

Coronavirus and Employment Law Implications

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Furlough and Government Guidance on the Coronavirus Job Retention Scheme (CJRS)

- Support for employers who cannot cover staff costs due to COVID-19
- The Scheme is not limited to those employees who would otherwise be made redundant. It applies to any who are furloughed "by reason of circumstances as a result of coronavirus or coronavirus disease" (Treasury Direction(TD)). Furthermore, the government guidance states employers who cannot maintain their current workforce because their operations have been severely affected by coronavirus can make a claim under the CJRS. The link to the TD is at the bottom of the page
- If an employer intends to access the CJRS, they will discuss with the employee the option of being classified as a furloughed worker
- To claim furlough, an employer must provide written confirmation to the employee, but it is not necessarily a requirement for the employee to provide a written response. A record of this communication must exist and be kept for a minimum of 5 years
- An employee must be furloughed for a minimum of 3 consecutive weeks to be eligible
- An employer will be able to claim a grant of up to 80% of the employee's usual monthly wage costs, up to a maximum of £2,500 per month

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-guidance-for-employees>

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses>

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/879484/200414_CJRS_DIRECTION_-_33_FINAL_Signed.pdf

Furlough and Government Guidance on the Coronavirus Job Retention Scheme

- To claim for this grant you must have:
 - created and started a PAYE payroll scheme on or before **19 March 2020** (previously 28 Feb) and individually notified to HMRC on a Real Time Information (RTI) submission on or before this date
 - enrolled for PAYE online
 - a UK bank account
- Any entity with a UK payroll can apply, including businesses, charities, recruitment agencies and public authorities
- The calculation of the 80% grant is causing some confusion – the way you work out your employees' wages is different depending on what type of contract they're on, and when they started work
- You can claim for the 80% of the employee's salary, as in their last pay period prior to 19 March 2020
- For employees whose pay varies, if the employee has been employed for 12 months or more, you can claim the highest of either the:
 - same month's earning from the previous year
 - average monthly earnings for the 2019-2020 tax year

Furlough and Government Guidance on the Coronavirus Job Retention Scheme

- An employer can claim for any regular payments they are obliged to pay their employees. This includes wages, past overtime, fees and compulsory commission payments. However, discretionary bonus (including tips) and commission payments and non-cash payments should be excluded
- An employer can also claim the associated Employer National Insurance contributions and pension contributions (up to the level of the minimum automatic enrolment employer pension contribution (3%)) on that subsidised furlough pay). Employer can top up the other 20%, but there is no obligation to do so
- An employer must pay the employee all the grant they receive for the employee's gross pay in the form of money
- See the following links for further information:

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

<https://www.gov.uk/guidance/work-out-80-of-your-employees-wages-to-claim-through-the-coronavirus-job-retention-scheme>

Key Workers and Shielding

Key workers

- The government has listed certain jobs and professions which are critical to the COVID-19 response. These include, but are not limited to, those working in health and social care, utilities, communication and financial services and key public services, including those responsible for the management of the deceased
- If you are a key worker, you are more likely to be required to attend work and the government has offered certain benefits, including priority for education provision

Vulnerable

- Over 70s (even if no underlying health issue), those who are pregnant or those with certain underlying health conditions
- Government guidance is being updated

Shielding

- This is a category distinct from the vulnerable group. Shielding is a measure to protect *extremely* vulnerable people (for example, those suffering from specific cancers and those who have had an organ transplant) by minimising interaction between those who are extremely vulnerable and others
- Those in this category have been strongly advised to stay home for a period of 12 weeks

Guidance for employers

- Employers should encourage employees to work from home where possible
- Those who follow advice to stay at home will be eligible for statutory sick pay (SSP) from the first day of their absence from work
- Employees from defined vulnerable groups should be strongly advised and supported to stay at home and work from there if possible. However, this is not yet a requirement
- Do keep in touch with employees and provide advice in respect of social-distancing and hand washing
- Job Retention Scheme and grants are available
- Please see the following links for more detailed government guidance:
 - <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/guidance-for-employers-and-businesses-on-coronavirus-covid-19>
 - <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses>

Guidance for employees

- Work from home where possible, unless a key worker
- What happens if an employee refuses to come to work?
- If too ill to work or isolating on government advice, employees will be entitled to statutory sick pay (SSP). Company sick pay may be a consideration depending upon the employment contract
- If you have COVID-19 or are advised to stay at home, you can get an 'isolation note' by visiting NHS 111 online, rather than visiting a doctor. For COVID-19 cases this replaces the usual need to provide a 'fit note' (sometimes called a 'sick note') after 7 days of sickness absence
- Consider becoming designated as a furloughed worker, should it be required
- Please see the following link for more detailed government guidance:
 - <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-guidance-for-employees>

Holidays

- Many questions in respect of holiday and furlough leave
- Confirmation in government guidance holidays not incompatible with furlough
- Holidays need to be paid at full rate of pay
- An available tool for employers to require employees to take holiday?

Other technical points

- Requirement to complete HR1 form in respect of collective consultation?
- Employee not to undertake any work – training, self-development, redundancy meetings?
- What if employee already on notice of termination? (re-instatement)
- What is an essential worker (e.g. Sports Direct)
- Availability to work for another employer?

Changing terms and conditions

- Useful when seeking a variation in employees' contracts of employment, in order to accommodate a reduction in work and pay
- Ordinarily, employees and unions would be unlikely to agree to such changes. However, in the current climate, this may be viewed as a more palatable alternative to widespread redundancies
- **Four key ways in which a contract of employment might be varied are as follows:**
 - (1) mutual agreement
 - (2) variation allowed under contract
 - (3) unilateral imposition of new terms
 - (4) dismissal and re-engagement

Redundancies

Individual consultation

- Fundamental to the fairness of any dismissal for redundancy
- *Polkey* guidelines

Collective consultation

- 20 or more employees at one establishment within a 90-day period, the employer will have to engage in collective consultation with a trade union or (if no union is recognised) elected employee representatives

Laying-off

- This occurs when an employer provides employees with no work (and no pay) for a period while retaining them as employees
- Employee agreement is needed if there is no contractual provision allows this course of action. If employee agrees, this would be a change in terms and conditions
- Guarantee payments (for those with at least one month's service) – employee entitled to this payment if laid off (in the legal context) or put on short-time working. The maximum an employee can get is £29 a day for 5 days in any 3-month period; being £145. Employer may have more generous scheme available, but are not obligated to provide an enhanced guarantee payment
- Guarantee payment unlikely available if employee being paid sick leave. *Reason* for absence important
- Maintains continuity of service, which makes the option more attractive to an affected employee

Short-time working

- Arises where employees are provided with less work (and less pay) for a period whilst remaining employed. 'Short time' means less than 50% of the employee's usual work
- Employees should be paid normal rate unless (i) it's agreed otherwise or (ii) their contract allows unpaid or reduced pay
- Agreement needed, either via employment contract, or after discussion with employees due to current situation (be mindful of changing terms and conditions)
- Employees can resign and claim statutory redundancy payment in respect of both short-time working and lay-offs. Complex procedure, but to qualify, the employee must have been laid off or on short time working: for four consecutive weeks; *or* six non-consecutive weeks in a 13 week period
- Emergency government legislation may be introduced to allow employers to consider lay-offs and short-time working in the absence of contractual agreement

Termination claims

- Strict time limits – 3 months minus 1 day after the date of dismissal or the date when notice period ran out

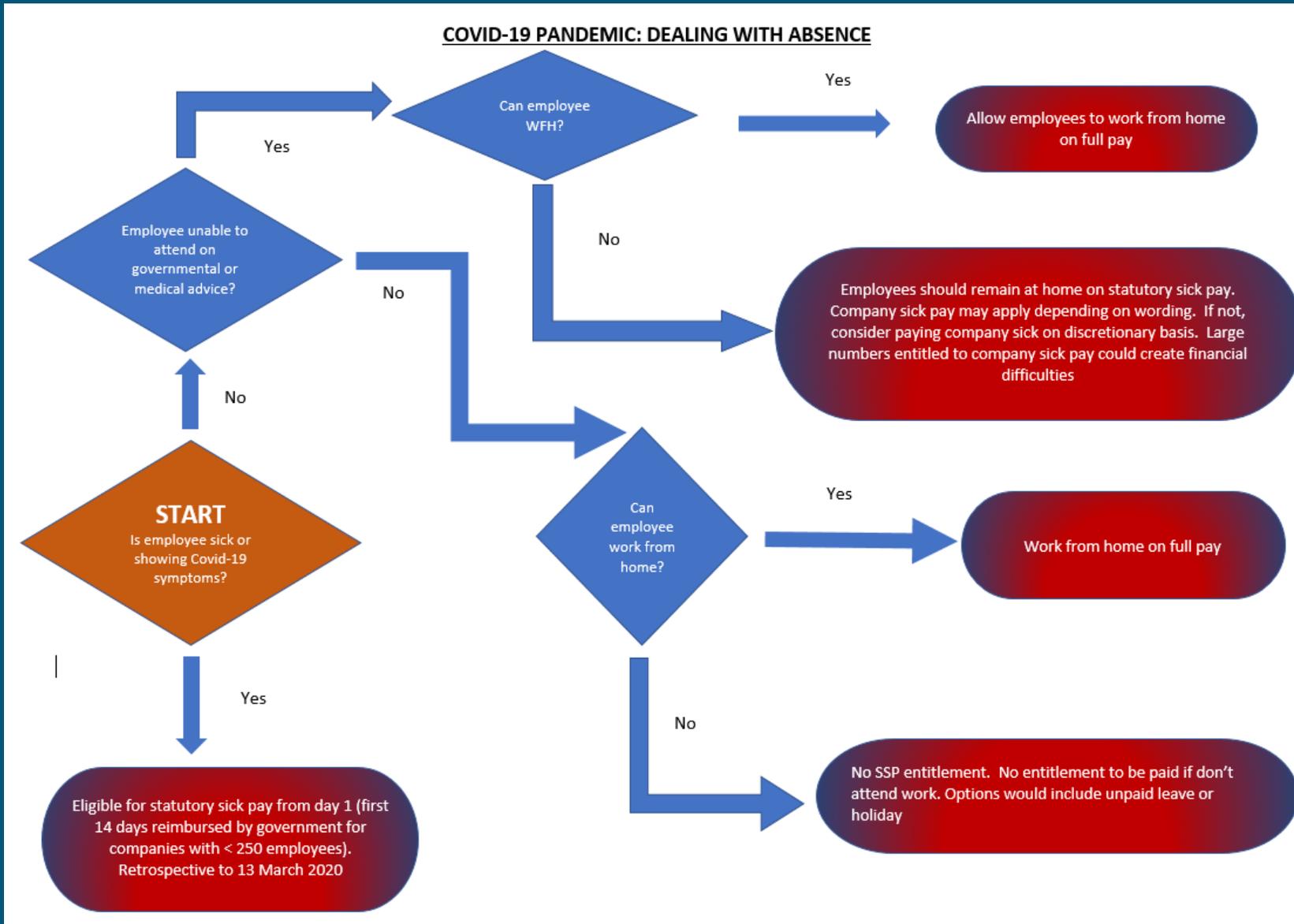
Unfair dismissal

- Must be an employee
- Requires 2 years' continuous service

Notice pay

- Entitled to notice pay
- Can work it or be paid in lieu (instead of). Employee can bring claim for breach of contract
- Not payable if dismissed for gross misconduct

Sick pay flowchart



Whistleblowing

- Reporting certain types of wrongdoing – e.g. criminality
- Employees are protected by law; should not lose job or be treated unfavourable as a result of 'blowing the whistle'
- Recent examples include Edward Snowden (leaked highly classified documents) and Queen Elizabeth Hospital, Glasgow (dirty water scandal causing patients to fall ill, with one fatality)

Available guidance for employers and employees

ACAS

- <https://www.acas.org.uk/coronavirus>

UK government

- <https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19>

NHS

- <https://www.nhs.uk/conditions/coronavirus-covid-19/>

Questions and Answers

Contact



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