

## Employment Law and COVID-19

### Statutory Sick Pay

The government have, as a result of the pandemic, amended the Statutory Sick Pay (SSP) rules. Before the pandemic an individual was entitled to sick pay if they were “deemed incapable of work”. This has been amended to include a person who is:

- (i) isolating himself [or herself] from other people in such a manner as to prevent infection or contamination with coronavirus, in accordance with guidance published by Public Health England, NHS National Services Scotland or Public Health Wales and effective on 16 March 2020; and
- (ii) by reason of that isolation is unable to work.

Currently Public Health England’s guidance is that if you have either a high temperature or a new continuous cough you need to stay at home for seven days. If you live with other individuals in your household then you should stay home for 14 days from the day the first person in the house became ill. That guidance may change in which case the circumstances in which SSP is payable may also change.

Some legislation bringing new rules into effect is passing through Parliament and so the fine detail of some aspects are still to be clarified or formally brought into effect.

### Waiting days for SSP

There will no longer be any waiting days and sick pay will be paid from the first day of an absence which is related to COVID-19. Small and medium sized businesses (i.e. those with less than 250 employees) will be permitted to reclaim any SSP to a worker for the first 14 days of COVID-19 related absence. This change has not yet been brought into law but will be retrospective from 14 March 2020.

### Fit Notes

Workers may still self-certify for the first seven days. If a worker is self-isolating for more than seven days, an online self-isolation note can be obtained from the NHS website or the NHS mobile phone app.

### Social Distancing

The government issued social distancing guidance on 16 March 2020 which strongly advises the below categories of vulnerable employees to socially distance themselves, which includes working from home and avoiding public transport. Those categories are:

- (i) Individuals aged over 70;
- (ii) Women who are pregnant; and/or
- (iii) Individuals aged under 70 with an underlying health condition

If an employee falls within one of the above categories then employers should consider their position very carefully before requiring an employee to come into work. This is because to do so could amount to a breach of the implied term of mutual trust and confidence entitling the employee to resign and claim constructive dismissal and/or discrimination.

It should also be noted that within the “underlying health condition” category the guidance identifies further sub-groups who are at an even higher risk of severe illness from COVID-19 and this should be taken into account by employers also.

### **Annual Leave**

Annual leave rules will continue to apply as normal and employees may wish to take annual leave as an alternative to SSP or nil pay. Employees and workers are entitled to take statutory annual leave during sickness absence, but it should be noted that an employer cannot compel its employee or worker to take annual leave during a sickness period. However, those employees who are not on sick leave can be asked to take their statutory annual leave by their employer, provided the required level of notice is given.

### **Lay Off & Short Time Working**

Lay off applies when an employer is unable to provide work (and so no pay) to its employees for a period of time while retaining them as employees.

Short time working applies when an employer provides employees with less work (and so less pay) for a period while retaining them as employees.

It is important that an employee’s contract of employment expressly states that an employer has the right to lay off or provide short time working. In the absence of such express authority an employee may be entitled to resign and claim constructive dismissal if an employer lays off or imposes short time working upon an employee. Whether an employee takes that action requires an assessment of risk by the employer. In the absence of a contractual right to lay off and the risk of a constructive dismissal claim, an employer may wish to explore with staff or recognised unions alternative options and/or await the formal introduction of Coronavirus Job Retention Scheme (furlough leave) as this is expected to be backdated to 1 March 2020 and is a grant of 80% of monthly wage up to a maximum £2,500 per employee per month.

Lay off may need to be considered by employers due to the effect of COVID-19 however, in the

absence of an express clause which deals with how long an employee may be laid off, the statutory scheme effectively gives employees the ability to determine whether they have been kept on lay off for an unreasonable period, by allowing them to claim a statutory redundancy payment after the prescribed period of lay off has elapsed, which is

- (i) Four or more consecutive weeks; or
- (ii) A total of six weeks' within a 13-week period.

If an employee does intend to claim a statutory redundancy payment after the prescribed period, then they must have two years or more service and serve a written "notice of intention to claim" on their employer within a specific time period.

The COVID-19 pandemic is continually changing and the government and ACAS' advice for employers is being updated as the situation develops. The information provided in this article is relevant at the time of writing (25 March 2020). As it is a changing environment it is important to obtain legal advice before decisions are made by employers in relation to their workforce.

Please contact the employment legal team at Hempsons if you have any questions relating to this or any other employment issue.