COVID-19 – Key EU and UK Employment Law Considerations
Keeping Employees Safe, Dealing With Time Off and Pay

What guidance has the UK Government introduced to assist employees and employers in their response to COVID-19?

- Public Health England – a resource for all UK Government guidance and measures relating to COVID-19 for employees, employers and businesses.
- ACAS – Coronavirus: advice for employers and employees – a useful guide on key employment law considerations, including sick pay, homeworking, layoffs and short-time working.

What general duties do employers have towards staff to keep them safe?

- Under the Health & Safety at Work Act 1974 (HSWA), the employer has a duty to protect the health, safety and welfare of its employees.
- Employers should keep everyone updated on actions being taken to reduce risks of exposure in the workplace.
- Actions include cleaning the workplace regularly, and providing soap, hand sanitisers and hot water sources for employees to wash their hands. Employees should be encouraged to practice good personal hygiene.

What obligations do employers have to pay employees during sickness or self-isolation?

Payment

- Employees or workers must receive statutory sick pay (SSP) if they need to self-isolate because:
  - they have COVID-19
  - they have COVID-19 symptoms (e.g., a high temperature or a new continuous cough)
  - someone in their household has COVID-19 symptoms
  - they have been told to self-isolate by a doctor or NHS 111
- If the employer offers contractual sick pay, this may be payable in the above circumstances, subject to the terms of the contract.
- Employees who are able to work from home should get their usual pay.

Changes to SSP

- SSP will be payable from day one instead of day four for affected individuals. This is likely to apply retrospectively from 13 March 2020.
- Employers with fewer than 250 employees (as of 28 February 2020) will be able to reclaim SSP for employees unable to work because of COVID-19, for up to two weeks per employee. The eligible period is expected to apply retrospectively from 14 March 2020.
- The legislation implementing the scheme is expected in the next week or so, and the government will work with employers in the coming months to set up the repayment mechanism.
- Employers should maintain records of staff absences, but employees will not need to provide a general practitioner (GP) fit note. An alternative to the fit note will be obtainable by contacting NHS 111.
• Those not eligible for SSP — e.g., the self-employed or people earning below the Lower Earnings Limit of £118 per week — can now more easily make a claim for Universal Credit or Contributory Employment and Support Allowance.

Is there a difference between company and statutory sick pay?
• Under SSP, qualifying employees are entitled to a weekly payment of £94.25 a week for up to 28 weeks during any period of incapacity.
• Company sick pay is offered by the employer to employees usually through the employment contract. This provides for incapacity payments to employees in excess of SSP.
• SSP cannot be withheld for late receipt of medical evidence, only for late notification of illness. Any decision to withhold should be detailed in writing, and the employee can appeal to the HMRC Statutory Disputes Payment Team.
• If an employer is uncertain that an employee is genuinely unfit to work, a fit note from a GP or NHS 111 will be conclusive. Current guidance states that employers should be flexible with the need for evidence given self-isolation constraints.
• Company sick pay may generally only be withheld in accordance with the contract, or if the employee consents.

Can the employer refuse sick pay if the employee travelled against government/employer advice?
• Depending on the circumstances, an employer may justifiably be able to refuse company sick pay if the employee ignored government and employer travel advice. This should be applied consistently and proportionately to reduce the risk of a discrimination claim.

What about time off caring for dependents?
• Employees are entitled to reasonable time off to care for dependants in an unexpected emergency or event, including COVID-19. Employees do not have a statutory right to pay for this time off, but some employers may offer contractual sick pay.
• Time off must be reasonable in the circumstances (e.g., the employee might initially take two days off, then book leave if more time is needed).

If work cannot be done from home, can employers insist that employees attend the workplace?
• If current public health advice is such that the employee could reasonably be asked to continue to attend work, then it is possible to insist that they do so.
  o Current government advice is that employees should work from home where possible, so it may still be reasonable to insist that an employee attends the workplace if this is not possible.
• Consideration should be given to potential discrimination issues, e.g. if the employee is pregnant, breastfeeding, elderly or otherwise vulnerable to COVID-19 infection.
• If there are no discrimination issues and the employee refuses, they could be investigated for misconduct for refusal to follow a reasonable management instruction, and their unauthorised absence.
• If the absence is unauthorised then the employee would likely not be entitled to pay as they are not willing to attend work.

How should employers deal with employees who refuse to come to work due to fear of catching COVID-19?
• If an employee does not want to go to work for fear of catching COVID-19, they should listen to their concerns.
• If the employee is in a vulnerable group, reasonable adjustments should be made and they should be asked to work from home where possible.
• The employer could offer flexible working, or the employee can take this time off as holiday or unpaid leave (if they cannot work from home). The employer does not have to agree to this — if the employee still refuses, it could result in disciplinary action.

Can the employer force employees to take unpaid leave or reduced wages?
• Generally an employee cannot be temporarily suspended without pay or on reduced pay without their consent, unless this is clearly provided for in their contract.
• Agreement should be sought from employees to reduce the risk of claims.
• Alternatively, unpaid leave or reduced wages could be offered as an alternative to layoff. In this case, a consultation process is advisable.
• During layoffs or short-time working, unpaid employees are still entitled to statutory guarantee pay. The maximum is £29 a day for five days in any three-month period, so a maximum of £145.
• There is no limit to how long an employee can be laid off or put on short-time, but they can apply for redundancy and claim redundancy pay after four continuous weeks of layoff/short-time, or six weeks in a 13-week period.

Immigration
How should sponsored workers on Tier 2 or Tier 5 visas be treated?
• Where a sponsored worker’s absence due to COVID-19 is authorised by the employer, a report to the Home Office is not required.
• If a sponsored worker is off work for more than 10 consecutive days without permission, this should be reported to the Home Office within 10 working days of the 10th day of absence.
• If a sponsored worker takes unpaid leave for more than four weeks, ordinarily this would mean the sponsorship must end. However, the Home Office has indicated that an exception will be applied in the case of COVID-19 and the sponsorship can continue.
• If a sponsored worker’s main work location changes due to COVID-19 — e.g., from one client site to another — most commentators recommend this is reported to the Home Office. If the sponsored worker must work from home, this would not need to be reported.
Travel

Can the employer ask employees about their personal travel plans?
- As part of the employer’s duty to protect employee health and safety, it is reasonable for the employer to ask employees to inform them of personal travel plans. This way it can keep track of any risk to the rest of its employees.

Can the employer ask employees not to travel to certain areas?
- Where the government has advised against travel to a certain country due to COVID-19, it will be reasonable for the employer to advise against personal travel to that country.
  - As of 17 March 2020, the FCO now advises against all non-essential travel worldwide for at least 30 days, so it is likely to be reasonable for the employer to do the same.
- The employer cannot compel employees not to travel to a particular country — although it can warn of any consequences that will apply, such as self-isolation and sick pay arrangements if the employee cannot work from home.
- If an employee does need to travel, say for family reasons, then the best approach is to agree on the process that will follow and on communication protocols going forward.
- Travel restrictions should be proportionate and should not indirectly discriminate against nationals from affected countries. Advising against travel to affected countries, in line with Government advice, is likely to be proportionate.
- More severe measures, such as cancelling the employee’s annual leave, increase the risk of indirect discrimination and should generally be avoided.

Employee Information and Communications

What medical information can an employer ask employees to provide regarding COVID-19?
- As part of the duty to protect the health and safety of employees, the employer may reasonably ask employers:
  - whether they are sick;
  - if they are self-quarantining (rather than just working from home);
  - whether they are self-quarantining due to their own illness or that of a household member; and
  - about their personal travel plans.
- These requests enable the employer to keep track of any risk to the rest of its employees.

Can employers ask for information regarding others in an employee’s household?
- As UK citizens must now self-quarantine for 14 days if a household member is showing COVID-19 symptoms, the employer may reasonably request similar information about people living with the employee. The employee should not be asked to identify such people.
How should the employer inform the workforce if an employee is suspected to have COVID-19?

- If an employee tests positive for COVID-19, the employer should notify other employees of the infection risk as soon as possible and advise that appropriate precautions should be taken. The infected employee generally should not be named.
- Employers should keep the workforce updated on actions being taken to reduce risks of exposure in the workplace and ensure that employees’ contact details are up to date.

Other Jurisdictions

How are other key jurisdictions such as France and Germany responding to COVID-19 from an employment law perspective?

France

- Administrative closures have been enforced for a range of businesses, such as theatres and bars (except for take-aways). These employers are effectively required to resort to partial activity (short-time working) until at least 15 April 2020.
  - Currently employers must generally pay 70% of employees’ salaries and may obtain a state-funded allowance as compensation.
  - The government will permit employers to apply for the partial activity scheme up to 30 days after implementation (rather than making a prior request), permit adjustments to the consultation process and increase employer compensation. More details are expected shortly.
- Employers have a general duty to protect workers’ health and safety. Collection of employees’ health data may be necessary to fulfil this duty, and may be permissible under the General Data Protection Regulation.
- French employees must comply with reasonable instructions or requests issued by their employer. They can be asked to specify where they have been in the past 15 days, to assess risk to the workforce. They cannot be asked to confirm they are not infected or to provide a medical certificate to the same effect.
- An infected employee is entitled to up to 20 days of social security benefits if they request a medical certificate from the regional health agency. They are indemnified under regular sick leave, as governed by length of service and any applicable collective bargaining agreement.
- A potentially infected employee is also entitled to up to 20 days of social security benefits if they request a medical certificate from the regional health agency, subject to medical evaluation.
- Regarding travel, the external borders of the Schengen area have been closed since 17 March for 30 days. The government advises against all international business or personal travel.

Germany

- Employees with COVID-19 are generally entitled to continued remuneration from their employer. The employer may be able to claim state compensation under the Protection against Infection Act (the PIFA).
In the event of a state-ordered quarantine, the employer must generally continue to pay remuneration to employees. State compensation is not available if the employee works from home.

• Quarantined employees who are unable to work from home will generally receive employer compensation under the PIFA, corresponding to loss of earnings. The employer can potentially recover this from the government.

• For quarantines longer than six weeks, compensation equivalent to regular statutory sick pay will generally be payable from the seventh week.

• Employers may potentially claim compensation from the government for reduced hours or reduced productivity due to COVID-19.

• Reduced hours and pay are possible if permitted by collective or individual agreements, or if employees consent. Employees may then receive state compensation for reduced hours.

• Employers cannot generally prohibit private leisure activities, but employees who fall ill after travelling to risk areas may lose their entitlement to sick pay.

If you have any questions, please contact your Sidley lawyer or one of the following:

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