Chattertons

SOLICITORS & WEALTH MANAGEMENT

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COVID-19: Employment Law Guidance

1. INTRODUCTION

COVID-19 is a new viral infection that can affect your lungs and airways. The situation surrounding the coronavirus pandemic is quickly developing. The government guidance and ACAS advice for employers is continuously being updated as the situation develops.

As of 9am 20 March 2020, 3,269 cases of coronavirus have been confirmed in the UK and as of 1pm, 144 patients who have tests positive for coronavirus have died. Most individuals who have passed away as a result of this illness have been over 70 or those with underlying health conditions, most others only display minor symptoms.

2. SYMPTOMS

The main symptoms of the coronavirus:

- A high temperature (over 37.8 degrees Celsius);
- A new, continuous cough dry cough. The NHS define a new continuous dry cough as coughing a lot more for one hour, or three or more coughing episodes in 24 hours (if you usually have a cough, it may be worse than usual).

Due to the illness being new, the NHS are still not certain exactly how the coronavirus spreads from person to person, but similar viruses are spread in cough droplets which can be directly transmitted or transmitted through touching the droplets on hard surfaces.

3. SENDING AN EMPLOYEE HOME

If an employee displays symptoms of the coronavirus at home, employers should immediately send them home and tell them to avoid touching anything. It would be recommended to thoroughly clean the work environment to stop the virus spreading to other employees.

The most recent guidance from the government is that anyone who experiences symptoms and lives alone, must self-isolate for **7 days**. If an individual continues to have a high temperature after 7 days then they must stay at home until their temperature returns to normal.

If an individual experiencing symptoms lives with others, and they are the first to exhibit symptoms, they must self-isolate for 7 days and everyone else in their household must self-isolate for **14 days**. If during the 14 day isolation period, anyone in the household begins to display symptoms, they must stay at home for 7 days from when they symptoms start – even if this results in them staying at home for longer than 14 days.

An employee's right to pay if they have been sent home by their employer due to displaying symptoms of coronavirus will depend on the circumstances. If an employee is able to continue working from home, then they will be entitled to their normal rate of pay. However, if they are unable or unfit to work then they are likely to be considered to be on sick leave therefore entitled to SSP (subject to the eligibility criteria).

Not all roles will be suitable for home working, employees who fit into this category will either need to take sickness absence or alternatively holiday pay for their time off work if the employee is not entitled to contractual sick pay.

4. ASSISTING EMPLOYEES WORKING FROM HOME

Following the government's guidance that individuals should work from home wherever possible, it has been suggested that employers should be practical and flexible regarding each employee and their personal circumstances about working from home. In most cases, forcing an employee to work from home would amount to a change in their contract of employment which would require their consent. However, under the current circumstances, it is likely that they are willing to consent to this.

Employers should ensure they are communicating with their employees to find out what support or resources they need in order to effectively carry out their role from home. They should consider each individuals personal circumstances - for example their living situation, childcare responsibilities or long-term health condition, when considering their ability to work from home and try to come to a practical solution.

During the coronavirus pandemic, it is unlikely that employers will be able to carry out the usual health and safety risk assessments required at an employee's home. However, they should still behave responsibly, ensuring that all employees are clear of what is expected of them whilst working at home and they have the right equipment to safely carry out their role. Employers should keep in regular contact with any members of staff working from home and ensure that they are keeping adequate records showing whether or not employees are complying with the limits on average working time, night work and provision of health and safety assessments.

5. CHILDCARE PROBLEMS AND SCHOOL CLOSURE

On 18 March 2020, the government announced that schools in England will be shut from Friday, 20 March 2020. Some schools may remain open for key workers such as:

1. NHS Staff and social carers;
2. Education and childcare staff;
3. Food and other necessary goods workers;
4. Key public services (postal workers, justice workers etc.);
5. Local and national government;
6. Utility workers;
7. Public safety and national security;
8. Transport workers.

Employees with dependents under the age of 18 with at least one year's continuous service are eligible to request **parental leave**. Parental leave allows eligible employees to take up to 18 weeks' unpaid parental leave in respect of each child. This can be taken in blocks of a week or a number of blocks, but not exceeding more than four weeks' a year in relation to each child. Ordinarily, employees should give their employers **21 days'** notice of their request for parental leave. However, we would advise that employers are flexible during this time as it may not be practical for your employees to meet this criteria. Employers do have the right to postpone or refuse a request for parental leave where it would unduly disrupt the business, but they must discuss alternative options with the employee and notify them of their decisions in writing within 7 days of receiving the request.

Under ordinary circumstances, it would not be appropriate or practical for employees to work from home whilst also providing childcare following the school closures as it is likely they are unable to dedicate 100% of their designated working hours to the business. We would advise that employers are flexible under the current circumstances. As the school closure is going to affect the majority of parents in the workforce, it may be considered unrealistic to expect them

all to take parental leave and it may also leave the business understaffed. We would suggest a pragmatic approach under these unprecedented circumstances, such as allowing employees to work their hours more flexibly to work around their childcare responsibilities as long as the business needs can still be met.

6. TIME OFF TO CARE FOR DEPENDENTS

Employees are entitled to take a reasonable amount of unpaid time off work when it is necessary to care for a dependent. A dependent is not necessarily a child under the age of 18. It could also be a spouse, a parent or grandparent for example. Reasonable time off in relation to a particular problem is not usually more than 2 – 3 days, but we would suggest that employees consider employees' circumstances on a case-by-case basis to deal with the developing situation, as the employee would likely need 14 days under the guidance. It may be reasonable to employers to allow their employees to take emergency holiday in order to meet their caring needs for example.

7. STATUTORY SICK PAY

An employee will not normally qualify for Statutory Sick Pay unless they are absent from work due to **incapacity**. If an employee has not be diagnosed with coronavirus, or displayed symptoms, their absence is unlikely to meet the standard definition of "incapacity".

However, the Government has announced that employees and workers must receive Statutory Sick Pay (SSP) if they need to self-isolate because:

- They have coronavirus;
- They have coronavirus symptoms;
- Someone in their household has coronavirus symptoms
- They have been told to self-isolate by a doctor or NHS 111.

Therefore, anyone who is off work due to displaying symptoms of coronavirus, or lives with someone displaying symptoms should be considered as lacking capacity to work for the purposes for SSP.

To qualify from SSP due to the coronavirus you must:

- Be classed as an employee;
- Earn an average of at least £118;
- Tell your employer you're unfit for work before their deadline – or within 7 days if they do not have one.

Ordinarily, an employee must only give their employer a fit note if they are off sick for more than 7 days in a row (including non-working days). However, under the current circumstances, it may be impractical for employees to obtain a fit note if they are self-isolating and therefore it is advisable that employers are more flexible. The NHS have recently launched an online isolation notes service. These will provide evidence of the advice to self-isolate where an employee is experiencing symptoms of coronavirus or living with someone who has symptoms. The government have announced that the notes will be accessible through the NHS website or NHS 111 online.

SSP is currently set at **£94.25 a week**, but employers may pay more than the statutory entitlement if they choose to. SSP is payable from **the first day** of sickness absence related to the coronavirus. If the business has less than **250 employees**, employers will be able to reclaim the cost of SSP for staff of work due to the coronavirus.

8. HOLIDAY

Some workers may wish to use their holiday allowance as an alternative to receiving SSP or no pay if they are not entitled to this. Workers will be entitled to use their annual leave entitlement as an alternative, but they cannot be forced to do so by their employers.

Employers have the right to tell workers when to take holiday if they need to and the employee is not currently signed off work due to sickness absence. However, employers must give sufficient notice. The notice required is double the length of time that the employer is requiring the employees to take as holiday. For example, if the employer tells their workers that they must take four days' holiday, they must give them eight days' notice.

9. HIGH RISK EMPLOYEES

The NHS has confirmed that individuals who suffer from certain health conditions are at a higher risk of serious illness or death if they contract the coronavirus. Therefore employers should take extra precautions for vulnerable groups such as those who are pregnant, aged 70 or over, or who have a long-term health condition. Additional precautions could include allowing to work from home where available; offering flexible working in order for members to work at quieter times or allowing them to take emergency holiday / unpaid leave.

If an employee refuses to attend work due to their fear of contracting the coronavirus, an employer should listen to their concerns and try to resolve the issue, taking into consideration the government latest advice. If an employee is unable to work from home and their do not fit into the category set out above in relation to incapacity, then they will not be entitled to pay and any unreasonable refusal to come into work may lead to disciplinary action against the employee. However, it would be sensible to seek advice prior to beginning disciplinary action or withholding full-pay or SSP from employees who do not come into work due to the coronavirus.

10. CHANGING YOUR EMPLOYEES TERMS OF EMPLOYMENT, LAY-OFF AND SHORT-TIME WORKING

Laying-off employees means that the employer will not provide their employees with any work, and subsequently **no pay**, for a period of time whilst retaining them as employees. **Short-time working** means that the employer will provide their employees with less work, and subsequently **less pay**, for a period while retaining them as employees. These are temporary solutions when employers face a downturn in business or other unforeseen circumstances. In order to lay-off or impose short-time working on employees, there must be an express clause in the contract of employment allowing this to be done. If a business feels that this is a possibility, it is important to communicate with their staff so that they can plan accordingly.

If an employee is laid-off or short-time working is imposed, they are entitled to a "guarantee payment" of **£29 per day** (£30 per day from 06 April 2020). There is a maximum of 5 days of guarantee payments payable in a three month rolling period. Employees will continue to accrue holiday pay during the period in which they are laid off.

If an employee with more than two years continuous service is laid off more than four continuous weeks or six weeks in a rolling 13-week period, then they may be entitled to resign and claim for a statutory redundancy payment. However, we recommend that employees seek legal advice on this matter prior to resigning from their employment.

In the absence of an express lay-off clause, an employer could also consider amending an employee's contract of employment to reduce the number of contractual hours. There are a

number of significant factors which must be considered before these amendments are made and therefore it is not advisable to do so without seeking legal advice.

11. REDUNDANCY

Redundancy is a form of dismissal. This occurs where a business closes permanently or there is a reduced need for employees from a particular role. Employees should be appropriate consulted prior to any redundancy taking place.

Unfortunately we are unsure of the impact that the coronavirus is going to have on businesses; the economic consequences which will arise or how long the pandemic will last, but redundancy is a more long-term and permanent solution than laying-off staff or imposing short-time working and therefore we would suggest seeking advice prior to taking this step to see if there are any alternative options.

The government's current advice is to stand by your employees and not to make redundancies as the government has assured businesses they will stand by you and assist with staffing costs.

12. BUSINESS CLOSURE

Although the Government has not yet told businesses, other than Schools, they must close it would be responsible for businesses to start considering contingency plans in case this does occur. We are currently in unprecedented circumstances which is difficult for both employers and employees. We suggest that employers keep their employees up to date about the current situation.

If there is no lay-off or short-time working clause in the contract of employment, employees will be entitled to expect ordinary pay for the period of time which the business is closed – provided that they are 'ready and willing' to work. However, as mentioned previously, employers can force employees to use their holiday entitlement where necessary.

13. DISCLAIMER

The law and advice set out in this booklet is correct as at 19 March 2020. We strongly recommend that all employers ensure they are keeping up to date with the government advice as the situation progress. Despite the advice about the coronavirus pandemic constantly changing, employment legislation will remain in force and must be adhered to in order to minimise the risk of a claim being brought against an employer. Therefore, if you are in doubt about anything, we recommend that you seek advice. Should you require any clarification on this matter, do not hesitate to contact a member of our Employment Team on 01522 814638.

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