

HR GUIDE: COVID-19 AND ABSENCE MANAGEMENT PROCEDURES

Covid-19 case numbers are currently rising rapidly and are expected to increase further following the lifting of restrictions on 19 July, and there remains uncertainty over how long the effects of the pandemic are likely to last. Although the rules on self-isolation for close contacts are likely to be relaxed for the fully vaccinated and there might be changes to the NHS Covid-19 app's contact tracing feature later in the summer, Covid-19-related absence from work is likely to remain an issue for some time. It's also important to be aware that not all employees will necessarily be fully vaccinated by the time the rules are relaxed, so some will continue to be caught by the requirement to self-isolate if they are close contacts of a confirmed case. On top of this, some employers are already managing large numbers of longer term absences due to serious Covid-19 illness and long Covid, and such cases could also increase.

Higher absence levels will inevitably have an impact on the cost of sick pay (particularly if you operate company sick pay), as well as on your operations if lots of employees are out at any one time. This could be compounded during the summer as other employees will be off on holiday.

You will inevitably have adapted your absence management processes to some extent during the pandemic, whether or not you formalised any such changes at the time. You may need to formalise these now, or make additional changes to deal with the immediate absence issues that you are likely to face during the summer.

In any event, you will want to ensure that you have robust and fair policies in place, to deal with both the current and ongoing situation.

This guide will help you consider the decisions you need to make in order to review your absence management documentation and ensure it is fit for purpose going forwards.

An essential point to remember throughout is that the normal rules about changing employee terms and conditions still apply. You must consider the extent of any changes to your absence management procedures, including whether they are contractual, in which case the stakes are higher. You will need to ensure that you follow an appropriate process to implement the changes. If you have already implemented changes and did not obtain agreement and/or follow an appropriate process, you may now need to seek advice on your potential exposure.

Absence management documentation

The checklist below outlines possible adjustments you might have made, or could make, to your absence documentation in the context of Covid-19 to better inform your employees and protect your business. The suggestions in the checklist will help you to identify possible adjustments, but any changes should be tailored to your particular circumstances, taking into account how you have to date dealt with absence management issues in practice during the pandemic and what you have communicated about your approach.

Self-isolation

Encouraging compliance with Government guidance

- Have you communicated to employees what current Government guidance on self-isolation requires and/or where they can access official information on this?
- Have you made clear that you require them to comply with the applicable Government rules?
- Have you instructed employees to tell you on their first day of absence if they are self-isolating?
- Have you made clear that failure to comply with self-isolation requirements will be treated as misconduct and dealt with in accordance with your disciplinary process?

Home-working during self-isolation

- Have you told employees who are self-isolating whose roles are suitable for home-working and who are well enough to work from home that they will be expected to do so, receiving their usual pay?
- Have you specified that you may adjust their role for the duration of self-isolation to facilitate home-working?

Keeping in touch

- Have you made changes to any requirements about keeping in touch during sickness absence where an employee is self-isolating?
- There will be circumstances where you may want daily contact with the employee, e.g. if they (or the person they have had contact with) are awaiting a test result that determines whether they need to continue with self-isolation. However, in other cases, the self-isolation rules will require the employee to remain off work for a set number of days, so you may not need regular updates during that time.

Evidence

- Have you flagged that you will require evidence of a requirement to self-isolate, e.g. an NHS self-isolation note, positive Covid-19 test result, or NHS Covid-19 app notification, where relevant?

Reporting positive Covid-19 tests

Employee responsibilities

- Have you told employees that they must inform you as soon as possible if they have tested positive for Covid-19?

Positive cases in the workplace

- Have you made clear to employees that you will be obliged to inform relevant staff members about certain confirmed cases of Covid-19?
- Have you flagged with employees that they may be contacted and instructed to self-isolate under the NHS Test and Trace programme if they have spent time in close proximity with colleagues who test positive for Covid-19?
- Have you notified employees that you will comply with applicable Government guidance for employers on reporting positive cases to the relevant public health authorities?

Data protection

- Have you reassured employees that you will not share more personal data about Covid-19 cases in the workplace than is necessary, in accordance with the Information Commissioner's Office guidance on this?

SSP and company sick pay

Communicating entitlements

- Have you specified when, in Covid-19 circumstances, an employee is entitled to SSP? For example, that they are entitled to SSP when self-isolating in accordance with Government guidance and unable to work?

Medical evidence

- Have you explained clearly what medical evidence you will require for payment of sick pay in the context of Covid-19, for example that you will accept an NHS self-isolation note in place of a GP fit note in cases of self-isolation?

Company sick pay

If you have limited the circumstances in which you pay company sick pay in the context of the Covid-19 pandemic, how have you done it? For example, have you:

- Distinguished between cases of self-isolation where the employee is actually unwell with Covid-19, and those where they are not? (If you have done this, how have you addressed the difficulties employees may face in obtaining appropriate medical evidence of illness?)
- Suspended the payment of company sick pay altogether due to concerns about affordability in the context of Covid-19?

If you made any such changes, how long do you intend to keep them in place?

Allowing holiday to top up sick pay

- If you have been providing less than full pay for self-isolation, for example SSP only, have you chosen to offer employees the option of taking paid holiday when they self-isolate?

Attendance management

Increase in short term absence

- Have you adjusted trigger levels in relation to management of short-term intermittent absence to take into account likely increased frequency and duration of absence due to Covid-19 and to encourage compliance with self-isolation requirements? (For example, you might have chosen to disregard any period of absence that is covered by the rules on self-isolation, or a certain number of such periods.)

Impact on longer term absence

- Have you considered how you will manage absence where Covid-19 has a longer term impact on the employee?
- Where an employee has a single lengthy period of absence while they recover from Covid-19 or its complications, have you made clear they will be managed as someone with long-term absence outside of the attendance review/trigger system?
- Where an employee with long Covid has multiple subsequent periods of absence after their initial illness has passed, will these absences be managed most appropriately inside or outside the attendance review/trigger system?

Return-to-work interviews

Remote arrangements

- Have you specified that return-to-work interviews after a period of self-isolation or absence due to suspected or confirmed Covid-19 will be conducted remotely?
- If employees work on site, have you made clear that they will be expected to be available for a telephone or video call at a pre-arranged time in the working day before they are due to return?

Manager training

Procedural and wellbeing

- Are managers appropriately trained on any relevant new aspects of absence management policies, e.g. changes to absence reporting procedures, conducting return-to-work interviews remotely, etc.?
- Have you considered also training managers on general wellbeing awareness, including how to support employees who are anxious about returning to work?

What impact does furlough have?

Furlough under the Coronavirus Job Retention Scheme (the 'Extended CJRS') will continue until 30 September 2021. The points set out in the above checklist may be slightly different for furloughed employees and raise some complex issues. Some examples of variations of approach for furloughed employees are set out below, but these are not exhaustive and we recommend that you seek advice on your particular circumstances.

If a furloughed employee falls ill or is required to self-isolate, can you keep them on furlough?

The Government guidance indicates that where an employee who is on furlough is required to self-isolate or falls ill, the employer can choose whether to keep the employee on furlough or move them onto sick leave and sick pay. If the employer moves the employee onto sick leave and sick pay, they can no longer claim in respect of the employee under the Extended CJRS. We assume that employers will usually have chosen (and would still choose) to keep the employee on furlough in order to continue to claim financial support from the Government under the Extended CJRS.

Unfortunately, the Government guidance does not expressly address the position with regard to employees on flexible furlough, although it could be interpreted as allowing the employer to move the employee between sick leave for the days they were due to work and furlough for the days they were due to be furloughed. However, some commentators have reported receiving advice from the HMRC helpline which contradicts this. For this reason, and from an administrative perspective, employers may in some circumstances prefer to put a flexibly furloughed employee who falls ill or is required to self-isolate on sick leave for the duration of their sickness / self-isolation. However, they will also need to take into account employee relations issues, particularly where they do not provide company sick pay.

Should you require furloughed employees to notify you of their self-isolation or other illness in the normal way?

If the employee is on flexible furlough and their self-isolation or illness will coincide with a time they are due to work, then clearly you do need to know about it (and if the employee is due to work at the workplace, they would be under a legal obligation to inform you of a requirement to self-isolate in any event). It would therefore make sense to require flexibly furloughed employees to notify you of any self-isolation requirement when it first arises, even if the self-isolation period begins on a furlough day.

Where an employee is on full furlough, you may need to know about their illness or self-isolation if you are likely to need them to return to work at short notice. In such cases, you may wish to require employees to inform you of any self-isolation requirement or illness when it first arises. However, outside of those circumstances, you will generally not need to know when a furloughed employee is required to self-isolate or is otherwise ill, and may not be able to justify collecting such information under data protection law. That said, there will be cases where a furloughed employee's illness which is linked to an underlying medical condition is relevant to absence management (see below) and the extent and timing of any information you require about this will vary depending on the individual circumstances.

Should you take into account periods of sickness that occur during furlough in your absence management procedures?

The purpose of absence management is to ensure that employees maintain a good level of attendance at work and to enable you to take action if an employee's absence is not sustainable for the business. Where an employee has been on furlough, however, in most cases this will be because you have not needed them in the business for that period of time. In addition, where you have kept an employee on furlough while they are unwell, they will not technically have had any sickness absence. It will therefore not normally be appropriate to include such periods of sickness towards trigger levels that you use for managing absence.

For long-term sickness and cases of intermittent absence where the employee has an underlying medical condition, it is common to manage the absence outside of your system of triggers in any event. The length of time they were ill may not be relevant to managing their attendance because in most cases you have not needed them in the business during their furlough and also they have not technically been 'off sick'. However, the fact of their illness may sometimes be relevant if you need to manage the impact of their condition on their future attendance and ability to work.

How can we help?

Make UK Legal Services brings together a highly-qualified team of legal and employment specialists to give you the in-depth support you need, combining the expertise and capabilities of a law firm with the practical experience of an HR consultancy.

Our balanced, risk-based advice will empower you to stay ahead of change, keep you fully informed and support you to make decisions with confidence. We pride ourselves on providing you with an accessible, high-quality service, personally delivered by our dedicated senior advisors.

To talk to us about how we can support you, call **0808 168 5874** or email **enquiries@makeuk.org**