

FACT3™

HR FAQ's (sourced from XpertHR)

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Q: Do employers have a duty to take special measures to protect those employees who are most at risk if they are exposed to coronavirus?

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Q: What if my people are still coming to work?

ANSWERS

Q: If an employee is advised to self-isolate to avoid the risk of spreading coronavirus, are they entitled to sick pay?

A: Current [government guidance](#) is that an individual should self-isolate at home for 14 days after visiting certain areas or after having close contact with someone who has tested positive for coronavirus.

(COVID-19). The Government also advises that individuals with a high temperature and/or a new continuous cough should [self-isolate](#) for at least seven days from the onset of symptoms. If they live with others, everyone in the household should self-isolate for 14 days.

Employees who are self-isolating in accordance with government advice are entitled to statutory sick pay (SSP), even if they do not have any symptoms. The Government has introduced temporary legislation (the Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020 (SI 2020/287)) with the effect that individuals who are unable to work because they are self-isolating are deemed to be incapable of work for the purposes of SSP. The employee must be self-isolating in accordance with coronavirus guidance published by Public Health England, NHS National Services Scotland or Public Health Wales.

In any event, it is good practice for employers to treat absence due to self isolation as sick leave and pay the employee in accordance with their usual policy, or to pay them in full. Employers should aim to avoid the situation where an employee attends work against medical guidance, risking the spread of coronavirus, because they are concerned about not being paid or having to use up their annual leave allowance to cover any absence.

If an employee is absent following an instruction from their employer not to come to work as a preventative measure, they are entitled to be paid as usual (unless the contract provides otherwise).

The Chancellor confirmed in the Budget 2020, on 11 March 2020, that emergency legislation will also be brought forward to allow the payment of SSP from the first day of absence, rather than the fourth day, for "people who have COVID-19 or have to self-isolate, in accordance with government guidelines".

Q: What medical evidence can an employer request from employees who are absent with flu-like symptoms during the coronavirus outbreak, when government advice is not to attend a GP?

A: Current [government guidance](#) is that, to prevent the spread of coronavirus (COVID-19), individuals with flu-like symptoms should obtain medical advice from NHS 111 online and should not go to see their GP.

Most sickness absence policies allow for employees to self-certify absences of up to seven days. Where an employee who is absent for more than seven days advises that they have flu-like symptoms, the employer will need to make an exception to its normal requirement for medical evidence. Nevertheless, the employer should take all reasonable steps to verify the sickness absence. This could include requiring the employee to make regular telephone contact, and requiring the employee to explain what medical advice they have sought and followed. The employee could be asked provide evidence where possible, but employers should act reasonably in what they require from employees in the circumstances.

In the Budget 2020, on 11 March 2020, the Chancellor announced that employees who are advised to self-isolate to prevent the spread of coronavirus will "soon" be able to obtain an alternative to the fit note from the NHS 111 service.

For the purposes of determining eligibility for statutory sick pay, employers are able to set their own rules on what evidence they reasonably require of employees' illness. Legislation does not require that the evidence is in the form of a fit note.

Q: How should employers respond if employees are affected by school closures to prevent the spread of coronavirus?

A: There is limited statutory provision for time off for employees who have to look after their children when schools, nurseries and other childcare providers are closed.

The statutory right to time off for dependants provides for a period of unpaid leave to take action necessary because of the unexpected disruption or termination of arrangements for the care of a dependant. This would cover time off to arrange alternative childcare in the event of a school closure, but it does not cover extended time off for employees to look after their children themselves. Some employers may have a policy on time off to care for dependants that is more generous than the statutory minimum.

Employers should keep in mind that advice on self-isolation and social distancing during the coronavirus outbreak is likely to make it more difficult for employees to make alternative arrangements for the care of their children. Employees may have no option but to stay at home themselves.

Employers will therefore need to consider alternative arrangements, such as allowing the employee to work from home where possible or agreeing to a period of paid or unpaid leave.

An employer could allow employees to take annual leave in this situation, as an alternative to unpaid leave, although employees may not have sufficient holiday entitlement to cover the absence or may be unwilling to use their holiday for this reason. Employers can require employees to take annual leave by giving them the required notice

Where an employee is self-isolating, in accordance with government advice, they will be entitled to statutory sick pay even where they are not ill.

Q: If an employer's workplace is closed to prevent the spread of coronavirus, must it continue to pay employees?

A: If an employer decides to close its business, for example due to the numbers of staff off sick or self-isolating, or due to lack of customers, it must pay employees as normal unless the contract provides otherwise. Some employers may have a contractual right to lay-off employees, in which case employees may be entitled to statutory guarantee payments.

In the event that an employer is instructed by the Government to close the workplace, employees may be entitled to statutory sick pay (SSP), as they may be deemed to be incapable of work in accordance with temporary legislation to prevent the spread of coronavirus. The Government has said that employers with fewer than 250 employees will be able to reclaim SSP paid to employees who are unable to work because of coronavirus. A refund of up to two weeks' SSP per employee will be available.

If employees can work from home while the workplace is closed, the employer should pay them as normal. In businesses where working from home is not an option, some employers may find themselves unable to keep up with their contractual obligations to pay employees. They may need to consider options such as asking for volunteers for redundancy or asking employees to agree to a period of unpaid leave. Employees may be prepared to accept unpaid leave on a temporary basis, where the alternative would be redundancy.

Q: What should an employer do if an employee is concerned about the risk of contracting coronavirus and does not want to attend work?

A: As a general rule, an employer can require employees concerned about contracting coronavirus (COVID-19) to attend work. However, the employer should check current [government guidance](#) about self-isolation and take the employee's own circumstances into account when deciding whether there are grounds for the employee to stay at home.

Where there are no grounds for self-isolation, the fear of contracting the illness would not generally be sufficient reason for failing to attend work, and an employer faced with an employee refusing to come to work will be entitled to take disciplinary action for unauthorised absence. An employer could also stop paying an employee who refuses to attend work on the basis that the employee is failing to perform their part of the contract.

However, where business needs allow, an employer may wish to take a more flexible approach and allow employees to work from home, or to take periods of annual or unpaid leave. This is particularly advisable when the employer is dealing with vulnerable employees, ie those at high risk of developing more severe symptoms from the coronavirus, such as employees with asthma, diabetes or heart disease.

Q: Can an employer instruct an employee who may be at risk of having contracted coronavirus not to come to work?

A: Employers are under a duty to ensure the health and safety of all their employees and to provide a safe place and system of work. In light of this, and the serious implications if the coronavirus (COVID-19) is contracted and spread in the workplace, an employer would be justified in instructing an employee with the symptoms associated with the coronavirus not to attend work, to seek advice from NHS 111 and not return to work until the symptoms have cleared.

In relation to an employee who does not have the symptoms associated with the coronavirus, but who has recently travelled to an affected region, or has been in contact with someone who has, or with an infected person, the employer can check [guidance](#) from the relevant public health body on whether or not it is necessary on risk grounds to ask such people not to attend work. It is open to the employer to agree with the employee that they will work from home or return to work only if they do not develop symptoms during the relevant period.

Q: Is there any duty on employers to close their workplace if a risk of contact with coronavirus is identified?

A: Current [government guidance](#) is that there is no need to close the workplace if someone suspected to have coronavirus (COVID-19) has been to the premises. Even if the person subsequently tests positive for coronavirus, closure of the workplace will not necessarily be recommended. The relevant public health body (eg Public Health England if the employer is in England) will advise the employer on what action to take in these circumstances.

Employers should consider putting in place a contingency plan that addresses business continuity in the event that the coronavirus threat escalates and results in workplace closures. In particular, alternatives such as homeworking, working from different premises, and lay-off should be explored. Employers should review the extent to which their technology enables remote access where this would enable employees to work from home.

Q: If an employer has a high proportion of employees self-isolating to avoid the spread of coronavirus, can it require other employees to work extra hours to cover the work?

A: An employer can require its employees to work extra hours where the contract of employment allows for this, and many employment contracts contain a term that states the employee is required to work additional hours in accordance with the needs and the requirements of the business. Any contractual right should be exercised fairly and reasonably so as not to breach the implied term of trust and confidence. The employer should consult with its workforce so as to determine which employees are able to work extra hours, and which have good reasons for not being able to do so. Where there is no relevant contract clause, employers must remain conscious of the difficulties of unilaterally imposing contractual changes, which may result in claims for constructive unfair dismissal. Any changes should be undertaken with

early consultation and with a view to reaching agreement with employees. An employee may be taken to have agreed to contractual changes by working extra hours without complaint.

Employers should also ensure that they observe their obligations under the Working Time Regulations 1998 (SI 1998/1833). The Regulations apply to "workers", which is defined as anyone engaged under a contract to do any work personally, but excludes the genuinely self-employed. Under the Regulations, a worker is entitled to an 11-hour daily rest period (reg.10), a 24-hour weekly rest period (reg.11) and a rest break of 20 minutes where the employee works more than six hours (reg.12). The employer must also provide adequate rest breaks where the pattern of work is such as to put the worker's health and safety at risk, eg monotonous work (reg.8). There are exemptions that apply to regs.10, 11 and 12. One that may apply in the case of a flu pandemic or the coronavirus (COVID-19) outbreak is where the worker's activities are affected by an occurrence due to unusual and unforeseeable circumstances beyond the control of the employer or an accident or the imminent risk of an accident.

Finally, unless employees have signed voluntary opt-out agreements, employers should ensure that their adult workers do not work more than 48 hours a week calculated over a reference period of 17 consecutive weeks.

Q: Do employers have a duty to take special measures to protect those employees who are most at risk if they are exposed to coronavirus?

A: Employers should check guidance from the Department of Health or the relevant public health body on any health conditions that could cause a vulnerability to becoming seriously ill with the coronavirus (COVID-19). People at particular risk could include those with weakened immune systems, older workers, and those with long-term conditions like diabetes, asthma, cancer, heart disease and chronic lung disease. Given the duty to ensure the health and safety of their employees, employers should consider measures to protect these employees from the risk of infection, for example by reassigning staff from high-risk work sites or locations.

Employers are also under special duties in relation to pregnant employees and disabled workers. In relation to pregnant employees, reg.16 of the Management of Health and Safety at Work Regulations 1999 (SI 1999/3242) imposes a duty on employers to conduct a risk assessment if working conditions could involve risk to a new or expectant mother or their baby. If the assessment reveals any risk to an employee, or their baby, the employer must follow a series of steps to ensure that they are not exposed to the risk or damaged by it. For example, it may be possible to avoid the use of public transport in an employee's role. If the risk cannot be avoided, the employee's working conditions or hours of work should be altered. Where that is not feasible, they should be removed to another job or, as a last resort, suspended on full pay. However, where there is suitable alternative work within the company, the employee must be offered the work before being suspended on maternity grounds.

In relation to other vulnerable employees, such as those who are asthmatic, they may be protected by the disability provisions of the Equality Act 2010 if their condition satisfies the

definition of "disability" in s.6. Where the Act applies, employers are under a duty to make reasonable adjustments, which may entail taking special measures to protect disabled staff. Examples of reasonable adjustments include assigning the disabled person to a different place of work and allowing homeworking.

Q: Can an employer withdraw notice of redundancy that was given before the announcement of Coronavirus Job Retention scheme?

The Government announced on 20 March 2020 that it will provide grants to employers under the Coronavirus Job Retention Scheme to enable employers to continue paying employees who would otherwise be made redundant. The employees can be put on a period of "furlough", during which they do not perform work for the employer, and HM Revenue and Customs will reimburse the employer for 80% of the wage costs relating to the worker, up to a maximum of £2,500 per month. The grants can be backdated to cover wages from 1 March 2020.

Some employers facing immediate financial difficulty because of the coronavirus (COVID-19) crisis will have given notice of redundancy to employees before the scheme was announced. These employers can ask the employees to agree to the withdrawal of the notice, and to agree to a period of furlough instead.

Once notice of redundancy has been issued to an employee, it is legally binding and cannot be unilaterally withdrawn by the employer, even if the employee is still working out their notice period. Therefore, the employer must obtain the express consent of the employee. In the circumstances, it is likely that employees will agree to keeping their jobs, while staying at home on reduced pay, as an alternative to redundancy. The employer can agree to top up the wages of the employee, so they are paid in full, but it is not obliged to do so.

Q: What if my people are still coming to work?

People should ONLY be travelling to and from work if their work absolutely cannot be done from home.

Most businesses have been instructed to close now or operate from home however there are some exceptions and indeed it is important that they carry on.

Employers and employees should discuss their working arrangements, and employers should take every possible step to facilitate their employees working from home, including providing suitable IT and equipment to enable remote working. Sometimes this will not be possible, as not everyone can work from home. Certain jobs require people to travel to their place of work – for instance if they **operate machinery, work in construction or manufacturing, retail : food and pharmacy, or are delivering front line services.**

If your people cannot work from home then they can still travel to work, provided they are well and neither they nor anyone in their household are self-isolating. This is consistent with advice from the Chief Medical Officer.

Employers who have people in their offices or onsite should ensure that employees are able to follow Public Health England Guideline, where possible, **maintaining a 2 metre distance from**

others, and washing their hands with soap and water often for at least 20 seconds (or using hand sanitiser gel if soap and water is not available).

At all times, if workers develop symptoms themselves or anyone in their families show symptoms then they need to follow the self isolation guidance which is 7 days if they live alone or 14 days if anyone in their family contracts the virus.