

SME DIGEST

ADVICE FOR SMALL & MEDIUM SIZED ENTERPRISES



Edited by Adam Bernstein

EMPLOYEE ADVICE FOR EMPLOYERS

CORONAVIRUS AT WORK

It's remarkable to think that despite the advances that man has made – the Moon, telecoms, modern healthcare and more – that something as small as a virus has stopped the global economy in its tracks. But stop it is exactly what Coronavirus has done.

There are countless issues to be concerned with for businesses, but one that is vexing employers is what to do with staff? It galls to let them go, but few firms have the resources to pay workers with no revenue coming in.

In a special feature, Adam Bernstein spoke to Arwen Makin, a senior solicitor at esphr, about the law and the options open to employers.



Don't panic

It's ever so easy to panic in times of crisis – it's a natural reaction - but employers should keep a calm head about them. And for Makin, good communication is key: "It is difficult in these unprecedented times to provide reassurance, but employees should be referred to official sources of information and told that the business is following the current government advice." In particular, she points to a link - <https://www.gov.uk/government/topical-events/coronavirus-covid-19-uk-government-response> - that should be sent to all employees. As the government has made clear, prevention is critical and

so employees who are unwell, have a continuous cough and/or a high temperature should stay at home.

For most people, Coronavirus (COVID-19) will be a mild illness. Even so, the government updated its guidance on 17th March (link above) with detail on the symptoms and self-isolation; in essence where firms are still open – maybe for essential servicing work - staff should self-isolate for seven days from the first symptoms or 14 days if someone in a household is infected.

Protecting the health and safety of workers

Irrespective of the government's

guidelines – that we try to minimise infection risk – Makin knows that firms must prevent employees bringing coronavirus into the workplace: "It now appears that people can be infectious without symptoms so social distancing where possible is the current advice, and is sensible advice, because it will prevent employees becoming ill at once."

The advice is clear in that if a worker displaying symptoms attends work, they should be immediately sent home to self-isolate – and as Makin says, "this is a reasonable management instruction due to the employer's duty to protect the health and safety of other employees."

Paying statutory sick pay (SSP)

In general, Makin says that SSP is payable if employees are incapacitated due to injury or illness or incapacitated despite being 'capable' of work because of necessary self-isolation.

"The 2020 budget," she adds, "made changes to allow eligible workers to claim SSP from day one of absence; temporarily extended SSP to cover people caring for those within the same household who display coronavirus symptoms and have been told to self-isolate; and also said that businesses with fewer than 250 employees will be reimbursed for any SSP paid to employees in respect of the first 14 days of sickness related to COVID-19." The detail is to follow, but updates can be read at <https://www.businesssupport.gov.uk/statutory-sick-pay-rebate/>.

The changes were radical, but they still beg the question of whether a firm needs to pay statutory sick pay if a worker chooses to self-isolate? For Makin the answer is clear – "a worker who chooses to self-isolate where none of the requirements are met is not entitled to statutory or contractual sick pay."

One solution, she does recommend, is allowing an employee to work from home if the role permits it. "But," she adds, "employers should consider whether it would be discriminatory to refuse home working, take disciplinary action, or withhold pay in light of the employee's refusal." And this is more of a problem if a worker has a (disability) health condition that puts them at higher risk of serious illness or death if they contract COVID-19 as discrimination claims could follow.

But if there is no disability, and the public health advice is such that the employee could reasonably be asked to continue to attend work, then the absence would be unauthorised and disciplinary action could follow. Further, as Makin notes, "the employee would likely not be entitled to pay."

There is also an elephant in the room – contractual sick pay. Makin's advice here is to look at the precise wording of the contract. She says, "it is tempting for

employers to regard a non-symptomatic worker in self-isolation as not 'actually sick' and only pay SSP. However, it is very difficult to argue that a worker is not entitled because they are not symptomatic, in circumstances where SSP regulations 'deem' them to be 'incapacitated'."

Sending workers home

But what if an employer sends a worker home against their wishes? Here Makin thinks the right to pay depends upon the circumstances – "where the employee is able to continue to work from home then they will generally continue to be entitled to their normal rate of pay. If working from home is not possible, and an employee is suspended by their employer on health and safety grounds, it is likely that they still have the right to continue to receive full pay."

The situation is murkier where an employer suspends due to official public health advice to self-isolate. Here Makin says that if the employee falls within the category of people who have been advised by government guidance to self-isolate, then they will fall within the new deemed incapacity rules for SSP.

An allied question is whether employers can make employees take holiday to cover absence. On this Makin notes that "it is possible to require employees to take annual leave at nominated times provided that they are given the required level of notice." Of course, employees can also take annual leave instead of being on SSP or nil pay.

It's also worth remembering that an employer imposing home working is technically

varying a contract which requires employee consent. But as Makin notes, "where an employee is faced with either being on SSP or nil pay as an alternative, they may well be willing to consent to working from home."

Sight shouldn't be lost of the government's advice for those considered vulnerable – those over 70, women who are pregnant, and those with an underlying health problem. People in this category should either work from home or vary their daily commute to use less public transport.

**ALLOW AN
EMPLOYEE
TO WORK
FROM HOME
IF THE ROLE
PERMITS IT**

Laying off staff

The natural reaction when an employer is in trouble is to cut costs and lay off staff. But as Makin advises, employers should first “check if the contract contains a contractual provision, which allows the employer to temporarily lay people off work (or reduce working hours).” She says that if there is a contractual right to lay off, then the employer should comply with the requirements of the provision.

But before pulling the trigger, it should be noted that the government is to guarantee workers’ pay to 80% of £2500 per month per employee. The detail, however, is yet to be published. Again, the government will be publishing more detail on the subject which can be read at <https://www.businesssupport.gov.uk/coronavirus-job-retention-scheme/>.

Next Makin talks of employees with one month’s service. If they’re laid off, they may be entitled to claim a statutory guarantee payment (SGP) on up to five work-less days in a three-month period. The current SGP maximum is £29 per day.

If other workers are laid off, they can claim a redundancy payment from the company if it’s for four or more weeks in a row, six or more weeks in a 13-week period, where no more than three weeks are in a row.

But if there is no contractual right to lay staff off, Makin says that an employer faces two main choices – “either seek the agreement of the staff to a temporary lay-off or reduced hours; or seek the consent of the employees to change the contract to include a lay-off provision.” Here she says that the negotiation must be handled fairly and will require a consultation process and reasonable notice.

She warns, however, that if there is no lay-off provision in the contract, “any lay-off without agreement, would be a fundamental breach of contract, an unlawful deduction of wages and could lead to various employment claims.”

In summary

Coronavirus has put employers and employees in very difficult situations where firms are placed between a rock and a hard place. The key message, if there is one, is that employers shouldn’t act in haste, but with, instead, the benefit of knowledge.

WHAT ABOUT STAFF ABOUT TO JOIN ?

Employers often see a turnover of staff. The present problem is, however, what happens if a job offer was made before Coronavirus kicked off - can the offer be rescinded? The simple answer from Makin is ‘no’. This is because they have been offered employment to start on a set date and they have accepted that offer and the employer is contractually bound to honour that obligation. That said, she says that “it may be possible to agree with the individual that you push back their start date.”

Problems arise where the start date is postponed indefinitely. If they do not agree to vary the start date, then the employer would need to consider alternative options which Makin says are akin to those above – potentially paying SSP if they have to self-isolate; have them work from home; or paying them in full if the business is not closed.

If the employer still wants to rescind the offer, Makin says to do this “an employer would need to check the terms of the contract to see what notice is required to give to terminate the contract. Further, you would also need to be careful that you do not inadvertently trigger any potential discrimination claims by treating people with any protected characteristics differently.”

It follows that there is a potential for the employee to claim breach of contract and as Makin explains, “if the employee has left their current job to start with you, and you pull the job offer and they suffer losses as a result, this could lead to a claims risk, especially in the current climate where other jobs may be more difficult to come by.”