

# The impact of Covid-19 on charities and social enterprises

## Some frequently asked questions

### Contents

Can we cancel booked annual leave? ..... 2

Can we make staff carry forward annual leave into the next leave year? ..... 2

Can we force staff to take holiday? ..... 2

What about contractual holiday? ..... 3

What are the legal implications of drafting in staff or volunteers to help manage the current situation? ..... 3

Can we change the work that existing staff do or the way they do it? ..... 3

What action should you take in relation to pregnant staff who can't work from home? ..... 3

Where can I find reliable sources of information about employment issues? ..... 4

What is the effect on obligations to pay rent either by or to a charity or social enterprise under a lease? ..... 4

How can we execute deeds and documents when signatories are in isolation? ..... 4

**Given the fast pace of change in response to the COVID-19 outbreak, the information in these FAQs is subject to change. These FAQs are informative and should not be relied on as legal advice.**

### **Can we cancel booked annual leave?**

If you've already approved statutory leave, you can retract approval by giving at least twice the length of notice as the period of leave that has been booked (e.g. ten days' notice for five days' leave). However, you will need to exercise caution and be sensitive to individual circumstances. Normally an employee might ask to be compensated for cancelling travel plans. In the context of COVID-19, they might have made plans to use their leave to take on childcare or other caring duties. Cancelling leave at short notice could be a breach of the implied term of mutual trust and confidence allowing the worker to resign and claim constructive dismissal.

### **Can we make staff carry forward annual leave into the next leave year?**

Until 27 March 2020, the rule was that Working Time Directive leave (that's the first four weeks' of statutory entitlement) must be taken in the year it accrues so you couldn't compel (or agree to allow) staff to carry over that portion of leave. However, the government has passed emergency legislation relaxing that restriction with immediate effect. Workers can now carry over any untaken WTD leave where it was not reasonably practicable to take it in the leave year "as a result of the effects of the coronavirus (including on the worker, the employer or the wider economy or society)".

In terms of leave entitlement that accrues under the Working Time Regulations (the remaining 1.6 weeks of statutory entitlement), it's up to employers whether they want to allow staff (by agreement) to carry it over.

### **Can we force staff to take holiday?**

Yes, you can make them take statutory holiday as long as you give notice of at least twice the length of the period of leave that the worker is being ordered to take (e.g. ten days' notice for five days' leave). In relation to contractual holiday (anything over and above the statutory minimum), you would need to refer to the employment contract and any applicable policies.

In these difficult times, separate from the legal points set out above, it's important to take a pragmatic approach to these issues. If possible, try to agree a consistent and reasonable approach with staff in relation to annual leave.

## What about contractual holiday?

You'll need to check your contracts and policies. In terms of carry over, if staff are entitled to contractual holiday over and above 5.6 weeks' statutory holiday, you could by agreement (either under the contract or by separate express agreement) arrange for it to be carried over.

## What are the legal implications of drafting in staff or volunteers to help manage the current situation?

Simply put, if you have an employee's agreement, you can put into place whatever working arrangements are safe, as long as you're not breaching any regulations in doing so and they are competent to do the job being asked of them. It is important to have something in writing setting out what you want them to do, how long the arrangement will last for, and whether they'll receive anything in return (such as payment or time off in lieu).

## Can we change the work that existing staff do or the way they do it?

As an employer you do have rights to enforce changes to working practices and ways of working for existing staff. If necessary, you can issue a formal instruction to staff in writing ("a reasonable management instruction") and warn them that failure to comply will be treated as a disciplinary matter. However, the instruction does have to be reasonable in the circumstances and you should obviously have regard to the qualifications, skills and competencies of the staff members concerned.

## What action should you take in relation to pregnant staff who can't work from home?

Unfortunately, there is no easy answer to this question. Pregnancy is one of the categories included in the Government's list of vulnerable people, issued on 16 March 2020, which "strongly advises" social distancing and working from home. Given the risk of allowing such an employee to continue working as normal, there are currently at least four possible options:

- The employee signs themselves off work under the new SSP regime and receives SSP or contractual sick pay if applicable. This is likely to be unsatisfactory from the employee's point of view and they might not be willing to do this. It may also amount to indirect pregnancy discrimination.
- Pregnant workers are entitled to a risk assessment and the result will be that it's not safe for them to remain at work. You will then need to suspend the employee on full pay in accordance with regulation 16(3) of the Management of Health and Safety at Work Regulations.
- Depending on how advanced the employee's pregnancy is, she may be able to start her maternity leave early, but you can't force her to do this.

- The final possible option would be to agree to place the employee on furlough leave. Details of the scheme are still emerging, but the latest version of HMRC's guidance was published on 4 April 2020 (click [here](#) for link). If your organisation is busy and the staff fully occupied during the Covid crisis (for example if you are a care home), it may be difficult to argue that furloughing a pregnant member of staff is a genuine alternative to making her redundant. Furloughing vulnerable groups, including pregnant staff, would likely be deemed a proportionate means of achieving the legitimate aim of protecting the health and safety of vulnerable employees as identified in government guidance.

## Where can I find reliable sources of information about employment issues?

[Public Health England and BEIS: COVID-19: guidance for employees, employers and businesses](#) (applicable in England)

[Acas: Coronavirus: advice for employers and employees](#) (relevant to employers throughout the UK)

[HMRC Guidance on Furlough](#)

## What is the effect on obligations to pay rent either by or to a charity or social enterprise under a lease?

The Government has announced that commercial tenants who cannot pay their rent because of COVID-19 will be protected from eviction. This protection will last until 30 June 2020, but the Government has the option to extend the period if needed. However, the guidance is clear that this is not a rental holiday and all commercial tenants will still be liable for the rent.

If an organisation leases space to someone else, it is possible that a tenant may seek to delay payment of rents as a result of COVID-19. It is important to take legal advice prior to engaging in any communication concerning rent arrears with a tenant. There is always a risk of a landlord inadvertently waiving payment of rents as opposed to allowing delay whilst reserving rights to enforce payment at a later date.

## How can we execute deeds and documents when signatories are in isolation?

It is possible that organisations will need official documents signed while trustees/directors and senior management are absent from the organisation in isolation.

If a person is in isolation, electronic signature platforms (such as DocuSign and Adobe Sign) will be an effective and efficient way to get documents signed where a witness isn't needed.

However, if you are executing deeds or other documents (such as a deed of grant) where a witness is required, the witness must be physically present when the deed is signed. At the time of writing, it is not possible under English law for deeds to be witnessed via video link or other remote means.

The witness cannot be a party to the deed or document. Generally, we recommend that witnesses are independent of the signatory in case they are required to independently verify the signature at a future date but there is no strict requirement for the witness to be otherwise independent as long as they can provide evidence that the deed was properly executed. So, although not ideal, there is no legal reason why spouses or family members cannot be witnesses, provided they are not also party to that deed. A person who is isolating at home could therefore ask a member of their household to witness their signature if it is not possible to have the document witnessed by someone more independent.

If you have any questions then please do contact Hempsons using [mail@hempsons.co.uk](mailto:mail@hempsons.co.uk)