

## **U.K. EMPLOYMENT LAW CONSIDERATIONS FOR COMPANIES RESPONDING TO COVID-19**

To Our Clients and Friends:

Whatever industry you are in, you are undoubtedly concerned about preparing your business to face the threat of the novel coronavirus (COVID-19).[1]

Below, we identify some of the key considerations for UK-based businesses working to reduce the risk of employee exposure. We also outline key steps to take when an employee tests positive for COVID-19 or must care for someone with the virus.

The UK government response to the outbreak evolves daily, and we encourage employers in the UK to monitor UK government and National Health Service Guidance and legislative developments over the coming days and weeks. In a television address of 16 March 2020, the UK government said the population should now avoid “non-essential” travel and contact with others, and everyone should work from home where possible. Meanwhile if one person in any household starts to display symptoms (a new continuous cough and/or high fever), the entire household must stay at home for 14 days.

### **Options for Reducing the Risk of Employee Exposure to COVID-19**

Employers in the UK have many options for reducing the risk of employee exposure but each comes with its own risks that should be managed carefully. The list below is not intended to be exhaustive, and is also focused on managing *employee* exposure to the virus. Additional considerations may apply to customers, vendors, contractors and others with whom you interact.

**Workplace Practices:** The UK government and the World Health Organisation (WHO) have recommended a number of ways to prevent the spread of infections in the workplace, including promoting handwashing by providing a place for employees to wash their hands thoroughly with soap, displaying posters promoting handwashing and putting sanitizing hand rub dispensers in prominent places around the workplace and regularly re-filling them. Offering guidance from occupational health and safety officers, briefings at meetings and providing information on the intranet to encourage frequent handwashing has also been recommended.

WHO has published guidance on ensuring workplaces are kept clean and hygienic, recommending regularly cleaning surfaces and objects with disinfectant. In some workplaces, it may be appropriate to install high-efficiency air filters and increase ventilation rates and employers in the UK have been recommended to ensure paper tissues are available along with closed bins for hygienically disposing of them.

WHO has also recommended advising employees and contractors to stay home when they are unwell, even with a mild cough or low-grade fever, and promoting remote working to allow employees to avoid public transport and crowded places (*see below*).

***Restricting Travel:*** Many employers in the UK are restricting business travel and it would be advisable for employees and contractors to consult national travel advice before going on any business trips. Views regarding the appropriate level of travel restrictions may vary by industry.

Employees may also be exposed to COVID-19 through personal travel. Employers in the UK may decide to require employees to notify Human Resources if they or their close relatives travel to affected areas and, if their travel indicates an elevated risk, employers in the UK may consider excluding them from the workplace for an appropriate period of time.

***Restricting Visitors:*** Employers in the UK may also wish to restrict visitors to the workplace and to make it clear that individuals who have travelled to high-risk countries, are ill, are being quarantined or have been instructed to self-isolate under NHS or other medical guidance will not be allowed to visit the office.

### ***Instituting Work-from-Home/Telecommuting Policies:***

As noted above, the UK government has advised that the population should now avoid “non-essential” travel and should avoid unnecessary contact with others, recommending that employees and contractors in the UK should work from home where possible. Accordingly, where some or all of an employee’s work may be performed remotely, employers in the UK should permit or require employees to work from home until the UK government guidance has been relaxed.

In the absence of an express power to do so, formally requiring employees to work from home, particularly on a long-term basis, may constitute a variation of the employment contract and require employee consent. It is, however, unlikely that employees would object to a request to work from home in the circumstances, given the alternatives.

For many employers in the UK, although a short-term home working policy may be feasible in these pandemic conditions, permanent changes would pose an undue hardship on the business. Therefore, when implementing a new work-from-home/telecommuting policy or expanding an existing one, employers should take steps to mitigate the risk that these temporary changes create an unworkable precedent for the future. Communicating the short-term and emergency nature of policy changes when requesting consent/informing employees of implementation of the policy is one way to limit risk. Furthermore, employers should retain the right to monitor, modify or withdraw the policy at any time.

Employers in the UK should be mindful that when employees work from home, doing so may raise its own exposure to potential liability for employment law violations. Key considerations include:

- *Ensuring employee health and safety:* Employers are responsible for an employee’s welfare, health and safety so far as is reasonably practicable. When implementing a home working policy for the first time, or expanding a current policy, employers should consider the health and safety

implications and ensure that the required infrastructure is in place to fulfil its obligations towards its employees, including conducting a suitable risk assessment of all work activities to identify hazards and assess the degree of risk to home workers. In particular, employers should consider the impact on employees on reasonable adjustments who may, for example, require the provision of additional equipment to enable them to comfortably work from home.

- *Working hours and rest period compliance:* Employers should establish the boundaries of working time and when employees are required to be available, whether this is entirely flexible or they wish employees to strictly observe office hours. Where an employee has not opted out of the Working Time Regulations 1998, the employer should make clear to them that the employee is responsible for regulating their own working time and taking breaks as appropriate.
- *Time off for dependants and childcare commitments:* Normally it would be inappropriate for an employee to work from home whilst also providing childcare. However, employers should take a pragmatic approach in the event that more schools and nurseries close as the COVID-19 pandemic escalates. Employers may consider allowing employees to work part-time around their childcare responsibilities. Employees may also assert their statutory right to time off to care for a dependant; a right which is unpaid in the absence of agreement to the contrary.
- *Business expense reimbursements:* For some employees, remote work may result in increased expenses. Employers should make clear which expenses an employee can claim during this period.
- *Fair implementation of policy:* Employers should ensure any remote working policies are implemented fairly and consistently, in order to avoid accusations of unlawful discrimination.

Employers in the UK should separately consider the increased cybersecurity risk of a large proportion of the workforce working remotely and ensure that their networks are prepared for the increased traffic and security risk. Employees should be warned against use of unauthorised software should they be required to use their own electronic equipment.

## **Instructing Employees Not to Work:**

Given the most recent televised UK government guidance, employers in the UK should instruct employees to work from home where possible. Where it is not possible to work from home, some employers may conclude that entire facilities should be temporarily shut down, in which case the primary concern will be the question of payment during the shut-down; that is addressed below. In the event that COVID-19 requires a long term or potentially permanent closure of any facilities or layoffs of workers, employers should ensure that employees and their appropriate representatives are consulted in accordance with UK redundancy laws<sup>[2]</sup>.

Employers in the UK may identify specific people or groups of people who should stay home on a temporary basis. For these employers, additional considerations include:

- *Asking employees to disclose symptoms of COVID-19:* Many employers may wish to ask employees whether they are experiencing a fever, cough, or other COVID-19 symptoms. UK government guidance focuses on action to take once it becomes clear that an employee is experiencing symptoms<sup>[3]</sup> – see section “*What to do if an employee tests positive...*”, below. Should employers in the UK wish to ask their employees whether they are experiencing symptoms, they should avoid being selective; making assumptions about who is most likely to have the disease could increase the risk of discrimination claims. Employers who retain and process employee health records and related information must ensure that they comply with the General Data Protection Regulation (“**GDPR**”) and Data Protection Act 2018 – see section “*What to do if an employee tests positive...*”, below.
- *Screening employees based on body temperature:* Employers cannot conduct health checks (including temperature checks) on employees, workers or visitors without their consent although may consider refusing access to those who refuse. From a data protection perspective, the results of any screening or health checks would need to be handled in accordance with the GDPR and Data Protection Act 2018, which may necessitate the involvement of an occupational health professional. See section “*What to do if an employee tests positive...*”, below, for further details.
- *Restricting discussions of underlying conditions or comorbidities:* Some populations are more vulnerable to COVID-19; UK government guidance mentions the elderly and those with underlying health conditions as examples.<sup>[4]</sup> Employers should take care when seeking details of an employee’s underlying medical conditions, in order to ensure compliance with UK disability discrimination laws. However, as the COVID-19 pandemic develops, and if contracting it poses a “direct threat,” the justification for making such enquiries becomes stronger. In the event that an employee “voluntarily discloses” a vulnerability to COVID-19, the employer may ask what accommodations the employee needs and should be as flexible as possible in response, but the employer should keep the medical information confidential.
- *Anti-discrimination laws:* As always, employers in the UK should avoid taking into account—or appearing to take into account—protected status when deciding who to send home. For example, employers should not affirmatively send home only those who are above a certain age, nor should employers appear to discriminate against people who are or appear to be of a particular national origin. Any guidelines developed by the employer should be uniformly applied.

Employers in the UK will also need to decide whether to pay employees for unexpected time off due to COVID-19. In so doing, employers in the UK should be mindful of the following:

- *Statutory sick pay (“SSP”):* SSP is payable when an employee is absent from work due to incapacity – including disease which renders them incapable of doing work – and so an employee who exhibits symptoms or having a diagnosis of COVID-19 may well qualify. New regulations have recently been imposed to extend the meaning of “incapacity” in connection with isolation for reasons of the virus; they refer to UK government guidance (which is still evolving, and which employers in the UK should monitor). However, in most cases, an employee in quarantine or self-isolation will now be regarded as incapable of work for SSP purposes, therefore entitled to

SSP and potentially company sick pay, even if he or she is asymptomatic. At present, guidance tells those suffering from even mild symptoms of the virus, and particularly a new continuous cough and/or high temperature, to self-isolate.[5] Recent televised guidance advised those sharing a household with someone exhibiting COVID-19 symptoms also to stay at home for 14 days. The Prime Minister Boris Johnson has stated that this means, “if possible you should not go out, even to buy food or essentials, other than for exercise and in that case at a safe distance from others”[6]. The government has announced that it will make SSP payable from the first day of sickness absence and employers in the UK with fewer than 250 employees will be reimbursed for SSP paid in respect of the first 14 days of sickness related to COVID-19. Meanwhile, a temporary alternative to the “fit note” is being devised, so employees can support their absence from work without burdening GPs.

- *Other pay considerations:* Absent any contrary contractual provision: (i) employees who work from home will be entitled to their normal rate of pay; (ii) employees who are suspended by their employer on health and safety grounds, but not within self-isolation advice from UK government, may nevertheless remain entitled to receive full pay during suspension; (iii) however, employees who refuse to attend work due to fears about COVID-19, and cannot work from home, may lose the right to be paid during any period of related absence. However, employers should consider current public health guidance and whether refusing home working, imposing disciplinary action, or withholding pay would be discriminatory. Employees may wish to opt to take annual leave rather than SSP or nil pay; employers in the UK cannot compel workers on sick leave to take annual leave, but can instruct others to do so given the correct notice.
- *Temporary lay-offs and short time working:* An employer in the UK may neither implement a period of unpaid leave for employees (known as a temporary lay-off) nor impose reduced hours and pay in order to deal with temporary interruptions to demand without the agreement of those employees who are affected. Such agreement may be found in the terms of a collective agreement or contract or employment or may be the subject of an ad hoc agreement.
- *Risks of making exceptions to standard policy:* In addition to ordinary holiday, sick pay or other paid time off policies, some employers in the UK may elect to provide extra paid leave, permit no-penalty absences, or allow employees to use PTO or sick-pay outside of regular policies on a temporary basis during the pandemic. As with new or expanded telecommuting policies, it will be helpful to communicate both the exceptional nature of these policies and the fact that the pandemic is the motivating factor behind them. Furthermore, these policies should be implemented fairly and consistently.
- *Staggering Shifts and Split Shifts:* An employer may agree with employees to work staggered or split shifts in order to reduce the risk of a virus spreading. Such agreement may be found in the terms of a collective agreement or contract or employment or may be the subject of an ad hoc agreement. Even so, care will be needed to ensure that the revised working hours/shift pattern complies with UK rules on working hours and rest breaks.[7]

## **What to Do If an Employee Tests Positive or Needs to Care for an Ill Family Member:**

***If a staff member or member of the public becomes unwell in the workplace:*** the government's COVID-19: guidance for employers includes: they should be removed to an area at least 2 metres away from other people, isolated behind a closed door if possible and a window opened there for ventilation. They should avoid touching people, surfaces and objects and should use a separate bathroom, if available, whilst waiting for medical assistance. They should call NHS 111 (or 999 if they are seriously ill/injured or their life is at risk) and outline their symptoms.

***If a staff member or member of the public with confirmed COVID-19 has recently been in the workplace:*** A local Health Protection Team from Public Health England will contact the management team to discuss the case, identify people who have had contact with them, advise on actions/precautions to take, and conduct a risk assessment. Closure of the workplace is not recommended. The team will advise staff who have had close contact with the case or bodily fluids. Those people will be asked to self-isolate for 14 days, following an advice sheet,<sup>[8]</sup> and the team will follow up with them. If they develop new or worse symptoms, they should call NHS 111; if they become unwell with cough, fever or shortness of breath they will be tested; if they test positive, they will be treated. Staff who have not had close contact with the confirmed case can attend work and need take no precautions. The team will also contact the case and their contacts to advise<sup>[9]</sup>.

***Cleaning and waste disposal:*** All surfaces with which the symptomatic case has come into contact must be cleaned. Public areas through which the person passed briefly need not be specially cleaned/disinfected. If someone becomes ill in a shared space, it should be cleaned; details of how to clean and how to dispose of waste are available in the government's COVID-19: guidance for employers.

***Suspected cases and returns from overseas travel:*** There are no restrictions or special control measures required while test results are awaited, in particular there is no need to close the workplace or send staff home. Although, as noted above, the list of specified countries/areas has been withdrawn, UK government guidance to employers in the UK still states that people who have returned in the last 14 days from Hubei Province (including Wuhan), Iran, Daegu or Cheongdo in the Republic of Korea, and any area within Italy under containment measures, should avoid attending work, call NHS 111 and stay at home. Under the withdrawn list, people returning from a number of other countries should self-isolate and call NHS 111 if they develop symptoms; as noted above, this instruction now applies to anyone with symptoms, whether they have travelled or not.

***Certifying absence:*** UK government guidance strongly suggests that employers in the UK use their discretion regarding evidence of medical reason for absence from work where an employee has been advised to stay at home due to suspected COVID-19. By law, medical evidence is not required for the first 7 days of sickness; thereafter, the employer decides what evidence is needed – this does not have to be a “fit note” from a doctor.<sup>[10]</sup>

***Caring for dependants:*** Acas guidance notes that employees are entitled to time off to care for dependants in an unexpected event or emergency, which would apply to the COVID-19 pandemic, for example if they need to care for a child or other dependant who is sick or needs to self-isolate or be

hospitalized. There is no statutory right to pay for this time, but employers in the UK should check for contractual rights or policy statements they have made. The amount of time off must be reasonable in the situation, and employees might take some time as holiday.[11]

**Data protection:** Data regarding an individual's health is "special category" personal data under the GDPR and Data Protection Act 2018. Employers in the UK may only process it if they have proper grounds to do so. The health exemption enables occupational health professionals who have confidentiality obligations to process data relating to health if necessary for e.g. assessing the employee's working capacity, medical diagnosis, and treatment. Employers may consider it possible to conduct e.g. temperature checks if such a professional were used and consent obtained although we are not aware of this having been tested with data protection authorities to date. A generic consent to health checks in employment contracts is unlikely to satisfy GDPR requirements. The ICO has stated it will "*take into account the compelling public interest in*" the pandemic<sup>[12]</sup> and employers in the UK can disclose to colleagues that an employee has contracted COVID-19 if give no more information than necessary and, mostly, it will not be necessary to name the person; staff information can be shared with health authorities for public health purposes if necessary; and it is reasonable to ask people if they have visited certain countries or are experiencing symptoms – advising staff to call NHS 111 will minimize the information that the employer processes.[13]

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Gibson Dunn's lawyers are available to assist with any questions you may have regarding developments related to the COVID-19 outbreak. For additional information, please contact any member of the firm's **Coronavirus (COVID-19) Response Team**.

This client update was prepared by James Cox, Heather Gibbons, Georgia Derbyshire, Charlotte Fuscone and Harriet Codd. Gibson Dunn attorneys regularly counsel clients on the compliance issues raised by this pandemic, and we are working with many of our clients on their response to COVID-19. Please also feel free to contact the Gibson Dunn attorney with whom you work in the **Employment Group**, or the following lawyers in the firm's London office:

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[1] We refer throughout to "COVID-19" instead of coronavirus because many of the cited guidance materials are specific to this pandemic.

[2] Sections 188 et seq. of the Trade Union and Labour Relations (Consolidation) Act 1992 requires an employer who is proposing to lay off 20 or more employees at one establishment within a period of 90 days or less to consult appropriate representatives of affected employees up to 45 days in advance.

[3] [www.gov.uk](https://www.gov.uk/government/collections/coronavirus-covid-19-list-of-guidance) website, BEIS and Public Health England, *Coronavirus (COVID-19): guidance for health professionals and other organisations*, 10 March 2020, available at <https://www.gov.uk/government/collections/coronavirus-covid-19-list-of-guidance> (“**COVID-19 Guidance**”)

[4] [www.gov.uk](https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance/stay-at-home-guidance-for-people-with-confirmed-or-possible-coronavirus-covid-19-infection) website, Public Health England, *Stay at home: guidance for people with confirmed or possible coronavirus (COVID-19) infection*, 12 March 2020, available at <https://www.gov.uk/government/publications/covid-19-stay-at-home-guidance/stay-at-home-guidance-for-people-with-confirmed-or-possible-coronavirus-covid-19-infection> (“**‘Stay at home’ Guidance**”)

[5] See ‘Stay at home’ Guidance

[6] BBC News, *Coronavirus: PM says everyone should avoid office, pubs and travelling*, 16 March 2020, available at <https://www.bbc.co.uk/news/uk-51917562>

[7] See Working Time Regulations 1998, available at <http://www.legislation.gov.uk/ukxi/1998/1833/contents/made>

[8] See ‘Stay at home’ Guidance

[9] COVID-19 Guidance

[10] See COVID-19 Guidance

[11] See Acas, *Coronavirus: advice for employers and employees*, available at <https://www.acas.org.uk/coronavirus>

[12] ICO, *Data protection and coronavirus*, 12 March 2020, available at <https://ico.org.uk/about-the-ico/news-and-events/news-and-blogs/2020/03/data-protection-and-coronavirus/>

[13] ICO, *Data Protection and Coronavirus: what you need to know*, undated, available at <https://ico.org.uk/for-organisations/data-protection-and-coronavirus/>

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Gibson Dunn attorneys are available to assist with any questions related to these developments. Please feel free to contact any of the Gibson Dunn lawyers listed above.

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