

EMPLOYMENT AND INDUSTRIAL RELATIONS

COVID-19: Practical Considerations: FAQ for employers in Northern Ireland

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The coronavirus situation is continually and rapidly evolving and we encourage you to keep up to date with guidance from the Government and Public Health Agency. These FAQs provide guidance on self-isolation, SSP, home working, temporary lay-off and short-time working. If you have a particular concern, specific advice should be obtained.



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WHAT CAN WE DO ABOUT EMPLOYEES WHO ARE AFRAID TO COME TO WORK BECAUSE OF CORONAVIRUS?

While many organisations are implementing home working, there are still some businesses continuing to function as normal in the absence of government guidance to close.

As a general tip, employers should encourage open dialogue with their staff where concerns can be voiced; this will help businesses assess if concerns are genuine and reasonable. Particular caution should be exercised in relation to high risk employees. In these circumstances, employers should meet with the employee and discuss possible flexible working arrangements such as homeworking.

If employees refuse to attend work due to genuine concerns about contracting Covid-19, you may consider letting employees take unpaid leave or using their annual leave. Ultimately, it is a balance of taking action that will be least disruptive to business needs whilst also trying to maintain good working relationships with employees.

If an employee refuses to attend work, technically this could constitute an unauthorised absence which may be dealt with via disciplinary action. However, we recommend that specific legal advice is sought in this scenario given the unique underpinning circumstances.

DO EMPLOYERS HAVE TO PAY EMPLOYEES WHO ARE SELF-ISOLATING?

Employees who can continue working from home

If employees are self-isolating as a precautionary measure, depending on the nature of their role, they may be able to continue working from home. In such instances, employees would continue to receive full pay because they are still fulfilling their duties to their employer.

Employees who cannot work from home and have no symptoms

The general position was that there was no automatic right for employees who are self-isolating with no symptoms and who cannot work from home to receive SSP.

However, given the unprecedented circumstances of the Coronavirus pandemic, emergency legislation has been introduced. The Statutory Sick Pay (General) (Coronavirus Amendment) Regulations (Northern Ireland) 2020, amends the general statutory sick pay ("SSP") legislation to enable those who are self-isolating on advice from Public Health to be deemed 'incapable of work' for the purposes of receiving SSP.

Essentially, employees who are self-isolating or socially distancing as a precautionary measure in line with Public Health advice may be entitled to

SSP provided that they satisfy the other eligibility requirements.

Employees who develop symptoms

If employees who are self-isolating develop symptoms and become unwell, they will usually be entitled to either company sick pay or statutory sick pay ("SSP") in the usual way.

Employers should keep a close eye on the emergency legislation being introduced and also on NI specific guidance and/or legislation that may follow.

WHAT INFORMATION CAN EMPLOYERS COMMUNICATE TO THEIR WORKFORCE IF AN EMPLOYEE TESTS POSITIVE TO CORONAVIRUS?

Communicating information about an individual's health will constitute processing of sensitive personal data under the GDPR. In accordance with Article 9 of the GDPR, employers must satisfy an additional lawful basis for processing this personal data.

It is unlikely that one of the additional processing grounds under Article 9 would be appropriate in the circumstances. Therefore, employers will need to ensure that any communication does not actually identify the individual.

At the same time, it is important that employers provide a safe working environment for the rest of the workforce. Notifying other employees in the same location as the infected employee would be necessary step to ensure that those in close contact with the employee can take precautionary measures and get tested for the virus.

Depending on the size of the workforce, it is possible that other employees will be able to work out which employee is suffering from coronavirus without the employee actually identifying them. Nevertheless, it is important from a data protection perspective that the employee's identity is not divulged by the employer unless the employee has given their explicit consent.

WHAT HELP IS AVAILABLE TO SME'S AND SELF-EMPLOYED?

Help for employers grappling with COVID-19 as announced in the 11 March 2020 Budget includes:

Small and medium sized businesses

UK businesses with under 250 employees as at 28 February 2020 can claim back statutory sick pay paid to staff suffering from Covid-19 or those who have been

advised to self-isolate as a precautionary measure in line with Government advice. This is in addition to the change announced by the Prime Minister that SSP will be payable from day 1 instead of day 4 for affected individuals.

Gig economy workers

Individuals who have Covid-19 or who are self-isolating in line with government guidance but are ineligible for SSP, for example, those who are self-employed, will be able to make claims for support more easily, namely:

- Universal Credit can be obtained up-front without having to visit a job-centre; and
- Contributory Employment and Support Allowance (ESA) can be claimed from day 1 rather than day 8.

On 13 March 2020, the Employment and Support Allowance and Universal Credit (Coronavirus) Regulations (Northern Ireland) 2020 were implemented to expressly legislate for the above measures.

Medical Notes

People who are advised to self-isolate for COVID-19 will soon be able to obtain an alternative to the fit note to cover this absence by contacting NHS 111, rather than visiting a doctor. This can be used in place of Fit Notes for sick pay purposes.

HOME WORKING CONSIDERATIONS

Are we obliged to consider working from home given current circumstances?

Yes, for certain categories of workers. This week, the UK Government "strongly advised" working from home for certain types of employees where possible – individuals over 70, pregnant employees, individuals under 70 with underlying health conditions such as chronic (long-term) respiratory diseases (asthma, COPD, emphysema), chronic heart or kidney disease, chronic neurological conditions, such as Parkinson's disease, motor neurone disease, multiple sclerosis (MS), a learning disability or cerebral palsy, those with weakened immune systems or who are seriously overweight.

The guidance also states that all other workers are "advised" to work from home and use less public transport, where possible. As such, employers should address their minds as to whether working from home is a feasible option for their workforces or categories of staff.

What about employees who will also be looking after children sent home from school? How can they work from home?

In normal circumstances, it wouldn't be appropriate for an employee to work from home and look after his/her children at the same time. However, these are exceptional circumstances and employers are encouraged to be practical and pragmatic. Many parents will face childcare issues given that schools and nurseries in NI are now closing. Employers may be expected to take a more flexible approach to homeworking in the circumstances allowing staff to work around their childcare responsibilities. Much will depend on the age of the children and the home dynamics, some parents may opt for dependent's leave – time off in these circumstances will generally be unpaid unless there is a contractual right to pay.

However, given the potential duration of any school closures, many employees are likely to prefer the option of undertaking homeworking if their employer allows it (rather than assert any statutory right to unpaid leave for childcare). See also Labour Relations Agency guidance at www.lra.org.uk.

What about health and safety considerations?

Under both statutory legislation and the implied terms in the employment contract, an employer has to take reasonable care to ensure that it is providing a safe system of work.

This can be done relatively easily for homeworkers by communicating with staff to ensure their temporary workspace is suitable with appropriate equipment provided to enable the work to be done. The most important element is clear channels of communication – work should be organised in such a way to ensure regular breaks and that employees are able to separate their work and personal lives.

In terms of the provision of any equipment, most employers will provide basic equipment at least. It is advisable to consider this on a case-by-case basis – particularly where the employee may suffer from a disability and the provision of such equipment could be considered a reasonable adjustment.

Staff may want to use company computer equipment to ensure compatibility as well as maintenance of virus protection and other security measures. If the employee will be using their own computer equipment or mobile, you may wish to agree whether or not

the employer pays for any maintenance. For example, some employers are using a “quid pro quo” given the offset in commute costs for employees but much will depend on the specific circumstances.

How do we manage and monitor staff?

Out of sight shouldn't mean out of mind. Some employers may already have homeworking policies in place which they can turn to in the current climate. Whether or not you have any formal policies for management guidance, you should consider adapting your reporting and review procedures, as well as individual management styles. This will be important both for the employee – who may otherwise feel isolated and without support – and the employer – as you will need to monitor the quality and/or quantity of the employee's output and retain the relevant level of control over the relationship.

Consider formalising the contact that homeworkers should have with their manager (for example being required to report in at least once per day).

In summary, top tips for managing homeworkers include:

- Keep up interactions – daily conference calls/catch ups.
- Send daily/weekly updates to your team so that each person knows what the other team members are working on.
- Check that all employees have appropriate working equipment and that a support network is in place for technical difficulties.
- Employees should be encouraged to take breaks to ensure productivity remains high.
- Remind staff that confidential information or documentation must be kept in a private and secure location.

TEMPORARY LAY-OFF AND SHORT-TIME WORKING

The rapidly evolving Covid-19 pandemic has resulted in many businesses having to take drastic and urgent measures. We are receiving many queries in relation to temporarily laying-off employees or reducing their hours. We have prepared this briefing note to provide some general guidance but we recommend that specific advice is obtained.

What is temporary lay-off?

Laying off employees means that the employer provides employees with no work (and no pay) for a period while retaining them as employees. Essentially this is a temporary redundancy and

enables employers to make financial savings during a period of economic downturn while retaining staff.

What is short-time working?

Short-time working occurs where a diminution in the work given to employees by their employer results in employees receiving a substantially reduced wage.

Employers are not under any duty to provide employees with work, but they are under a duty to pay their employees if the employees are ready and willing to work. Therefore, there will usually need to be a clause within employment contracts that permits employers to temporarily lay-off staff or place them on short-time working.

We have set out below different situations that employers may face in relation to laying off staff or reducing their hours as a result of the Coronavirus pandemic.

In what circumstances can employers lay-off employees or place them on short-time working?

Contractual provision

Employers should check their employment contracts to ascertain whether they contain an express provision on temporary lay-off and/or short time working, for example:

“If there is a reduction in work, we may temporarily lay you off without pay or reduce your working hours and your pay proportionately. Depending on the circumstances you may have a statutory right to a guarantee payment.”

If there is an express provision within the employment contracts, employers may lay-off their employees temporarily without pay and/or reduce their working hours and pay accordingly.

There is no limit on the time frame for temporary lay-off but employers should be aware that if any lay-off extends beyond four consecutive weeks, employees may opt to take redundancy and obtain a statutory redundancy payment.

No contractual provision

If there is no express contractual provision permitting employers to temporarily-lay off staff, employers cannot lawfully lay-off their employees without pay. The position is the same in relation to short-time working and employers do not have a unilateral right to reduce employees' hours and pay.

Laying-off employees or placing them on short-time working in the absence of a contractual right to do so could leave employers exposed to claims for:

- (a) Constructive dismissal (repudiatory breach of contract); and/or
- (b) Unlawful deductions from wages.

What can employers do if there is no contractual right to lay-off or short-time working?

Employers should consult with affected employees to discuss the reasons for and nature of the proposed lay-off or short-time working, with the view to obtaining the employees' consent. If employees do consent, it is important that this is documented in writing in order to mitigate any potential future claims.

In very limited circumstances employers may have an implied right to temporarily lay-off employees due to custom and practice - employers would have to demonstrate that employees could not have commenced employment without viewing temporary lay-off as part of the contract.

Statutory guarantee (lay-off) payments

Even if employers have a contractual right to lay-off employees without pay, employees may still be entitled to statutory lay-off payments (guarantee payments), in accordance with Article 60 of the Employment Rights (Northern Ireland) Order 1996.

Guarantee payments are currently capped at £29.00 per day in Northern Ireland. They are calculated based on the number of days an employee normally works e.g. if an employee works three days per week, they would receive a maximum of £29.00 x3 in any three month rolling period. Therefore, the current maximum guarantee payment is for five workless days at £29.00 which equates to £145.00.

The calculation method for guarantee payments is set out under Article 62 of the Employment Rights (Northern Ireland) Order 1996. The method can prove rather difficult if employees do not have normal weekly working hours.

Guarantee payments are subject to tax and national insurance contributions.

Can employees who have been laid off claim a statutory redundancy payment?

This will depend on the length of the lay-off. If employees have been laid off with no pay (save for a statutory guarantee payment) for four consecutive weeks or for six weeks within a period of 13 weeks, they may be eligible for a statutory redundancy payment, provided that the employee also has two years' qualifying service.

The fact that employees have received a guarantee payment will not prevent the employees being entitled to a statutory redundancy payment.

Can employees placed on short-time working claim a statutory redundancy payment?

The same criteria apply to employees on short-time working. However, in order to be eligible for a redundancy payment,

employees must be receiving less than half of their normal weekly pay as a result of the short-time working.

What benefits are available for employees who have been laid-off?

It is possible that the employees who are temporarily laid-off may be able to claim the following benefits:

Universal Credit

- on a low income or out of work

- 18 or over (there are some exceptions if you're 16 to 17)
- under State Pension age (or your partner is)
- applicant and their partner have £16,000 or less in combined savings
- live in the UK

Job-Seekers Allowance

- Up to age 24 – up to £57.90 per week
- 25 or over – up to £73.10 per week.