or lay off**

If you need to shut down your business for a period of time, or reduce opening times, unless you have a specific clause in your contract, then you need to still pay your employees.

**Holidays** - The normal rules on taking annual leave under the Working Time Regulations 1998 will continue to apply. Workers may wish to take annual leave as an alternative to scenarios where they would otherwise be on SSP or nil pay. Workers are entitled to take statutory annual leave during sickness absence but may not be compelled by the employer to do so.

Workers who are not on sick leave can be instructed to take statutory annual leave by their employer, provided that they are given the required level of notice. However, you need to give them twice as many days' notice as the leave they are being asked to take. So if you want them to use a week (5 days), then you must give 2 weeks' notice.

Communication is key and you should make sure everything is recorded and employees understand why you are taking drastic measures.

**Lay Off and short time working** - Broadly speaking, short-time working is a temporary reduction in the hours or days worked during a given week, and lay-off involves giving an employee no work during a week while still retaining them as an employee.

**Is an express clause needed?** Employers may not automatically have the right to lay staff off or reduce their hours just because there is less work. There should be no problem for an employee with no guaranteed hours or pay, working under a casual or zero-hours contract, as the contract does not guarantee a certain level of income. However, where the employee is engaged on a fixed salary or weekly wage, the employer will remain liable to pay the employee unless there is either an implied right (usually through custom and practice) or express wording in the contract permitting lay-off or short-time working.

A contractual provision allowing lay-off or short-time working does not necessarily mean the employee will receive no pay for days or weeks in which they are not working. An employee with normal working hours who is not provided with work for any complete day during which they would normally be required to work under their contract is entitled to be paid a statutory guarantee payment (SGP) by their employer if either:

- There is a reduction in the requirements of the employer's business for work of the kind which the employee is employed to do.
- There is any other occurrence which affects the normal working of the business in relation to this type of work.

SGP is limited to five days in any period of three months for a full-time employee, or pro rata for an employee who works fewer than five days a week

SGP until 5<sup>th</sup> April 2020 is £29 a day (subject to a maximum of five days or £145 in any three months).

### **Right to claim redundancy pay**

In some circumstances, employees who are laid off or put on short-time working (or a combination of the two) for four consecutive weeks, or a total of six weeks in any 13, have a right to terminate their employment and claim a statutory redundancy payment.

**SSP and the self-employed.** This is a little trickier and it relies on the benefits system – Employment Support Allowance <https://www.gov.uk/employment-support-allowance/eligibility>

### **Practical considerations**

Employers should consider what practical measures to put in place at their businesses to minimise the risk. These may include:

- Providing and keeping readily accessible information on what Covid-19 is and the latest World Health Organisation guidance on precautionary measures to be adopted.
- Considering self-quarantining for those who have recently been in affected countries or been in close contact with visitors from affected countries, and advising them to work from home for a period following their return or contact.
- Considering self-quarantining for anyone exhibiting flu-like symptoms, with support on how best to seek medical care.

- Creating an immediate alert system for any suspected or confirmed cases of Covid-19 among employees.
- Creating an approval regime for business travel to affected countries and using alternative means, for example, video conferencing, where possible.
- Reminding staff of the importance of good hygiene practices, particularly thorough and regular handwashing.

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