

Employment issues during a pandemic virus

Introduction

A pandemic is an outbreak that may affect hundreds of thousands of people worldwide or in certain geographical areas, leading to a large proportion of the population becoming ill e.g. pandemic flu, Ebola virus disease, etc. A pandemic virus can develop and spread very quickly and because it is new, people have very little or no immunity to it and there may at the time be no licensed vaccine or treatment. Because of this lack of immunity and treatment, the virus can infect more people over a large geographical area, spread rapidly from person to person and cause clinical illness in a proportion of those infected.

For example, pandemic flu is different from ordinary seasonal flu, which for most people is an unpleasant illness but runs its natural course and is not life-endangering. Pandemic flu can occur when a new influenza virus emerges which is markedly different from recently circulating strains and to which people have little or no immunity, such as happened with swine flu in recent years.

Employers should have in place contingency plans for dealing with pandemic or epidemic viral diseases.

Businesses should plan to handle absence rates of 12% or more over the peak period of a pandemic (in addition to normal levels of Employee absence). This rate may be higher for small businesses that only have a few employees or businesses with open-plan offices or sites where the speed of spread of the virus may be quicker.

This fact sheet addresses the key employment law issues for employers to consider in a pandemic and advises on the contingency plans that employers should think about putting in place to ensure that the effects of a pandemic are minimised as far as possible for their business.

Advance business continuity planning

Whilst you may already have a business continuity or disaster recovery plan in place to deal with unforeseen crises and major incidents such as a terrorist attack, it should be reviewed. This is because most disaster recovery plans

focus on managing a one-off major incident, whereas planning for a pandemic need to take account of changed ways of working that may last for many weeks or months.

The starting point is to consider what your business needs to continue to function, for example the departments/key roles that are essential (and whether they could be temporarily relocated to other work sites) and the minimum number of employees that would be required to run each department so that the business can continue to operate with a skeleton crew. As part of this exercise, it is useful to compile a list of the transferable or interchangeable skills of each employee and to consider which employees could easily be retrained, redeployed or relocated to other work sites in the event of a high level of Employee absence. Then, consider offering appropriate training in alternative job duties in advance of a pandemic so that you are better prepared to deal with it if it does happen. In relation to key roles, you might also wish to develop procedures now to ensure a smooth handover to employees who are filling in for their absent colleagues, for example, as well as providing training, putting together a detailed list of job duties and how and when those duties need to be carried out and the relevant procedures involved.

You should also establish a 'communications tree' which can be utilised in the event of an outbreak. This will set out details of the pandemic coordinator and pandemic response team and their defined roles and functions and how individual employees will be contacted (for example, mobile phone or e-mail) to advise of office closure, relocation of work, etc. For this to work successfully, you will need to have up-to-date contact details for all your Employees. Also consider that the initially selected method of communication could fail (for example, if business e-mail is down) so consider having a back-up communication system in place to enable you to make urgent contact with employees if necessary. It may be worth setting up a dedicated 'hotline' for communicating pandemic status and actions to employees, suppliers, customers and clients or introducing a regular information bulletin to ensure employees are up to date with all relevant information.

It is important that you do not wait until a pandemic develops before considering what measures to take. It is impossible to predict the actual full effect of a pandemic until an outbreak happens and therefore your forward planning must be flexible and based on realistic assessments of likely risk. You must consider what effect the various possible scenarios of absence levels would have on your employees and how they operate.

If you do not already have one, it is recommended you put in place a policy covering serious disasters or incidents that also includes major public health incidents such as pandemic flu or Ebola virus disease. You should then notify your Employee what arrangements you have made to prepare for an outbreak, including what role you expect individual employees to play and how information will be communicated and disseminated, for example if your business premises need to close due to an outbreak of the virus amongst the workforce. Your policy could also usefully identify any specific changes to current procedures and policies that will apply in the event of a pandemic, for example changes to your sickness absence policy, dependent care leave policy, business travel policy and remote working policy (some of these are discussed in further detail below). Finally, your policy should cover relevant non-employment issues such as re-routing technology, sourcing potential additional suppliers, communicating with clients and customers, etc. You might also wish to discuss your contingency plans with critical suppliers to ensure they are complementary.

Workplace health and safety measures

The Health and Safety Executive has issued general guidance for employers on pandemic flu, setting out issues you should have regard to, both in terms of preventing the spread of the virus in the workplace and controlling the spread of it if an employee contracts it. It is therefore advisable to adopt basic precautionary measures in the workplace, even if you perceive that a pandemic poses a low risk to your business.

In terms of pandemic flu, on a general prevention level, you should provide all employees with information about it and the need for good personal hygiene measures, such as always carrying tissues, using a clean, disposable tissue to cover their mouth and nose when coughing or sneezing, disposing of it appropriately after one use, washing hands thoroughly after coughing or sneezing, before eating and drinking and at regular intervals with soap and hot water or a sanitiser gel and avoiding unnecessary hand to mouth and hand to eye/nose contact. Your message can be reinforced using posters in suitable locations, such as in the canteen or toilets. Also, consider reviewing and improving your own cleaning regime in the workplace, such as more frequent cleaning and using antiseptic wipes on door handles, stair railings, taps and common work areas.

The more your employees know about how to prevent a viral infection, the more resilient your business will be.

Although a pandemic is a public health concern, it can have indirect health and safety consequences which impact on the duties placed on you under health and safety legislation. For example, where worker numbers are reduced due to mass sickness absence, there is the potential for health and safety issues to arise. These are discussed further below.

Employee absence

During a pandemic, it is likely that your workforce will be seriously depleted. This is because large numbers of employees could be absent at any one time. This could include employees who:

- Have contracted the virus.
- Are looking after partners or dependants that have contracted the virus.
- Have children who cannot attend school or nursery, because the school has been forced to close as a result of the virus.
- Are afraid to attend or travel to work for fear of catching the virus.
- Cannot get to work because of severe disruptions to public transport caused by the virus.

Dealing with each of these categories in turn:

Employees who have contracted the virus

With employees who have contracted the virus, you should not encourage them to come in if they are ill but instead you should advise them to stay at home. It is important all employees who are ill remain at home until fully recovered. This will help prevent the virus being passed on to work colleagues. Self-isolation by individuals with symptoms of the virus is central to containing the spread of the virus.

In all cases, employees who are absent from work due to possible contraction of, say, pandemic flu should not return to work until they are fit to do so, which will usually be at least a week in that case. Unfortunately, it is difficult for you to insist on a requirement that an employee must have been certified as medically fit by a doctor before they can return to work (unless this becomes a Government requirement in relation to a particular pandemic). The key here is for employees to adopt a common-sense approach.

You should also consider reviewing your sickness absence and pay policy to ensure it is appropriate. For example, you may need to make a change to your policy to ensure employees must advise you when they have been diagnosed as having a pandemic virus and that they do not return to work until it is safe for them to do so. This is particularly important with employees who only receive statutory sick pay (SSP) during sickness absence because they may be tempted to return on financial grounds before they are fully recovered. Also, during a pandemic it will be difficult for employees to obtain an appointment with their GP to get a medical certificate (usually required after the first week of sickness absence), so you may need to consider accepting self-certification of sickness absence in these circumstances. In addition, you may need to adapt your reporting arrangements for sickness absence. For example, if you require employees to make contact on a daily basis with their line manager during their first week of sickness absence, this may not be practical if you have a high level of sickness absence due to a pandemic virus and it may block essential communication channels.

Under the SSP rules, if an employee is excluded, abstains or is prevented from working by reason of their being a carrier of, or having been in contact with, a case of a 'relevant disease', they are deemed incapable of working and are therefore still entitled to be paid SSP. Any employees to whom this provision applies should not be disciplined for their refusal to attend work and they can be paid SSP.

Whilst you may have concerns about employees using a viral pandemic as an excuse to skive off work, these concerns may need to give way to the predominant need to prevent the spread of the virus. There is a balance to be struck between managing people who you suspect are skiving and ensuring genuinely sick employees do not spread the virus within the workplace. If you suspect an employee is taking a 'sickie', you should deal with this in the normal way by investigating it as a potential disciplinary matter. However, you will need evidence to support your assertion and unfortunately it will normally be difficult for you to prove on the balance of probabilities that an employee was not genuinely ill i.e. that they were lying about showing symptoms of the virus. Each case will, of course, turn on its own facts and it could well be that you can obtain appropriate evidence in a case.

It may be that an employee has been exposed to the virus (or they have just returned from holiday in a seriously infected area), but they are showing no symptoms of it. In this case, as a precautionary measure, you might wish to quarantine them for a period by asking them to stay away from the workplace. Before doing this, you could ask

them to complete a health surveillance questionnaire covering the relevant symptoms to assess their fitness for work. In this scenario, as you are forcing the employee to stay away from work when they are not sick you will need to pay them their normal salary for this absence because the absence is at your request and is not sickness absence.

Finally, be aware that the detail of an employee's physical health or condition constitutes 'sensitive personal data' under the terms of the Data Protection Act 2018 if it is stored on computer or as part of a relevant filing system. Sensitive personal data may only be processed with the explicit consent of the data subject. Therefore, you will need the employee's express consent to disclose to the rest of the workforce, say by e-mail, that they have a pandemic virus. You also owe your employee a duty of confidentiality in this regard.

Childcare and Dependency concerns

At least some of the time off under these headings is likely to fall under the statutory right to time off for dependants. The statutory right provides for employees to take a reasonable amount of unpaid time off work to deal with certain unexpected or sudden emergencies concerning a dependant and to make any necessary longer-term arrangements. Cases which are covered include:

- Helping or planning for the provision of longer-term care if a dependant falls ill.
- Where childcare, or other arrangements for the care of a dependant, unexpectedly break down.

For these purposes, a 'dependant' generally means a spouse, civil partner, child, parent or a person living in the employee's household as part of the family. It does not include tenants or boarders or someone who lives in the household as an employee. In cases of illness or where care arrangements break down, a dependant may also be someone who reasonably relies on the employee for assistance. This may be where the employee is the primary carer or is the only person who can help in an emergency.

There is no set limit to the amount of time off which can be taken – the right to time off is such as is necessary to deal with the emergency. In most cases, the amount of leave will be a few days at most, but this will depend on individual circumstances and a pandemic virus is a rather exceptional circumstance that may warrant a longer period

off work than would be normal. For further information, see the fact sheet on parental leave and time off for dependants.

If you currently pay for time off for dependants, you may wish to consider reviewing this so that payment is limited to a certain number of days in the case of a pandemic virus. If the right to payment is contractual, you will need employee agreement to any change (see the fact sheet on varying terms of contracts of employment).

Another option to consider here is giving employees notice to take annual leave if they are likely to be off for more than a couple of days caring for dependants. Subject to your contractual provisions providing different notice arrangements, the Working Time Regulations 1998 state that you must give double the length of notice as the holiday you wish the employee to take. For example, four working days' notice for two days' holiday.

Also, think about introducing more flexible working, such as changed working times or remote/home working. This may enable employees to undertake their obligations to care for sick dependants without having to stop work completely. Always ensure you treat Employee in this position consistently and fairly.

Finally, if you request an employee to stay at home on the basis that one of their dependants has a pandemic virus (but they do not), you will need to pay them their normal salary for this absence because the absence is entirely at your request – it is not a request from the employee for time off for dependants.

Employees who are afraid to attend or travel to work for fear of catching the virus

Actively insisting that your sick employees stay at home will hopefully encourage the healthy employees to come to work on the basis that the risk of infection is relatively low. However, be prepared to be sensitive to genuine concerns, particularly in relation to employees who have underlying health problems, compromised immune systems or are pregnant and are therefore particularly vulnerable to infection and/or more at risk of serious illness or complications if they do contract a pandemic virus. For these employees, consider trying to agree different working arrangements, such as working from home or at an alternative work site or you could suggest they may wish to take a period of annual leave.

Otherwise, an unreasonable or unacceptable refusal to work by an employee can result in disciplinary action being taken against them. Employees are not entitled to refuse to come to work on the basis of fear alone (unless there is a clear health and safety risk), but bear in mind that fears might outweigh concerns about being subject to disciplinary action, so it is important to support and sustain morale during the outbreak of a pandemic virus and to try to convince employees to attend in the first place rather than automatically penalising them through disciplinary action.

Employees who refuse to perform their part of the contract of employment have no right to be paid for any time not worked

Employees who cannot get to work because of severe disruptions to public transport

It is possible that travel restrictions could be put in place, or public transport may be suspended, during a pandemic virus.

It is an employee's obligation to report for work regardless of the situation. Employees should therefore make every effort to attend work in all circumstances. Where there are major disruptions to public transport caused by a pandemic virus, you should advise your employees to take steps to obtain advice on the position from the appropriate external agencies and to allow extra time for their journey, making alternative travel arrangements where appropriate.

You can still discipline an employee for unjustified or unacceptable absence. However, where you are satisfied that an employee has used their best endeavours to attend work but is unable to do so because of major disruptions to public transport, consider allowing or requiring the employee to do one of following:

- Make up the time later.
- Take any absence from work as part of their annual leave entitlement.
- Take any absence from work as special unpaid leave.
- Be paid as if they had attended work on the day(s) of absence.
- Work from home or otherwise work remotely (see further below) or at a work site more local to their home.

You can legitimately ask your employee to demonstrate that they were unable to attend work.

Issues to consider in relation to employees who remain at work

It is likely that increased sickness and dependent care absence may put pressure on other employees to work longer hours to cover for those who are off and keep the business going. Bear in mind that the provisions of the Working Time Regulations 1998 will generally still apply in relation to hours of work and rest periods and breaks (see the fact sheet on the Working Time Regulations). However, the night work limits and the right to rest periods and breaks do not apply where a worker's activities are affected by an occurrence due to unusual and unforeseeable circumstances beyond the control of the employer, or there are exceptional events, the consequences of which could not have been avoided despite the exercise of all due care by the employer. It is arguable that a pandemic virus would fall into one of these exempt categories although ultimately the exemptions are for the Employment Tribunal/HSE to decide on. In these cases, workers are still entitled to compensatory rest. This is a period of rest the same length as the period of rest that the worker has missed, to be taken as soon as possible thereafter.

You may also have to consider redeploying workers to unfamiliar tasks or to lone working because of reduced employee numbers. In these circumstances, it is important to ensure that appropriate training is given to any remaining workers who may be required to carry out alternative job duties or take on additional responsibilities. Always remember that you owe a duty of care to your Employee to protect their health and safety and therefore use your health and safety risk assessment as a basis for ensuring that appropriate control measures are put in place to take account of the reduced workforce and the remaining pool of skills available to maintain your business. During a temporary work reorganisation caused by a depleted workforce, make sure you do not substitute young workers or pregnant workers into inappropriate work. You may also need to think about extra precautions if workers, who normally work in a group, are required to work alone or in a remote location – such a scenario might even need to be suspended until you have a sufficient compliment of employee. The important thing is to properly consider the impact of reduced worker numbers on the remaining employees and then to ensure that any risks as a result of such changes are properly assessed and controlled.

Redeployment, whether permanent or temporary, should only take place with the employee's express agreement, preferably obtained in writing, or in reliance on an express term in the employee's contract of employment, such as

a mobility clause giving you the right to require the employee to change their place of work or a flexibility clause giving you the right to require the employee to carry out different job duties. Additionally, when enforcing express contractual clauses, you must not act in a way that undermines the duty of trust and confidence implied into every contract of employment. See the fact sheet on varying terms of contracts of employment for further information. A unilateral variation of contract will usually amount to a fundamental breach, enabling the employee to resign and claim constructive dismissal. An employee can generally claim constructive dismissal if they have been employed for two years or more. Alternatively, the employee could issue a claim for damages for breach of contract, regardless of the length of their employment.

One obvious solution to consider is whether employees could safely work from home or otherwise work remotely during the outbreak of a pandemic virus. This will depend on how viable it is for an employee's job role to be performed remotely and of course you must have arrangements and systems in place to enable them to do so. For example, you should consider issues around IT (such as remote access via broadband connections) and the management and coordination of work. Unfortunately, many workers will simply not be able to work from home because of the nature of their job.

Other precautionary measures to consider implementing during a pandemic include:

- Opting for videoconferencing, tele-conferencing or use of the internet/e-mail where possible instead of holding face-to-face meetings.
- Cancelling or postponing training courses, non-essential business travel and work-related social events.
- Introducing more flexible working, such as changed working times, for example to avoid using public transport during busy periods.
- Using agency, temporary, bank or part-time workers to supplement departments in the event of Employee shortages – you may even need to consider asking retirees or ex-employees if they would assist in the event of a pandemic.
- Reducing the number of employees working in enclosed places.
- Asking employees to avoid direct contact with other employees and suppliers/clients/customers and to observe a social distance of at least one metre (reconfiguring the site layout to enable this to take place).
- Advising employees to avoid congregating at break times and to take more staggered lunch breaks.

- Introducing 'ghost' shift changes so that employees leaving one shift do not encounter employees arriving for the next.
- Offering key workers who are reliant on public transport dedicated transport to and from work.