

Coronavirus (COVID-19) and the workplace

23 March 2020

LATEST NEWS

Since last week the Government has announced further initiatives:

- Closure of schools, and encouraged the closure of nurseries, except for children of key workers
- Coronavirus Job Retention Scheme (see below)
- Deferring the next quarter of VAT payments, with no VAT payable until the end of June 2020
- Suspending minimum income floor, meaning self-employed can access universal credit at the same rate of SSP available to employees
- Self-assessment payment for self-employed deferred to January 2021.

THIS UPDATE

In this update we cover [Coronavirus Job Retention Scheme](#), the [definition of redundancy](#), the [importance of recording absence](#) and [some more FAQs](#) which are correct as at this date but may be subject to change.

The Coronavirus Job Retention Scheme

Under the Coronavirus Job Retention Scheme, all UK employers will be able to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during this crisis.

The Scheme is initially set to run from 1 March (backdated) until the end of May 2020, but the Government has said that the scheme will be extended if necessary.

How to access the scheme

You will need to:

- designate affected employees as 'furloughed workers,' and notify your employees of this change - changing the status of employees remains subject to existing employment law and, depending on the employment contract, may be subject to negotiation
- submit information to HMRC about the employees that have been furloughed and their earnings through a new online portal (HMRC will set out further details on the information required)

HMRC will reimburse 80% of furloughed workers wage costs, which will be capped at £2,500 per month. HMRC are working urgently to set up a system for reimbursement. Existing systems are not set up to facilitate payments to employers.

If your business needs short term cash flow support, you may be eligible for a Coronavirus Business Interruption Loan.

What does this mean in practice?

To minimise the need for redundancies because of the temporary closure of the place of work, temporary reduction in the need for an employee's role, or a downturn in business, an organisation may ask to:

- "furlough" an employee's employment; and

- reduce their pay (although by no more than 20%).

This means that, even though the organisation is not providing the employee with work, they can continue to pay affected employees through funding they receive from the Government's Coronavirus Job Retention Scheme, which is expected to open "within weeks".

During any furlough period, the employee would:

- continue to be employed by the organisation;
- not carry out any work for the organisation; and
- continue to receive their wages/salary, which may be reduced.

All other terms and conditions of employment including continuity of employment would not be affected during this period.

Unless the employer has a contractual right to lay off workers, it will need to obtain the worker's agreement to be placed on furlough leave. This is unlikely to present an issue in most situations, if the worker is aware that the alternative is redundancy or a period without pay (depending on the individual's contract). Organisations should be clear that they are seeking the employee's cooperation during what is a very unsettling time.

How it will be administered

The Chancellor stated on 20 March 2020 that the system for administering reimbursements is expected to be in operation "within weeks". Further details of how the scheme will operate are expected in due course.

Possible scenarios

1. If you have staff who are currently under lay off, the job Retention Scheme applies:

- If you have the contractual right to lay off without pay (other than the statutory guaranteed payment) then you are now able to pay them up to 80% of their normal pay and reclaim this through to 31 May
- If you have no lay off clause then to send people home you are liable to pay them their normal pay.
 - If you consider redundancies to be a potential outcome, you may propose to those affected employees the option of them becoming a 'furloughed' employee, (staying at home without the need to work), and receiving up to 80% of their pay (subject to the cap) as an alternative to redundancy. You would need their agreement to this.
 - It is your choice to top up the employee's pay to 100% if you are able/willing.
 - If the employee does not agree to the proposed variation to terms, then you are either making their role redundant or maintaining their pay at 100% and only reclaiming 80% (be mindful of consistency in decision making here)

2. If you anticipate a reduction in work for certain roles and you are considering making roles redundant then you need to think about the short and medium term prospects.

Run your calculations:

- what would it cost to make those roles redundant?
- What are the risks?
- If business performance were to improve by June what would it cost to recruit and retrain new staff?
- What other financial assistance could you seek / take advantage of to help you retain staff?

3. Where you have requested and applied a temporary reduction in hours

- If you have asked for more than a 20% reduction in hours and pay: review your business case and consider 1 and 2 above.
- If you have asked for a reduction in pay with no reduction in hours: review your business case. In this scenario, I would suggest you still have work for employees to do, so the Job Retention Scheme would not apply.
- If there is no work for certain roles, then they are genuinely furloughed and can be sent home (with pay / without pay depending on your lay off clause, see above)

Self-employed workers

- If you no longer have work then you no longer offer them work / tell them they are no longer required after [date]. Follow whatever contractual arrangement you have with them.

Zero hours workers

- We are awaiting information from government as to how to calculate the 80% payment if furloughed

Those on casual hours contracts

- We are awaiting information from government as to if the Job retention Scheme applies and, if so, how to calculate the 80% payment if furloughed

Whatever action you are thinking of taking always look at your contract of employments in the first instance. Clauses to look at specifically include:

- Lay off – with pay / without pay?
- Working hours – right to amend?
- Job role and duties – requirement to do other duties?
- Variation to terms – are you required to give a period of notice?

Definition of redundancy

Under s.139 of the Employment Rights Act 1996, an employee is dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to:

- the fact that the employer has ceased or intends to cease:
 - to carry on the business for the purposes for which the employee was employed; or
 - to carry on that business in the place where the employee was so employed; or
- the fact that the requirements of the business:
 - for employees to carry out work of a particular kind have ceased or diminished or are expected to cease or diminish; or

- for employees to carry out work of a particular kind in the place where the employee was employed by the employer have ceased or diminished or are expected to cease or diminish.

The Importance of Recording Absence

It is more important than ever to ensure you are recording employee absence at this time for many reasons including for pay purposes. You may need to backdate your absence records to 1 March as this may affect your claims for SSP, payments under the Job Retention Scheme etc.

If you use our MyHR portal then we have set up all the relevant absence types for you and please contact us with any queries as normal.

For those of you using other systems (online or paperbased) we advise you to record all absence from the (usual) workplace daily to include:

- Lay off
- Furloughed
- Self-isolating
- Sick (Reason - Covid19)
- Working from home
- Unpaid leave
- Parental leave
- AWOL

Those workers who receive a letter from the government as considered at high risk

- If they receive a letter then they should be sent home on SSP. Employee should send a copy of the letter to the company as soon as received.
- If someone chooses to stay off because they are frightened or they believe they are high risk but have not received a letter then they are off work on unpaid leave / annual leave.

SSP reminder on how to calculate

This may seem obvious, but we have had an increasing number of businesses ask us about this, so to clarify

- SSP is currently (during the Covid19 pandemic) payable from day 1 (without the usual 3 waiting days) for sickness absence due to Covid19 (in line with Coronavirus Bill, implementation date to be confirmed).
- If you pay more than SSP for any period of absence, then this should include any entitlement to SSP and you are effectively topping this up to the employees normal pay
- You can then reclaim the SSP element related to Covid19 (if you had less than 250 employees as at 28 February 2020).

Some Questions That We Are Getting Asked

What is the difference between a lay-off and a redundancy?

- A lay-off is a period where the employer does not have sufficient work for the employee, and they are not paid as a result. An employer can only lay off an employee if it has the contractual

right to do so, or if the employee agrees to the lay-off. **It is not usual for employment contracts to include such a provision, outside of certain sectors.** Employees may be prepared to accept a temporary period of lay-off as an alternative to redundancies, for example during the coronavirus (COVID-19) crisis.

- A redundancy is a dismissal that is necessary because the business has closed down, or the employer needs fewer employees to carry out the work.

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

- If an employer closes its business, for example due to the numbers of staff off sick or self-isolating, or because instructed to by the Government, 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.
- 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. This is where the Job Retention Scheme would apply. The scheme is intended to support employers to continue paying employees who would otherwise be made redundant or put on a period of lay-off. It is open to all employers.

Can an employer that is affected by the coronavirus crisis postpone a new recruit's start date or withdraw a job offer?

- Yes, but with caution.
- You may wish to postpone a new recruit's start date as a cost-saving measure, particularly if a temporary reduction in demand means there is no current need for the employee. There may also be practical difficulties in taking on a new employee if, for example, the entire team has switched to working from home.
- Where the employee has accepted a job offer and the start date has been agreed, this will be a term of the contract. The employer would be able to change the start date only with the employee's agreement, otherwise it would be in breach of contract. A new recruit may be prepared to accept such a change if the employer explains the circumstances, particularly if the alternative is that the job offer will be withdrawn.
- Where an employer does withdraw a job offer due to the coronavirus crisis, the employee could claim for breach of contract. It is likely that the compensation would be limited to payment for the notice period under the contract. To avoid such a claim, the employer could give the employee notice of termination and pay them for the notice period. The employer should ensure that the reasons for the decision are well documented, to avoid any allegation of discrimination.

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

- 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.
- Current government guidance is that employers should encourage all employees to work from home, wherever possible. If an employer has a policy that employees should not be responsible for looking after their children at the same time as working from home, it may need to relax this policy.
- Where working from home is not possible, employers will need to consider alternative arrangements, such as 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 twice as much notice as the duration of the leave.
- Children of employees in sectors that are critical to the response to the coronavirus outbreak will still be able to attend school. The government guidance on maintaining educational provision includes a list of the sectors covered.

What measures can be taken to protect the most vulnerable workers who do not receive a letter requesting they self-isolate for 12 weeks?

- Some people are more vulnerable to coronavirus and are statistically at a higher risk of suffering severe symptoms or fatality, for example, the elderly, pregnant women and those with underlying health conditions (such as diabetes, cancer, asthma, COPD, or heart disease) and those who are otherwise immunosuppressed. Social distancing guidance strongly advises that such workers work from home if practical, and if not, vary their working hours to minimise rush hour commuting. Such workers, or those with close dependants who are vulnerable, may be understandably fearful of contracting coronavirus and keen to minimise the risk of doing so.
- For disabled workers, the employer has a positive legal duty to make reasonable adjustments to remove any substantial disadvantage they face accessing work due to their disability. For pregnant workers, the employer should update their risk assessment and consider how the risks can be mitigated. However, outside of those duties, employers should consider whether it is practical to agree temporary variations to the working conditions of vulnerable workers (irrespective of disability), for example:
 - Can working hours be varied, to allow the worker to avoid rush hour commuting on public transport?
 - Can the worker be allowed to work from home as much as possible?
 - Can they be removed from higher risk front-line customer facing duties?

- Can they be allowed to take some of their accrued annual leave, or a period of unpaid leave, during the peak of the pandemic?

A worker who should be in self-isolation wants to return to work before the isolation period is over – can we stop them doing so?

- In many cases the period of self-isolation is 'recommended' by government advice (e.g. guidance on the NHS 111 website), it is not 'compulsory' or a 'legal obligation' placed upon the worker. Firstly, consider whether you have an express right to require the employee to stay at home (e.g. you may have an infectious diseases policy that addresses this point). If not, it may be possible for you to suspend the employee on health and safety grounds because their return to work during the self-isolation period may increase the risk of infection for other staff. However, you may be required to continue to pay the employee's wages in this case. Some employers are taking a robust approach and only paying sick pay in accordance with the contract for any time spent self-isolating under government advice. Alternatively, consider whether agreement can be reached to permit the worker to work from home (and therefore continue to be paid as usual).

Have you considered everything that the government is offering?

- You will need to be able to confirm this to staff when you communicate your decision making. This is complex and we need to get creative as to how we can retain jobs, so you are ready
- The Chancellor has set out a package of temporary, timely and targeted measures to support public services, people and businesses through this period of disruption caused by COVID-19. The intention is to support businesses to continue to survive so they are ready to thrive when the tide turns. Organisations need to be taking advantage of all relevant support.
- How you treat people in these times of crisis will affect your reputation for future employees.

A note on communications

Make sure you have a communications plan in place to provide your workforce with regular situation updates, as well as any actions taken by the business during the emergency measures period.

We strongly recommend you build / continue to add to, a **Frequently Asked Questions (FAQs)** document during this time, to keep your workforce informed as the situation changes. This way you can ensure everyone is getting the same message that is relevant to your business. Critical if you have homeworkers and workers in isolation too.

We're Here to Help

If you have any specific questions, please contact us.

As we are experiencing an exceptionally high volume of calls at the moment, **we ask that you email your specific HR Advisor, Claire, Rachel or Katie** and provide them with a contact number for you so they can call you back as soon as possible.

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Rachel@p3pm.co.uk

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We will of course provide further updates as soon as we know anything.