

Coronavirus and employees - a (non-exhaustive!) list of FAQs

Best practice checklist

A summary of our key recommendations are:

- Check all existing contractual terms and policies.
- Ensure that employees are aware of the symptoms of the virus and what they should do if they suspect they have it. For example, inform you by telephone or email rather than in person, self-isolate and contact 111.
- Ensure employees are aware of their obligations to themselves and others to keep themselves and their colleagues safe (including good hand hygiene).
- Ensure employees are aware of what they should do regarding travel arrangements.
- Ask employees about their travel plans and discuss those with them, taking heed of up-to-date Foreign & Commonwealth Office (FCO) and Public Health England (PHE) guidance.
- Ask employees to come forward with any concerns they have regarding any particular health vulnerabilities and discuss issues of concern.
- Prepare for the likelihood of home working / unpaid leave / additional holiday.
- Undertake risk assessments or ask employees to do them themselves.
- Start to discuss with employees whether changes may be required to their work patterns as more people become ill or are required to self-isolate.
- Develop relevant written policies on the above points and keep these updated.

Who should self-isolate?

As of 13 March 2020 Public Health England (PHE) changed its advice for travellers returning from certain affected countries. The previous advice was split into Category 1 (most affected) and Category 2 countries.

From 13 March 2020, people were advised to stay at home for seven days if they had either a high temperature or a new continuous cough, irrespective of whether they have recently returned from the Category 1 or 2 areas.

This advice was updated on 16 March 2020. From that date, those living alone with symptoms should still stay at home for seven days. For those living with others where either they or one of their cohabittees have symptoms, all household members must self-isolate for 14 days from when the first person became ill. Anyone in the household who starts to

display symptoms must stay at home for seven days from when the symptoms appeared, regardless of which day they are on in the original 14 day isolation period.

While the above is stated to be PHE “guidance”, employers have a statutory duty to protect the health and safety of their employees and others such as visitors to an office. We therefore advise employers to instruct their employees to adhere to this guidance.

There may be an express contractual right for an employer to enable this – for example, a suspension or garden leave clause. There are also implied duties on the employer to protect the health and safety of its workforce and for the employee to comply with reasonable instructions. In these circumstances, we believe both implied terms would apply to make it reasonable to require an employee to remain at home in accordance with the PHE guidance.

Employers also need to be aware of this guidance as it will determine who is entitled to sick pay, or statutory sick pay (see below).

It may also be reasonable to require employees to work from home even if they are not advised to self-isolate according to the current PHE guidance. An example of this could be an employee who has recently returned from a Category 1 area and who is showing no symptoms – before 13 March they would have been required to self-isolate, but after 13 March, only if they were showing symptoms. If they can work effectively from home, this is unlikely to be particularly disruptive.

For particular roles it may be more justifiable to require an employee to self-isolate even where the guidance does not require them to do so. For example, if they have come into contact with someone who is known to have contracted the virus, but where they are not cohabitants. This is likely to be more justifiable if the employee works with groups who are more vulnerable such as the elderly or those with particular medical conditions.

Should self-isolation be treated as sick leave?

An employee who has symptoms of the virus will be on sick leave. This is also the case where employees are self-isolating in accordance with PHE advice. They should be treated as any other employee on sick leave and paid according to their contract of employment. SSP is normally payable from the fourth day of absence. Under new rules (which are yet to be implemented), SSP will be payable for the first three days as well.

Where neither of the above applies - for example an employee returning from a Category 1 area who is not displaying symptoms - and the employer requires them to stay at home, our suggestion would be to treat the absence as “special leave”. They should be paid as usual, whether or not they can work from home.

An employee who self-isolates without being on sick leave or is otherwise not required by the PHE guidance or their employer to do so may themselves be absent without authorisation and may lose their right to pay. Employers in these circumstances should discuss the issue with the employee and seek to understand the reasons for their behaviour (see below).

Can employees in more vulnerable groups require you to allow them to work from home?

On 17 March 2020, PHE published "Guidance on social distancing for everyone in the UK and protecting older people and vulnerable adults". This applies to everyone.

Some employees may be more anxious about working as normal during the virus outbreak and the guidance deals with those who will be most vulnerable. These include pregnant employees and those who have certain medical conditions such as asthma, heart conditions, diabetes, cancer or chronic lung disease that might make them more susceptible to complications caused by the virus. The employer should check this guidance from PHE on any relevant conditions that could cause a vulnerability.

Employers have a duty to protect the health and safety of their employees and need to seek to protect them from the risk of infection, particularly those who are in more vulnerable groups. The employer should therefore review this guidance and follow it as far as possible. In accordance with the guidance, employers will need to consider flexible work practices and strategies such as:

- working from home, if possible
- a staggered start and finish time to avoid a busy commute
- avoiding face to face meetings / work or external gatherings such as a work conference where a number of other people are present
- encouraging heightened sensitivity and awareness of hygiene for all staff.

Employees who are known to be vulnerable should be contacted to discuss any concerns they may have, so that a risk assessment can be undertaken. The guidance states that those who are in vulnerable groups are "strongly advised" to follow the social distancing measures as much as possible.

Others should follow it as far as is practical.

Pregnant employees have special protection under the management of *Health and Safety at Work Regulations 1999*. Current guidance from PHE states that it is not clear that the virus causes a particular risk to pregnant women. However, pregnant staff may well feel more vulnerable and should receive a sympathetic hearing and have a risk assessment carried out to assess their particular situation.

Employers have a duty under the *Equality Act 2010* to make reasonable adjustments if the employee's condition satisfies the definition of "disability". Where the Act applies, employers will be under a duty to make reasonable adjustments which will include discussing the issue with the employee and allowing flexible working if reasonably possible. Each case will need to be considered on its own merits and the needs of the business balanced against the risk to the employee.

Can we require employees not to travel?

From the beginning of March, travel to many countries has been severely restricted or banned by those countries entirely. The Foreign & Commonwealth Office (FCO) has been updating its advice regularly, and on 17 March 2020 has advised against all non-essential travel worldwide for an initial period of 30 days.

New travel bookings

It is clearly advisable to instruct employees not to make new travel bookings in accordance with this advice. The situation is extremely volatile and there is no way of knowing when travel will become easier

Existing bookings

Employees who have existing bookings should contact their insurers to see if they can get refunds and / or their travel agents / airlines to see if their arrangements can be substituted for later travel to other destinations. Their travel insurance may be invalidated if they do travel to countries where the FCO is advising against travel for anything other than “essential” reasons. They should check their insurance policies for the definition of “essential”.

On the basis of the FCO advice and an employer’s health and safety obligations (and the reasonable likelihood that their return travel and work will be disrupted), we believe it would be reasonable for employers to restrict employees from travelling in accordance with the FCO advice (apart from “essential” travel).

In our view, employers would not be obliged to reimburse employees for any expenses they cannot otherwise recover if they are unable to travel. On the basis that we believe that, in most cases, this will be a reasonable instruction, employees failing to comply could be liable to disciplinary action.

Any employees who believe they have “essential” reasons to travel to these areas will need to discuss this with you for you to consider the following:

- their reasons for travelling
- their insurance arrangements
- the possible outcomes of returning such as whether they will be able to get back
- the risks to them and others

What should we tell other employees if one of their colleagues has tested positive?

Due to the potential data protection issues surrounding the disclosure of sensitive personal information (known as 'special category data' under the General Data Protection Regulation (GDPR)), we suggest the following:

- informing the other employees that one of their colleagues has tested positive for the coronavirus without naming that individual
- advising them to self-isolate and call 111 to seek medical advice if they are feeling unwell and have at least one of the known symptoms of coronavirus - a cough, a high temperature, or shortness of breath.

If there is a real requirement to disclose the infected employee's name to other employees, the company should be able to rely on its overriding duty under health and safety legislation to protect the health, safety and welfare at work of its staff as the legal basis for disclosing the information under the GDPR and Data Protection Act 2018 (DPA), provided it is clear about the reason for needing to disclose this information.

You should also be careful to keep the personal data that is shared to a minimum. Only disclose it on a strict need to know basis and consider whether you should carry out a data protection impact assessment. Ideally, an employee should be asked to agree to the disclosure of the information as a matter of courtesy but, if they refuse and it is essential to share it, it should be justifiable because of the overriding health and safety duties.

If you have any concerns about the risk of the infection having spread to other employees, you may wish to introduce temperature checks or require medical testing of your employees.

Can we require employees to submit to a medical test?

An employee cannot be physically forced to submit to a medical test but employers may have contractual requirements for medical testing which means that an employee who refuses to agree is in breach of contract. Employers should be careful to make any requests in a non-discriminatory way. For example, employees should not be singled out for medical tests on the basis of race or nationality as the coronavirus does not discriminate.

We consider that employees themselves have a duty to tell their employers if they are exhibiting symptoms and they should be instructed to do so.

As above, information about an individual's health will amount to 'special category data' under the GDPR and obtaining a medical report will amount to processing for the purposes of the GDPR. The employer should be able to rely on its overriding duty under the *Health and Safety at Work Act* to protect the health, safety and welfare at work of its staff as the legal basis for processing the information in a medical report under the GDPR and the DPA 2018, provided the company is clear about the reason for processing this information.

Can we ask employees who are not self-isolating or ill to work longer hours or change their shift patterns to cover their colleagues?

This will depend on the contractual terms of the employees in question. Many contracts of employment will contain terms that provide for an element of flexibility in working hours or changes to shift patterns on a temporary basis to allow for natural fluctuations in demand. Where the requirements go over and above normal or regular fluctuations, staff would need to be consulted to determine who was able to work longer hours or change shift patterns and if any are unable to do so. Overtime pay or shift allowances may need to be paid in accordance with contractual terms.

Employers will need to consider the effect of the Working Time Regulations and seek to adhere to the requirements for daily and weekly rest periods.

Can we place employees on short time working or lay off if we have less work?

Possibly. However, this depends on whether there is a right to do so in the employee's contract. If an employer lays off an employee or puts them on short time working in the absence of an express or implied right to do so, the employer will be in fundamental breach of contract, entitling the employee to resign and claim constructive dismissal, breach of contract or unlawful deduction from wages.

Employees placed on short time working or lay off for more than a temporary period will have the right to claim a redundancy payment and terminate their employment.

In the absence of a contractual right to lay off staff or put them on short time working, employers would be obliged to continue paying staff in accordance with their contract during a temporary business closure. There may be flexible clauses entitling employers to require staff to work at other sites or they may be able to work from home.

In the case of a more prolonged workplace closure or where other flexible working options are not possible, the employer will need to seek agreement with staff on unpaid leave or seek to require them to go on a period of paid leave, in accordance with contractual terms or the rules in the Working Time Regulations (which require a period of notice to be given).

What happens if members of staff do not want to work with others who have recently returned from high risk areas?

There is now no requirement for employees who have recently returned from Category 1 areas to self-isolate if they are showing no symptoms. As such, those employees will be entitled to return to work. The reason for this change in government policy after 13 March was the fact that the evidence was showing transmission of the virus between people in the UK without any apparent connection with those areas previously thought to be of greater risk.

However, employees who are in a period of self-isolation imposed before the guidance changed could still be asked to continue to self-isolate in accordance with the PHE guidance which was applicable at the time. From 13 March we don't think such people would be considered to be on "sick leave" if showing no symptoms. As such, if they are required to stay at home, they should be considered to be on "special leave" and paid accordingly, as set out above.

You would need to remind all employees who are concerned about working with their colleagues of the current PHE guidance, the rates of transmission in the UK, their obligations to themselves and others regarding good hand hygiene, and their obligations not to discriminate on grounds of race (if their concern is directed at any particular race or nationality).

If concerned employees are part of a vulnerable group, you should discuss the issue with them and seek to make flexible adjustments on a reasonable basis, in line with the above advice.

What about employees who have to take time off to look after their children?

Employees have the right to take time off to help with domestic emergencies. The closure of a school would fall within that entitlement. The employee should inform their employer as soon as reasonably practicable of their absence and how long they expect to be absent. It is the case that this type of leave is only anticipated to last for a few days and is unpaid.

It is possible that wholesale closure of schools may be ordered as part of a UK-wide response to seek to reduce the spread of the virus. This is likely to cause considerable disruption to employees with school-age children. Employers will need to deal with employees on a case by case basis – using a combination of unpaid leave, holiday leave, flexible working and home working, wherever possible.

If unable to work from home or flexibly, employers would not be obliged to pay staff and this could cause considerable hardship. Employers should start considering how they might deal with this circumstance and determine the employees who may be affected.

Are there any data protection issues to consider when asking for and then holding details of an employee's holiday or travel plans?

Requesting and retaining details of holiday and travel plans constitutes the processing of personal data for data protection purposes. The data can be lawfully processed for the legitimate business interests of the employer and / or to comply with health and safety obligations.

In the current circumstances we think such a request is likely to be considered a legitimate and reasonable management request since the reason for the company's request will be to be made aware of its employees' potential exposure to infection, in the event that they intend to travel to a high-risk area. An employee who refuses to provide such information may be failing to comply with a reasonable management instruction.

The company will need to decide for how long it is necessary to retain such information. We would advise that 28 days after return, the data should be destroyed.

Are there any data protection issues to consider when asking an employee about whether they have specific vulnerabilities or live with anyone who is more vulnerable?

Keeping a record of specific vulnerabilities constitutes the processing of special category personal data for data protection purposes. As the reason for processing the data will be to understand the employee's potential increased risk of infection with the purpose of protecting their health and safety, it should be permissible under the GDPR and DPA 2018 provided the reasons for keeping it are clear and it is not retained for longer than necessary or shared more widely than is essential.

Should employees carry out their own risk assessments when asked to work from home?

Where an employee needs to work from home, a health and safety risk assessment should be carried out. It should be possible for the employee to perform their own risk assessment provided the company has a method for recording the outcome of the risk assessment which is tailored to home-working and is accessible to employees working from home. Further guidance and template risk assessment forms can be found on the [Health and Safety Executive's website](#).

How can we do a right to work check for immigration purposes for someone who is unable to attend to present documents as they are self-isolating?

Generally, a manual right to work check must be undertaken in person and documents verified before employment commences. The only exceptions are foreign nationals who hold Biometric Residence Permits and EEA nationals who have obtained status under the EU settlement scheme. In these two circumstances, an online check can be undertaken remotely, as long as the employer is satisfied that any photograph on the online right to work check is of the individual (eg verified via video conferencing).

There is scope for the employer to carry out a manual right to work check via video link. However, they will need to have the physical original document sent to them which may prove difficult if the documents are with the person who is in isolation. The UK Government's current policy regarding right to work checks during a period of self-isolation is silent. The advice as it currently stands is to defer the commencement of employment until the person is no longer required to self-isolate (unless the above steps can be undertaken).

The Government does offer a coronavirus immigration helpline (0800 678 1767). Lines are open Monday to Friday from 9am to 5pm.

Can we continue formal consultation (eg redundancy/TUPE) with employees who are unable to attend because they are ill or self-isolating?

With regard to collective consultation, consultation takes place with “appropriate representatives”. There are no rules regarding how such consultation takes place and it can be in person, by telephone or in writing. As such, it should be possible to continue to consult effectively with appropriate representatives even where some may be absent because of illness or self-isolation.

With regard to individual consultation meetings for redundancy purposes, if the individual is on sick leave, the likelihood is that they are also too ill to attend a meeting remotely by telephone or Skype. In that case, you should try to postpone the consultation until their period of sick leave has come to an end, until their fit note expires if they have one, or until advised by a health professional that they can return to work.

If the individual is self-isolating but is otherwise fit to work, then consider carrying out the consultation remotely by telephone or Skype. The format of the meeting should be the same as if the consultation were being conducted face to face.

Should we postpone disciplinary meetings because someone is ill or is self-isolating?

If the individual is genuinely too ill to attend a disciplinary meeting in person then they are likely to be too ill to attend such a meeting remotely by telephone or Skype. In that case, you should postpone the meeting until the person’s period of illness has come to an end, until their fit note expires if they have one, or until their health professional advises that they can return to work.

Alternatively, if the individual is self-isolating but is otherwise fit to work then you should consider carrying out the meeting remotely by telephone or Skype. Ensure that the format of the meeting is the same as if the meeting were being conducted face to face.