

COVID-19 (Coronavirus): Frequently Asked Questions (FAQ)

- as at 27 March 2020

Business Advice

provided courtesy of the Scottish Craft Butchers employment lawyers, Lindsays

In light of the COVID-19 pandemic, set out below are some frequently asked questions. This is a fast-moving situation and you should always check the latest Scottish and UK government guidance and seek advice on specific situations.

On 23 March 2020 the UK government's approach to managing the coronavirus outbreak changed. The government now requires all those who can work from home to do so and to stay at home unless required to go out for food, health reasons or essential work. Those who must leave home to travel to work may do so, but only if this absolutely cannot be done from home and should remain at least 2 metres from other people.

Full guidance here: <https://www.gov.uk/government/publications/full-guidance-on-staying-at-home-and-away-from-others/full-guidance-on-staying-at-home-and-away-from-others>

The Government has produced further guidance listing **businesses which must close**: <https://www.gov.uk/government/publications/further-businesses-and-premises-to-close/further-businesses-and-premises-to-close-guidance>

The Scottish government has indicated that it will produce guidance on businesses which must close in Scotland and at present it is unclear whether this will differ from the list for England and Wales. The Scottish government's position is subtly different in that it has stated that employees should only leave home '*to travel to essential work if that cannot be done at home*'. As Scottish specific guidance is available it will be circulated.

The FAQs below must be read in light of the above.

1. Sickness, Self-Isolation and Pay

1.1. If an employee has an existing health condition that places them in the vulnerable group category and they choose to self-isolate for 3 months, what should they get paid?

Government guidance presently states that those with underlying health conditions should minimise social contact and should work from home, where they are able to do so.

Employees who fall within this vulnerable group should therefore be encouraged to explore working from home and you should try to accommodate this. However, where this is not possible, and the employee is well enough to attend work, they should continue to do so. Ensure appropriate steps are taken as appropriate e.g. additional hygiene measures,

permitting late starts to avoid public transport at peak times. Employers are encouraged to be sympathetic, to listen to and address such vulnerable employees' concerns as much as possible.

Vulnerable, but well employees who choose to self-isolate are not currently entitled to Statutory Sick Pay ('SSP') because they have not been advised to self-isolate, but to minimise social contact. If, however the employee becomes unwell, or lives with someone who is unwell, they should self-isolate in accordance with government guidance and will be entitled to SSP.

Where you have asked a vulnerable employee to stay at home you should pay them in full unless they become unwell in which case they will be entitled to SSP.

If you consider that the employee may have a disability for the purposes of the Equality Act 2010 or are concerned about potential disability discrimination, or if the employee is pregnant, please seek specific advice.

Particularly vulnerable people who are at higher risk of severe illness as a result of COVID-19 will be directly contacted by the NHS and be required to follow stringent 'shielding' advice.

1.2. Is an employee who is self-isolating as a precautionary measure without symptoms entitled to Contractual or Company Sick Pay ('CSP') as well as SSP?

The emergency SSP legislation provides that a person is deemed incapable of work where he is: "isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus disease, in accordance with guidance published by Public Health England." Therefore, provided that the employee is acting in accordance with advice and they cannot work from home, they should receive SSP.

However, as CSP is a contractual benefit, the emergency SSP legislation isn't determinative. An employee's entitlement will depend on the wording of the contract and any applicable policy. It is therefore possible that CSP will not be payable, if for example the conditions for payment cannot be met or it is stated to be only payable to employees who are sick as opposed to being unavailable for work due to self-isolation.

Note: Although permissible in our view, this approach may be unpalatable from an industrial relations perspective. It may also discourage employees from self-isolating under current guidance. We therefore suggest that where you intend to adopt this stance, you are prepared to explain the rationale behind the decision to restrict the definition of 'sickness' for the purposes of CSP.

1.3. What are an Employer's options for revoking/varying what are now considered to be 'overly-generous' contractual CSP provisions?

You would need to seek consent from each employee in order to change their contract of employment. It is likely that such consent will be difficult to obtain at present. If CSP is genuinely discretionary it may be withheld. Bear in mind however that if CSP has been invariably paid for a specific period – e.g. up to four weeks a year – it may have become a contractual term by long use. If in doubt, seek advice.

1.4. If a pregnant employee chooses to self-isolate, are they entitled to SSP?

In accordance with government advice, pregnant women should be careful to minimise social contact, however, they are not presently required to self-isolate simply because they are pregnant. Pregnant employees should therefore be encouraged to explore working from home and you should try to accommodate this. However, where this is not possible, and the employee is well enough to attend work, they should continue to do so.

Note: Please seek specific help in circumstances of pregnant employees before reaching a decision as more complex requirements apply to pregnant staff, including the obligation to carry out specific risk assessments.

1.5. What help can I get with SSP?

Small and medium sized businesses can reclaim up to 14 days of SSP paid to staff who have been unable to work because of coronavirus. The support is available to employers:

- with under 250 staff as at 28 February 2020
- whose employees have claimed SSP because of absence due to coronavirus – i.e. who have symptoms or who have been required to self-isolate in accordance with NHS or government public health guidance.
- Employees unable to work because of coronavirus on or after 13 March 2020 – i.e. who have symptoms or who are required to self-isolate on medical advice – are entitled to SSP from the first day of absence and do not have to serve three 'waiting days'.
- The process for seeking repayment is not yet finalised.

Does it apply to employees who are off sick for a reason other than Coronavirus?

Initially it was understood that all employees who were off sick from 13 March would be entitled to SSP from day 1. It now appears however that it will only be for those unable to work because of coronavirus.

1.6. What proof do employees have to give of sickness?

Employees need only self-certify for the first 7 days of sickness absence.

On 19 March the government introduced an alternative certification process for employees who have been absent for over 7 days – the online isolation note [NHS 111 online](#). This can be emailed direct to the employer. It is recommended you keep full records of staff absence and payments of SSP, including the online isolation notes to seek refunds. GP fit notes will not be required for the refund process.

2. Lay Off and short time working

2.1. What is lay off?

Laying off employees means that the employer provides no work (and no pay) for a period of time while retaining them as employees.

2.2. What is short time working?

Short term working means providing employees with less work and less pay for a period of time, while retaining them as employees. To constitute short term working, individual employees need to earn less than half their normal week's pay

2.3. Can any employer introduce it?

An employer can lay-off employees or place them on short time working where they have the contractual right to do so. If this is the case, and you wish to introduce either measure, we recommend you meet the employees to confirm the situation facing the business and explain that in order to try to protect their continued employment, you will place them on short-time working or lay them off temporarily until the effects of the current pandemic are resolved or demand increases.

You cannot enforce lay-off or short-time working if there is no contractual right to do so. Please seek further advice on the correct process to follow in that case.

Note: In light of the Government's new Coronavirus job retention scheme, we recommend all employers offer staff the option of being placed on 'furlough' on payment of a proportion of pay which will be reimbursed by HMRC. Further details below.

2.4. What is the Government's Coronavirus Job Retention Scheme and can I access it?

All UK employers are eligible to claim financial support for the salaries of employees who would otherwise have been laid off as a result of the coronavirus crisis.

Called 'Furloughed employees' they must have been on your PAYE payroll on 28 February 2020, and can be on any type of contract, including:

- full-time, part-time employees
- employees on agency contracts, flexible or zero-hour contracts

The scheme also covers employees who were made redundant since 28 February 2020, if they are rehired by their employer.

To claim, employers must:

- Designate affected employees as 'furloughed employees'
- Notify their employees of this intention in writing – if no contractual entitlement to lay off exists, consent will be required – keep this record for 5 years
- Submit details of furloughed employees and their earnings via a new HMRC online portal

HMRC will reimburse up to 80% of wages of furloughed employees, to a maximum of £2,500 per month. The support will be available for three months initially, backdated to 1 March 2020.

Note: Care does need to be taken over how the lay off or furlough process is carried out and we recommend you consider all the options first.

Further Details - **Job retention scheme update 5th April 2020**

Furloughing employees

To be eligible for the grant employers must confirm in writing to their employee, that they have been furloughed. A record of this communication must be kept for five years.

Past overtime, fees, commission, bonuses and non-cash payments

The updated guidance says

- Claims can include any regular payments you are obliged to pay your employees. Including wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded

This appears to clear up the question about overtime. If you **regularly** pay certain workers overtime, you can include this in the furlough pay calculation and claim the grant on this amount. Employers should use the averaging calculations described in earlier updates to work out the average pay due to workers as a basis for their claim. It would however imply that if overtime is occasional, the workers' basic wage should be used instead.

Since the grant excludes non-cash benefits, employers will not be able to claim for benefits normally paid to employees such as childcare vouchers and health care.

Apprentices

- Can be furloughed in the same way as other employees and continue to train while on furlough, however you must pay your apprentices at least the Apprenticeship Minimum Wage, National Living Wage or National Minimum Wage as appropriate, for all the time they spend training. This means you must cover any shortfall between the amount you can claim for their wages through this scheme (80% or £2,500) and their appropriate minimum wage.

Employees with caring responsibilities

- Employees who are unable to work because they have caring responsibilities resulting from COVID-19 can be furloughed. For example, employees that need to look after children.

Employees on fixed term contracts

- Employees on fixed term contracts can be furloughed. Their contracts can be renewed or extended during the furlough period without breaking the terms of the scheme. Where a fixed term employee's contract ends because it is not extended or renewed you will no longer be able claim grant for them.

Company directors

- Salaried company directors are eligible to be furloughed and receive support through the job retention scheme. The company (through its Board of Directors) should consider the decision to furlough one or all the directors and this decision should be formally adopted as a decision of the company, noted (presumably by way of a minute) in the company records and communicated to directors.
- Where furloughed directors need to carry out certain duties to fulfil the statutory obligations they owe to their company, they will be allowed to do only that and still claim the grant
- Directors while on furlough should not be carrying on any kind of 'normal' work for example tasks which are intended to generate commercial revenue or provides services to or on behalf of their company.
- This also applies to salaried individuals who are directors of their own personal service company.

Benefits in Kind and Salary Sacrifice Schemes

- Reference salaries for the purpose of the grant, should not include benefits in kind or benefits obtained under salary sacrifice arrangements (including pension contributions). Employers, however, will be required to provide benefits to employees while on furlough under the terms of employees' contracts of employment.
- Normally, an employee cannot switch freely out of a salary sacrifice scheme unless there is a life event. HMRC has clarified that COVID-19 counts as a life event which could warrant changes to salary sacrifice arrangements, if the relevant employment contract is updated accordingly. If one of your employees therefore wants to come out of a salary sacrifice agreement, you will need to agree to this and put the change in writing as a variation to the employee's contract of employment.

National Minimum Wage

- Workers are only entitled to the National Living Wage/National Minimum Wage/Apprentices Minimum Wage for the hours they are working or treated as working under minimum wage rules. This means that furloughed workers who are not working can be paid the lower of 80% of their salary or £2,500 even if, based on their usual working hours, this would be below their appropriate minimum wage.

Minimum furlough periods

- Government has confirmed that employees can be furloughed multiple times, but each separate instance must be for a minimum period of 3 consecutive weeks.

Making claims

- Claims should be made using the amounts in your payroll - either shortly before or during running payroll. Worker's wages should be reduced to 80% (or £2,500) of their salary within your payroll before they are paid.

You can view the full guidance here:

<https://www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme#how-much-you-can-claim>

Some questions remain, for example, whether staff can take holidays while on furlough and if so, should they be paid at 100% or 80% of regular wage?

REMEMBER: You will only be able to claim the grant if you have followed the guidance and correctly furloughed your employees. **This includes making sure you have their agreement in writing.**

If you have not already done so, you need to enrol for PAYE online services. This can take up to 10 days. If you have a Government Gateway login you should check to make sure you have access to PAYE for employers and if not, request for this to be added to your account. Follow the guidance here: <https://www.gov.uk/payee-online/enrol>

The updated guidance states that HMRC will check your claim, and if you're eligible, pay it to you by BACS to a UK bank account.

2.5. What are my options if I don't have the contractual right?

We recommend you consult your employees and explain the difficult situation you are in and ask them to agree to being laid off, placed on short time or 'furloughed' temporarily. Consent would be required but may be easier to achieve if the alternative is compulsory redundancies.

2.6. Can a reduction in hours be permanent? And how would this apply to part-time staff?

Where employees agree to a reduction in hours, it would usually be temporary as a permanent reduction in hours would require a more substantive consultation and contractual variation to minimise the risk of claims.

In terms of part-time staff, this should be considered on a case by case basis. If the part-time employee is able to work fewer hours, then ask them if they will agree to do this. However, if in practical terms, this reduction in hours will mean that they cannot be productive, then you do not need to ask them to do so and they can remain on their normal hours while full time staff reduce theirs.

2.7. If an employer decides to lay-off or place its employees on short term working, should it give a timescale?

In an ideal situation, employees should be given a timescale for when normal working hours will resume. However, at present, we do not know how long the pandemic will last and it may not be possible to give an accurate or any timescale. It is recommended that wording such as "until such time as the situation improves and the Government advice

changes” be adopted to provide employees with a (albeit vague) timescale. It is recommended you keep the situation under regular review and keep employees up to date – for example every two weeks.

Note: Care is needed where lay off or short time working (under 50% of hours/pay) lasts for more than 4 continuous weeks or 6 discontinuous weeks as employees may be able to trigger entitlement to a redundancy payment. Keeping in touch with employees and keeping them updated on when you expect to re-open or resume business is vital to keep them on your side.

For as long as the Government’s Coronavirus job retention scheme is available – and this will be three months initially – the risk of redundancy pay claims being triggered by a lengthy lay off, is substantially reduced. It is nevertheless recommended the situation is kept under regular review and employees kept informed.

2.8. Where an employee who has been laid off or placed on short time working falls sick or is advised to self-isolate, are they entitled to SSP or CSP and if the last, at what rate?

An employee who is laid off but falls sick is unlikely to be entitled to SSP as they are not absent from work because of sickness or deemed sickness – they are absent because they have been laid off. Entitlement to CSP will depend on the terms of your absence management policy.

From a PR perspective, it may be worth considering whether to pay for periods of sickness during lay off. It is also worth bearing in mind the government will meet the first 14 days of SSP for staff who are off sick with, or self-isolating because of, Coronavirus and this will therefore meet some of your costs.

Entitlement to SSP for ‘furloughed’ employees is unclear. Further details are awaited.

Employees who are working short time will be entitled to SSP or CSP in the usual way. Whether they are entitled to full CSP based on their salary before lay off will depend on the terms of their contractual entitlement and your policy.

2.9. If an employer asks its employees to take a pay cut, how much notice should be given?

As the employer in this scenario is asking employees for approval, it is not a question of giving notice as the employees are being asked to agree to both the pay cut and the date it starts. It is important to remember that the shorter the “notice period”, the less likely employees will agree to the reduction in their pay.

3. Working from Home

See above introduction on changes to the government’s approach from 23 March 2020

3.1. Can employers ask their employees to work from home and what should the employer do if the employee refuses?

You can ask that an employee work from home and in the current circumstances this is likely to be a reasonable request. Where an employee unreasonably refuses to do so, you may wish to consider disciplinary action

3.2. Can an employer refuse to allow an employee to work from home?

See above introduction on changes to the government's approach from 23 March 2020

The current government guidance on vulnerable employees is that the employer should help them work from home where possible.

In respect of employees who are not vulnerable, in the current climate it is in your interests to get employees working from home as efficiently as possible and from 23 March 2020 this is required save for essential work which cannot be done from home – and see link to UK government guidance on businesses which must close. However, there are a lot of practical issues that need to be addressed and you may have limited capacity to address these. In particular, IT departments will likely be at full capacity and employees need to understand the exceptional circumstances and have patience.

Be clear that you are not unreasonably refusing requests to work from home but in the circumstances, you cannot accommodate their request due to practical constraints. We recommend documenting the request and reasons for refusal. If the request is made as a formal flexible working request, ensure you follow the appropriate procedures.

From 23 March where employees cannot work from home, unless they are performing essential work in accordance with government guidance, we recommend they are placed on the furlough scheme either under a contractual lay off term or with consent. If they do not consent, contact us to discuss.

3.3. What health and safety duties do employers have?

You have a duty to provide a safe place of work for your employees – whether they are office or home based. However, as you will appreciate this presents practical difficulties when the employee works from home. Those difficulties are magnified in current circumstances when the number of employees working from home has dramatically increased with a number doing so for the first time. The duration of home working will likely be significantly longer than previous arrangements where employees may have worked from home, one or two days per week.

We recommend you follow the Health and Safety Executive guidance for Home Workers which is available here: <https://www.hse.gov.uk/toolbox/workers/home.htm> and the additional HSE advice produced on coronavirus.

4. Childcare considerations

4.1. With schools closed, what duties do employers have towards employees with childcare responsibilities?

Employees have the right to take unpaid emergency time off for dependants/unpaid parental leave. Emergency time off is usually only 1 or 2 days to make alternative

arrangements, whereas unpaid parental leave can be for up to 4 weeks a year or longer if you agree. Given the circumstances, it may be wise to relax usual notification periods for taking these types of unpaid leave as employees may have no alternative childcare options. Employees may also request to take annual leave or make any alternative working arrangements such as compressed hours or working from home. Where possible, you should try to accommodate.

5. Other ways of cutting costs?

5.1. Are there other ways of cutting costs?

If short time working or lay-offs are not an option, despite the new coronavirus job retention scheme, you may need to consider redundancies. Employees with less than 2 years' service can be made redundant with fewer risks and costs than longer serving staff as they cannot claim 'ordinary' unfair dismissal. Care will be needed however – for example to minimise the risk of discrimination claims and, in particular, age discrimination.

If more than 20 employees are at risk of redundancy in a 90 day period a full process of collective consultation is required, lasting between 30 and 45 days, involving employee representatives and notification to the Secretary of State.

In these exceptional circumstances, full consultation may not be possible, and consideration can be given to whether the employer can rely on what is known as the "special circumstances" defence. This is rarely accepted, and we recommend consulting as much as feasible and seeking prompt advice on redundancy procedure.

Regardless of how many employees are at risk, employers should follow a fair and reasonable process to minimise the risk of claims for unfair dismissal. This usually includes consulting with the employees, fair and transparent selection and considering alternative employment. Normally this process will take a minimum of 2 weeks (subject to longer collective consultation requirements) however some employers have seen their business disappear overnight and, in the current circumstances are shortening this period.

We recommend taking advice before starting a redundancy process.

5.2. Can an employer ask its employees to take all of their holidays to avoid having to formally close their office?

You can *ask* employees take holidays, but you can only *insist* that they do by giving twice as much notice as leave to be taken. First, required notice may be impractical and second, we consider that given the restrictions on the quality of leave during 'lock down' or stringent social distancing, the necessary quality of holiday is unlikely to be achieved

At present we do not therefore recommend that employers require staff to take holiday during lay off or furlough. If staff ask to take holiday this can be permitted.

5.3. If an employer opts to dismiss employees with less than 2 years' service, why is there an age discrimination risk?

The discrimination risk exists because employees with short service are more likely to be younger than those with longer service. Given the present circumstances, it is a risk that may need to be taken and before proceeding, it is advised you take advice to discuss how to minimise the risk.

5.4. If redundancies are necessary, can this process be carried out remotely?

It is quite possible to undertake the redundancy process by video conference, skype or telephone conference. The normal practice is that a face to face meeting should be arranged, however given that the government guidance is that close contact – especially with larger groups - should be limited or avoided, you are unlikely to be overly criticised for carrying out these meetings remotely.

6. Workplace closure.

We have been told to close. What do we tell staff and do we need to pay them?

From 20 March 2020, the government required businesses such as cafes, pubs and restaurants, to close and other businesses, such as theatres, leisure centres and gyms to close as soon as possible to extend and enforce social distancing.

This is uncharted territory and we recommend that employers review government guidance on the impact on staff contracts and if possible, use the government's Coronavirus job retention scheme. Details as above.

If you voluntarily close the workplace or ask employees to stay away from the workplace you should pay them in full.

7. Self Employed

- 7.1.** For people who work for you but on a self-employed basis they will need to follow the following guidelines. However, bear in mind any contractual obligations you have with them.

<https://www.gov.uk/guidance/claim-a-grant-through-the-coronavirus-covid-19-self-employment-income-support-scheme>