

## COVID-19 (Coronavirus): FAQs for employers

In light of the COVID-19 pandemic, we have set out below frequently asked questions (FAQ). This is a fast-moving situation and you should always check the latest Scottish and UK government guidance and seek advice on specific situations.

**Note: FAQs as at 1 May 2020 – changes since last edition are highlighted in blue.**

**The HMRC online portal for applying under the Coronavirus Job Retention Scheme went live on 20 April 2020. Employers can now submit applications under the Scheme.**

On 23 March 2020 the UK government's approach to managing the coronavirus outbreak changed. The government now requires all those who can work from home to do so and to stay at home unless required to go out for food, health reasons or essential work. Those who must leave home to travel to work may do so, but only if this absolutely cannot be done from home and should remain at least 2 metres from other people.

Full guidance here: <https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others>

The Westminster government has produced further guidance listing businesses which **must** close: <https://www.gov.uk/government/publications/further-businesses-and-premises-to-close/further-businesses-and-premises-to-close-guidance>

The Scottish government produced its own guidance on 25 March on business closure which differs from the UK government's in that it advises all businesses in Scotland to close unless they are:

- **essential** to the health and welfare of the country during this crisis; or
- **supporting (or being repurposed to support) essential services**; or
- **capable of working in a way which is fully consistent with established social distancing advice**; or
- **wider public health, health and safety or other considerations apply** and require a facility or service to continue to operate or a specific period of time for a safe shutdown process to be completed.

Full Scottish guidance is available here:

<https://www.gov.scot/publications/coronavirus-covid-19-business-and-social-distancing-guidance/>

These FAQs below must be read in light of [all applicable UK and Scottish Government guidance](#).

### 1. Sickness, Self-Isolation and Pay

#### 1.1. If an employee has an existing health condition that places them in the vulnerable group category and they choose to self-isolate for 3 months, what should they get paid?

Government guidance presently states that those with underlying health conditions should minimise social contact and should work from home, where they are able to do so. Employees who fall within this vulnerable group category should therefore be encouraged to explore working from home and you should try to accommodate this.

However, where this is not possible, and the employee is well enough to attend work, they should continue to do so. Ensure you take appropriate steps – e.g. additional hygiene measures, permitting late starts to avoid public transport at peak times – as appropriate.

Employers are encouraged to be sympathetic and to listen to and address such vulnerable employees' concerns as much as possible.

Vulnerable, but well employees who choose to self-isolate are not currently entitled to Statutory Sick Pay ('SSP') because they have not been advised to self-isolate, but to minimise social contact. If, however the employee becomes unwell, or lives with someone who is unwell, they should self-isolate in accordance with government guidance and will be entitled to SSP.

Where you have asked a vulnerable employee to stay at home you should pay them in full unless they become unwell in which case they will be entitled to SSP.

If you consider that the employee may have a disability for the purposes of the Equality Act 2010 or are concerned about potential disability discrimination, or if the employee is pregnant, please contact us for specific advice.

Particularly vulnerable people who are at higher risk of severe illness as a result of COVID-19 will be directly contacted by NHS Scotland and will be required to follow stringent 'shielding' advice. Employees who are 'shielding' in accordance with public health guidance and unable to work may be furloughed under the Coronavirus Job Retention Scheme [or alternatively, from 16 April may be deemed sick and entitled to SSP](#). [The HMRC Direction and associated guidance are inconsistent on this point](#). **Contact us to discuss any such staff.**

## **1.2. Is an employee who is self-isolating as a precautionary measure without symptoms entitled to Contractual or Company Sick Pay ('CSP') as well as SSP?**

The emergency SSP legislation provides that a person is deemed incapable of work where he is: "isolating himself 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." Therefore, provided that the employee is acting in accordance with that advice and that they cannot work from home, they should receive SSP.

However, as CSP is a contractual benefit, the emergency SSP legislation isn't determinative. An employee's entitlement will depend on the wording of the contract and any applicable policy. It is therefore possible that CSP will not be payable, if for example the conditions for payment cannot be met or it is stated to be only payable to employees who are sick as opposed to being unavailable for work due to self-isolation.

Although permissible in our view, this approach may be unpalatable from an industrial relations perspective. It may also discourage employees from self-isolating under current guidance. We therefore suggest that where you intend to adopt this stance, you are prepared to explain the rationale behind the decision to restrict the definition of 'sickness' for the purposes of CSP.

## **1.3. What are an employer's options for revoking/varying what are now considered to be 'overly-generous' contractual CSP provisions?**

You would need to seek consent from each employee in order to change their contract of employment. It is likely that such consent will be difficult to obtain at present. If CSP is

genuinely discretionary it may be withheld. Bear in mind however that if CSP has been invariably paid for specific period – e.g. up to four weeks a year – it may have become a contractual term by long use.

If in doubt, seek advice.

#### **1.4. If a pregnant employee chooses to self-isolate, are they entitled to SSP?**

In accordance with government advice, pregnant women should be careful to minimise social contact, however, they are not presently required to self-isolate simply because they are pregnant. Pregnant employees should therefore be encouraged to explore working from home and you should try to accommodate this.

Different considerations apply to pregnant employees with significant heart disease who are required to be shielded.

Please contact us to discuss the specific circumstances of pregnant employees before reaching a decision as more complex requirements apply to pregnant staff, including the obligation to carry out specific risk assessments.

#### **1.5. What help can I get with SSP? Does it apply to employees who are off sick for a reason other than Coronavirus?**

Small and medium sized businesses can reclaim up to 14 days of SSP paid to staff who have been unable to work because of coronavirus.

The support is available to employers:

- With under 250 staff as at 28 February 2020
- whose employees have claimed SSP because of absence due to coronavirus – i.e. who have symptoms or who have been required to self-isolate in accordance with NHS or government public health guidance.

Employees unable to work because of coronavirus on or after 13 March 2020 – i.e. who have symptoms or who are required to self-isolate on medical advice – are entitled to SSP from the first day of absence and do not have to serve three ‘waiting days’. Initially it was understood that all employees who were off sick from 13 March 2020 would be entitled to SSP from day 1. It now appears however that it will only be those unable to work because of coronavirus.

The process for seeking repayment is not yet finalised.

#### **1.6. What proof do employees have to give of sickness?**

Employees need only self-certify for the first 7 days of sickness absence.

For longer absence, a GP fitnote or other evidence acceptable to the employer is needed. This was clearly going to cause difficulties where employees had been told to self isolate and couldn't get to a GP.

On 19 March the government introduced an alternative certification process for employees who have been absent for over 7 days – the online isolation note. This can be emailed direct to the employer.

We recommend you keep full records of staff absence and payments of SSP, including the online isolation notes to seek refunds. GP fit notes will not be required for the refund process.

## **2. Lay-off and short-time working**

### **2.1. What is lay-off?**

Laying off employees means that the employer provides no work (and no pay) for a period of time, while retaining them as employees.

### **2.2. What is short-time working?**

Short-time working means providing employees with less work and less pay for a period of time while retaining them as employees. To constitute short-time working, individual employees need to earn less than half their normal week's pay.

### **2.3. Can any employer introduce it?**

An employer can lay-off employees or place them on short-time working where they have the contractual right to do so. If this is the case, and you wish to introduce either measure, we recommend you meet the employees to confirm the situation facing the business and explain that in order to try to protect their continued employment, you will place them on short-time working or lay them off temporarily until the effects of the current pandemic are resolved or demand increases.

You cannot enforce lay-off or short-time working if there is no contractual right to do so. Please contact us for further advice on the correct process to follow in that case.

In light of the Government's new Coronavirus Job Retention Scheme, we recommend all employers offer staff the option of being placed on 'furlough' on payment of a proportion of pay which will be reimbursed by HMRC. Further details below.

### **2.4. What is the Government's Coronavirus Job Retention Scheme and can I access it?**

All UK employers are eligible to claim financial support for the salaries of employees who would otherwise have been laid off as a result of the coronavirus crisis where:

- the business has had a PAYE payroll system in place on or before 19 March 2020 and have a UK bank account.
- the affected employees were on that PAYE payroll on or before 19 March 2020.

To claim, employers must:

- Designate affected employees as 'furloughed employees'.
- Notify those employees of this intention, explaining that as an alternative to redundancy or lay-off, and because of the impact of coronavirus on your operations, you propose to apply for grant funding for wages under the Scheme,

and that to progress this, the employees will need to agree to being furloughed/to cease all work for you.

- Write to employees:
  - seeking consent to relevant changes to their contractual terms and conditions. Record the date furlough started;
  - instructing them that they must cease working for you during this time and request they agree to this. **Keep a record of their written consent for 5 years.**
- Where 20 or more employees are involved, you **may** need to engage in a collective consultation process to seek consent to this change to the employees terms and conditions.
- Submit details of furloughed employees and their earnings via a new HMRC online portal. The online portal is now live and employers can submit claims under the Scheme.

HMRC will reimburse up to 80% of wages of furloughed employees, to a maximum of £2,500 per month. Employers will also be able to claim associated Employer National Insurance Contributions and minimum automatic enrolment employer pension contributions from HMRC.

Initially the support will be available for three months and can be backdated to 1 March 2020. **HM Treasury announced on 17 March that the furlough leave scheme will be extended to 30 June 2020.**

Care does need to be taken over how the lay-off or furlough process is carried out and we recommend you contact us to discuss.

For further information in relation to eligibility as well as advice on accessing the Scheme, please see our separate guidance: *Covid-19: Job Retention Scheme – FAQs for employers*

## **2.5. What are my options if I don't have the contractual right?**

We recommend you consult your employees and explain the difficult situation you are in and ask them to agree to being laid off, placed on short time or 'furloughed' temporarily. Consent would be required but may be easier to achieve if the alternative is compulsory redundancies.

We recommend if you intend to lay-off staff, that you firstly consider whether you may be able to apply under the Coronavirus Job Retention Scheme (see 2.4 above). This is due to the fact that as you don't have the contractual right to lay-off your employees, it is very unlikely that they would agree to be laid off without pay, when there is a government scheme in place to fund 80% of their normal salary.

If you were to proceed with laying off employees without their agreement and without pay, you run the risk that they could resign and claim constructive unfair dismissal on the grounds that you have breached the implied duty of trust and confidence.

## **2.6. Can a reduction in hours be permanent? And how would this apply to part-time staff?**

Where employees agree to a reduction in hours, it would usually be temporary as a permanent reduction in hours would require a more substantive consultation and contractual variation to minimise the risk of claims.

In terms of part-time staff, this should be considered on a case by case basis. If the part-time employee is able to work fewer hours, then ask them if they will agree to do this. However, if in practical terms, this reduction in hours will mean that they cannot be productive, then you do not need to ask them to do so and they can remain on their normal hours while full time staff reduce theirs.

## **2.7. If an employer decides to lay-off or place its employees on short-time working, should it give a timescale?**

In an ideal situation, employees should be given a timescale for when normal working hours will resume. However, at present, we do not know how long the pandemic will last and it may not be possible to give an accurate or any timescale. It is recommended that wording such as “until such time as the situation improves and the Government advice changes” be adopted to provide employees with a (albeit vague) timescale. We recommend you keep the situation under regular review and keep employees up to date – for example every two weeks.

Care is needed where lay-off or short-time working (under 50% of hours/pay) lasts for more than 4 continuous weeks or 6 discontinuous weeks as employees may be able to trigger entitlement to a redundancy payment. Keeping in touch with employees and keeping them updated on when you expect to reopen or resume business is vital to keep them on side.

For as long as the Government’s Coronavirus job retention scheme is available – and this will be **four** months initially – the risk of redundancy pay claims being triggered by a lengthy lay-off, is substantially reduced. We do nevertheless recommend the situation is kept under regular review and employees kept informed.

## **2.8. Where an employee who has been laid off or placed on short time working falls sick or is advised to self-isolate, are they entitled to SSP or CSP and if the last, at what rate?**

An employee who is laid off but falls sick is unlikely to be entitled to SSP as they are not absent from work because of sickness or deemed sickness – they are absent because they have been laid off. Entitlement to CSP will depend on the terms of your absence management policy.

From a PR perspective, it may be worth considering whether to pay for periods of sickness during lay-off. It is also worth bearing in mind the government will meet the first 14 days of SSP for staff who are off sick with, or self-isolating because of, Coronavirus and this will therefore meet some of your costs.

Entitlement to SSP for ‘furloughed’ employees is [addressed in our separate guidance: Covid-19: Job Retention Scheme – FAQs for employers.](#)

Employees who are working short time will be entitled to SSP or CSP in the usual way. Whether they are entitled to full CSP based on salary before lay-off will depend on the terms of their contractual entitlement and your policy.

### **2.9. If an employer asks its employees to take a pay cut, how much notice should be given?**

As the employer in this scenario is asking employees for approval, it is not a question of giving notice as the employees are being asked to agree to both the pay cut and the date it starts. It is important to remember that the shorter the “notice period”, the less likely employees will agree to the reduction in their pay.

## **3. Working from Home**

See above introduction on changes to the government’s approach from 23 March 2020 and Scottish government guidance from 25 March 2020.

### **3.1. Can employers ask their employees to work from home and what should the employer do if the employee refuses?**

You can ask that an employee work from home and in the current circumstances this is likely to be a reasonable request. Where an employee unreasonably refuses to do so, you may wish to consider disciplinary action

### **3.2. Can an employer refuse to allow an employee to work from home?**

See above introduction on changes to the government’s approach from 23 March 2020 and Scottish government guidance from 25 March 2020.

The current government guidance on vulnerable employees is that the employer should help them work from home where possible.

In respect of employees who are not vulnerable, in the current climate it is in your interests to get employees working from home as efficiently as possible and from 23 March 2020 this is required save for essential work which cannot be done from home – and see link to UK government guidance on businesses which must close and related Scottish government guidance. However, there are a lot of practical issues that need to be addressed and you may have limited capacity to address these. In particular, IT departments will likely be at full capacity and employees need to understand the exceptional circumstances and have patience.

Be clear that you are not unreasonably refusing requests to work from home but in the circumstances, you cannot accommodate their request due to practical constraints. We recommend documenting the request and reasons for refusal. If the request is made as a formal flexible working request, ensure you follow the appropriate procedures.

From 23 March 2020 where employees cannot work from home, unless they are performing essential work in accordance with UK/Scottish government guidance, we recommend they are placed on the furlough scheme either under a contractual lay-off term or with consent. If they do not consent, contact us to discuss.

### **3.3. What health and safety duties do employers have?**

You have a duty to provide a safe place of work for your employees – whether they are office or home based. However, as you will appreciate this presents practical difficulties when the employee works from home. Those difficulties are magnified in current circumstances when the number of employees working from home has dramatically increased with a number doing so for the first time. The duration of home working will likely be significantly longer than previous arrangements where employees may have worked from home, one or two days per week.

We recommend you follow the Health and Safety Executive guidance for Home Workers which is available here: <https://www.hse.gov.uk/pubns/indg226.pdf> and the additional HSE advice produced on coronavirus.

## **4. Childcare considerations**

### **With schools closed, what duties do employers have towards employees with childcare responsibilities?**

The Government has made it clear that where an employee cannot work because they have caring responsibilities (including having to take care of a child) they can be furloughed.

Alternatively, for example if the guidance changes or the furlough scheme ends, employees have the right to take unpaid emergency time off for dependants/unpaid parental leave.

Emergency time off is usually only 1 or 2 days to make alternative arrangements, whereas unpaid parental leave can be for up to 4 weeks a year or longer if you agree.

Given the circumstances, it may be wise to relax usual notification periods for taking these types of unpaid leave as employees may have no alternative childcare options. Employees may also request to take annual leave or make any alternative working arrangements such as compressed hours or working from home. Where possible, you should try to accommodate.

## **5. Other ways of cutting costs?**

### **5.1. Are there other ways of cutting costs?**

If short-time working or lay-offs are not an option, despite the new coronavirus job retention scheme, you may need to consider redundancies.

Employees with less than 2 years' service can be made redundant with fewer risks and costs than longer serving staff as they cannot claim 'ordinary' unfair dismissal. Care will be needed however – for example to minimise the risk of discrimination claims and, in particular, age discrimination.

If more than 20 employees are at risk of redundancy in a 90-day period a full process of collective consultation is required, lasting between 30 and 45 days, involving employee representatives and notification to the Secretary of State.

In these exceptional circumstances, full consultation may not be possible, and consideration can be given to whether the employer can rely on what is known as the "special circumstances" defence. This is rarely accepted, and we recommend consulting as much as feasible and seeking prompt advice on redundancy procedure.



Regardless of how many employees are at risk, employers should follow a fair and reasonable process to minimise the risk of claims for unfair dismissal. This usually includes consulting with the employees, fair and transparent selection and considering alternative employment. In the present circumstances, it will also be important to consider for example applying to the Coronavirus Job Retention Scheme, and if this is not possible, recording your rationale as to why this Scheme would not avoid the need to make redundancies.

Normally this process will take a minimum of 2 weeks (subject to longer collective consultation requirements) however some employers have seen their business disappear overnight and, in the current circumstances are shortening this period.

We recommend taking advice before starting a redundancy process.

## **5.2. Can an employer ask its employees to take all of their holidays to avoid having to formally close their office?**

You can *ask* employees take holidays, but you can only *insist* that they do by giving twice as much notice as leave to be taken. First, required notice may be impractical and second, we consider that given the restrictions on the quality of leave during 'lock down' or stringent social distancing, the necessary quality of holiday is unlikely to be achieved.

We do not therefore recommend that employers require staff to take holiday during lay-off or furlough.

If staff, ask to take holiday this can be permitted.

## **5.3. Our leave year is fast approaching, and several employees still have unused holidays to take, what can I do?**

The Government has amended the Working Time Regulations to allow employees to carry up to 4 weeks of unused holidays over into the next 2 leave years (or receive a payment in lieu for those holidays if their employment is terminated) where it is not reasonably practicable for them to take all their holiday entitlement due to the Coronavirus outbreak.

This amendment will only apply to the 4-week EU holidays and not to the UK's additional 1.6 weeks' holidays or any additional contractual leave to which the usual rules will apply.

It is anticipated this will apply to employees who are self-isolating or are absent due to sickness, furloughed employees as well as employees who have had to continue to work during the outbreak.

## **5.4. If an employer opts to dismiss employees with less than 2 years' service, why is there an age discrimination risk?**

The discrimination risk exists because employees with short service are more likely to be younger than those with longer service. Given the present circumstances, it is a risk that may need to be taken and we recommend you contact us to discuss how to minimise the risk before proceeding.

## **5.5. If redundancies are necessary, can this process be carried out remotely?**

It is quite possible to undertake the redundancy process by video conference, skype or telephone conference. The normal practice is that a face to face meeting should be

arranged, however given that the government guidance is that close contact – especially with larger groups - should be limited or avoided, you are unlikely to be overly criticised for carrying out these meetings remotely.

Updated HMRC guidance dated 30 April confirmed that furloughed employees who are union or non-union representatives can undertake duties and activities for the purposes of individual or collective consultation of employees or other workers – provided they do not thereby provide services or generate income for their employer or an associated or linked organisation.

## **6. Workplace closure. We have been told to close. What do we tell staff and do we need to pay them?**

From 20 March 2020, the government required businesses such as cafes, pubs and restaurants, to close and other businesses, such as theatres, leisure centres and gyms to close as soon as possible to extend and enforce social distancing.

This is uncharted territory and we recommend that employers review government guidance on the impact on staff contracts. Our current view is that employers may be able to argue that they are not required to pay staff, but this is not clear and we recommend seeking specific advice.

All employers in this situation should review and if possible, use the government's Coronavirus job retention scheme. Details are above.

If you voluntarily close the workplace or ask employees to stay away from the workplace you should pay them in full.

### **For further guidance and support, you can contact:**

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