

Employment

THIS BOOKLET IS UP TO DATE AS AT JUNE 2021. PLEASE NOTE THAT THIS RESOURCE IS NO LONGER BEING UPDATED.



Burgess Salmon

COVID-19: a guide for employers

Other Burges Salmon COVID-19 guidance for employers

Employment

[New COVID-19 guidance on working safely – what employers need to know](#)

[COVID testing at work – what employers need to know](#)

[The COVID-19 vaccine: What does it mean for employers?](#)

[The Coronavirus Job Retention \(Furlough\) Scheme from November 2020 to September 2021](#)

[Treasury Direction on the Coronavirus Job Retention Scheme: A summary of key points](#)

[A conversation about...hybrid working after COVID-19](#)

[A conversation about... COVID-19 and the reluctant returner](#)

[A conversation about... flexible working in a COVID-19 world](#)

[A conversation about...COVID-19 and the quarantined employee](#)

[Managing holiday and extension of carry-over provisions](#)

[The Test and Trace Scheme – what does it mean for employers?](#)

Pensions

[Dealing with a contribution crisis](#)

[New guidance on furlough and pensions: what employers and scheme trustees need to know](#)

GDPR

[ICO issues guidance on workplace testing for employers](#)

Contents

- 4 Introduction
- 5 Working safely
- 13 Absence from work and entitlement to pay
- 22 Employees with childcare issues
- 23 Working away from the workplace
- 25 Business travel
- 27 The Coronavirus Job Retention Scheme
- 28 Practical tips

PLEASE NOTE THIS GUIDE IS NO LONGER BEING UPDATED. WE ADVISE THAT YOU CHECK THE CURRENT POSITION IN YOUR NATION AND PROCEED ON THE BASIS THAT THE INFORMATION IN THIS GUIDE MAY NOT REFLECT THE CURRENT GUIDANCE OR LAW.

Introduction

COVID-19 has presented a global challenge on a scale that has not been seen in a generation. Throughout the pandemic we have provided this booklet to address the key issues that employers have had to consider. In light of the successful roll-out of the vaccine in the UK and the completion of the UK government's 'roadmap', which has seen the majority of COVID restrictions lifted in England (and the similar steps taken in the devolved nations), we have taken the decision to stop updating the guide. Many of the sections may remain relevant for employers as they continue to grapple with the multitude of issues created by COVID-19; however, all information should be checked against the current guidance and law.

Please note that the information in this booklet is drafted with reference to England and there may be different considerations in Scotland, Wales and Northern Ireland.

We are continuing to advise our clients on a daily basis on the continuing impact of COVID-19 on their workforces, including the 'return to the workplace' and hybrid working practices. If we can assist you, please do not hesitate to get in touch.

Contact us

We are advising our clients on the continuing impact of COVID-19 on their workforces and workplace practices on a daily basis. If we can assist you, please do not hesitate to get in touch.



Luke Bowery

Partner

T +44 (0) 117 902 2716

M +44 (0) 7980 765781

E luke.bowery@burgess-salmon.com



Kate Redshaw

Senior Associate

T +44 (0) 117 902 6610

M +44 (0) 7980 984025

E kate.redshaw@burgess-salmon.com

Working safely

Please check the restrictions in place for your particular area – this section is for general guidance only.



As an employer, you are under a duty to take reasonable steps to ensure your employees' safety.

The duty to ensure your employees' safety includes providing a safe place for your employees to work and so you need to take steps to assess and reduce the risk to your workforce of contracting COVID-19 on an on-going basis. Broadly, the current guidance throughout the UK provides that everyone who can work from home should continue to do so. Under the current roadmap, the government does not intend to substantially change this guidance for those in England until the final step and therefore it is anticipated that employees will need to continue to work from home, if they can do so, until at least June 2021. In England, employees should only travel for work or attend the workplace if they are not able to work from home or if it is otherwise necessary for work purposes. Employers should continue to take every possible step to facilitate home-working and where employees need to attend the workplace, COVID-secure measures should be put in place.

The government ['Working safely during coronavirus'](#) guidance comprises a suite of detailed non-statutory workplace guides for employers to take into account when complying with existing health and safety obligations. Where employers have employees who need to come into their place of work, the guides explain how to make working and workplace environments COVID-secure and cover a wide range of different types of workplace environments and businesses that operate more than one type of workplace will need to take account of more than one guide. These guides are updated on a regular basis and employers should make sure they are familiar with the latest guides for all their working environments.

As lockdown restrictions are eased, the government is expected to provide further guidance on a return to the workplace at the final stage of the roadmap, including what measures will be required by employers to limit transmission. You should start considering how a return to the workplace can be handled for your employees including any anticipated

Working safely

areas of difficulty (for example, if you will face physical constraints in implementing social distancing (if required) or if you have employees who may be reluctant or unable to return). You may also want to consider whether you will be putting in place testing arrangements.

The guides highlight that the mental health and wellbeing aspects of COVID-19 should be considered, and direct individuals to the government guidance on the same ([‘COVID-19 guidance for the public on mental health and wellbeing’](#)).

Employees who attend the workplace

For the time being, employees should only go to work on a day to day basis where they cannot work from home and employers should continue to facilitate this home-working as far as possible. Guidance on how to establish whether it is possible for employees to work from home is provided in the workplace guides and employers are advised to engage with employees about who should attend the workplace. The workplace guides recommend measures that should be taken to provide a COVID-secure working environment and it is recommended that employers consult on an ongoing basis with any recognised trade union health and safety representatives or, if there aren't any, with a representative chosen

by employees about these measures. Employers should give particular consideration to vulnerable employees who are at higher risk.

As employers decide who can attend the workplace, risk assessments and actions should be updated to reflect this and to ensure the risk of transmission is managed. Employers should continue to monitor the wellbeing of any workers who remain working off-site.

Employers are advised to have an up to date COVID-19 outbreak plan. In addition, you should make sure any visitors to your building understand the precautionary measures you expect them to take and adhere to guidance on social distancing. If you are a tenant in a building, make sure you are liaising with your landlord to understand the steps they are taking to prevent the spread of COVID-19 both in terms of maintenance of the common parts and in respect of any other tenants in the same building.

The implementation and monitoring of any risk assessments is key for employers, in particular:

- **Do what you say** – it is very easy to make something look good on paper but it is important to implement the steps you say you are taking.
- **Be prepared to change** – it is a risk management cycle, so monitor whether

Working safely

the steps are working and be prepared to change them.

- **Consider the impact on other risks**
 - some tasks need two people to be done safely. Some tasks are safer with two people. Some tasks need to be supervised. Organisations should not, therefore, think about COVID-19 risk in isolation. Where a core pillar of any COVID-19 risk assessment is to keep two metres apart wherever possible, organisations also need to think about how this impacts other processes and existing risk assessments so as to avoid re-introducing or increasing risk in those other areas.

Protecting people who are at higher risk

Two groups have been identified as being at higher risk from the dangers of COVID-19; the clinically extremely vulnerable and the clinically vulnerable.

In England, shielding advice for clinically extremely vulnerable individuals was paused on 1 April 2021. Those who are clinically extremely vulnerable should continue to work from home where possible but where this is not possible they can now return to the workplace. Where a clinically extremely vulnerable person does need to return to the workplace you should make sure you take steps to reduce the risk of their exposure to COVID-19.

The change to advice means that clinically extremely vulnerable individuals will not be eligible for SSP (on the basis of being advised to shield) if they cannot work from home. If they are eligible, you may choose to place (or continue to place) clinically extremely vulnerable employees on furlough. Employees who are not furloughed (or in any case as the furlough scheme winds down) may present challenges if they cannot work from home as they may be nervous about returning to work particularly if they have not had or are unable to have the vaccine. You will need to consider how to approach these situations, including with reference to the COVID-secure measures that can be put in place, and you may need to seek legal advice.

It is possible that the government may issue further shielding notifications and / or there may be future variations in local COVID-19 advice for the clinically extremely vulnerable.

Employees who live in the same household as a clinically extremely vulnerable individual can continue to attend work if they are unable to work from home. If, as a result of COVID-19, an employee has caring responsibilities for a vulnerable individual in their household, the employee can be furloughed.

Further information is set out in the **guidance** in England on shielding and

Working safely

protecting people who are clinically extremely vulnerable from COVID-19.

The clinically vulnerable are at less risk than the clinically extremely vulnerable but are still at a higher risk than the general population. A full list of those who are viewed as clinically vulnerable can be found on the NHS website ['Who's at higher risk from coronavirus'](#) and it includes the over 70s, those who are pregnant and those with certain underlying health conditions. Clinically vulnerable employees should be allowed to work from home wherever possible and, as an employer, you should support this. The Government workplace guidance confirms that the higher risk that COVID-19 poses to certain individuals (including those who belong to 'higher-risk' groups which also include, for the purposes of the guidance, older males) should be considered as part of employer's risk assessment on who should work and how risks can be effectively managed.

Many of those who are clinically extremely vulnerable or clinically vulnerable may also be disabled. This gives them additional protection from discrimination and also means that employers may need to make reasonable adjustments to accommodate the effects of their disability. The guidance also stipulates that 'particular attention should also be paid to those who live with clinically vulnerable individuals' who may

also, in certain circumstances, be entitled to protection under discrimination legislation.

In addition, those who are pregnant are also categorised as clinically vulnerable. A pregnant employee who cannot work from home may be entitled to be suspended from work on medical grounds (and to be paid full pay) unless the employer can alleviate the risks to which the employee is exposed in the workplace as a result of COVID-19, for example by altering hours or conditions of work or by providing a suitable alternative role.

You may wish to seek legal advice in the above circumstances.

Can an employee refuse to attend the workplace?

For those who cannot reasonably work from home, there are likely to be employees who are understandably nervous or anxious about attending the workplace. This is likely to become an increasing issue for employers as we approach a return to 'normality' and workplaces begin to open to more people – particularly as that is likely to happen before everyone has been offered the vaccine. An employee may refuse to attend their workplace if they reasonably believe there is a serious and imminent danger posed by coronavirus. Section 44 of the Employment Rights Act 1996 provides that an employee has the right

Working safely

not to be subjected to a detriment by any act, or any deliberate failure to act, by an employer on the ground that, in circumstances of danger which the employee reasonably believed to be serious and imminent, the employee refused to attend their place of work or any dangerous part of their place of work. Section 100 of the Employment Rights Act 1996 provides that a dismissal on these grounds will be automatically unfair and there is no qualifying period or cap on compensation for such a claim. Whether the employee's belief that there is a serious and imminent danger is a reasonable belief will depend on a number of factors, including the extent to which the employer has assessed risks and followed guidance and whether any further safeguards, such as PPE, can be provided or other measures can be taken.

The application of Section 100 of the Employment Rights Act 1996 to an employee who refused to attend the workplace because of COVID-19 was considered in *Mr D Rodgers v Leeds Laser Cutting Ltd: 1803829/2020*. In this case, the dismissal of the employee for non-attendance was not found to be unfair with the Employment Tribunal rejecting his argument that COVID-19 created circumstances of serious and imminent workplace danger regardless of the employer's safety precautions. His

employer had implemented the COVID-secure measures that were recommended by the government at the time and to have accepted Mr Rodger's arguments would have meant that any employee could have left their workplace simply by virtue of the pandemic. This was a decision of the Employment Tribunal and so is not binding on other tribunals. There were also specific facts in play but it will be interesting to see if other Employment Tribunals adopt a similar approach.

Employers will need to consider the varied circumstances of different employees (including vaccination status) and the danger of coronavirus must be considered within the context of any vulnerabilities; the measures that may be sufficient to reduce the danger for other employees, may not be adequate for clinically vulnerable/ clinically extremely vulnerable (or those who live with such individuals) or disabled employees.

A complaint that the workplace is unsafe could also amount to a protected disclosure and so the employee would be protected against detriment and dismissal on the grounds of that disclosure as a whistleblower. If the employee is disabled there is also an obligation to consider reasonable adjustments.

Therefore, employers will need to handle the situation carefully and engage with

Working safely

the employees to:

- understand their concerns;
- reassure them as to the steps taken on site and the measures put in place;
- respond to any particular concerns they have raised and consider any suggested measures that they put forward; and
- inform them (where relevant) of the trade union's involvement in considering and supporting the business' social distancing and other safety measures.

A continuing refusal would need to be handled sensitively:

- continue to engage with the employee to understand and alleviate their concerns;
- where relevant, seek to engage with the trade union to see if they can help allay concerns;
- if the employee's concerns are linked to a particular health concern, consider an occupational health referral to understand the impact of the pandemic on the employee;
- if the employee's concerns are related to travelling to and from the workplace on public transport, consider what measures could be put in place to alleviate the concerns (e.g. providing a car parking space or changing working hours to avoid the rush hour); and

- respond to the concerns, explain the safety measures that have been put in place and if they still refuse to attend the workplace consider alternative roles, the possibility of working from home and explore with the employee what other types of leave they could take to cover the period (e.g. unpaid leave, annual leave).

Disciplinary action/ and or withholding pay may be possible in certain circumstances but you may wish to seek legal advice as the employee may have:

- protection against disciplinary action, suffering a detriment and/ or dismissal, where the employee reasonably believes there is a risk of serious and imminent danger by coming into the workplace; and/or
- disability discrimination protections which may apply, depending on the employee's circumstances (for example, they may be clinically extremely vulnerable or clinically vulnerable or they may have a disability and/ or potentially be subject to a greater chance of suffering more serious effects from the virus than others).

The employee relations, legal and reputational risks associated with disciplinary action could be significant.

The COVID-19 vaccine

The successful rollout of COVID-19 vaccinations is a welcome development and it largely forms the basis for the roadmap out of lockdown, including ultimately providing employers with opportunities to bring employees back to the workplace. However, it also presents many logistical and ethical challenges that employers need to address with care.

Find out more about the issues raised for employers and the steps to take by reading our briefing note [**'The COVID-19 vaccine: What does it mean for employers?'**](#).

The employee's commute

Whilst an employer is not usually responsible for the employee's commute to work, these are not usual times. The vaccination programme is being successfully rolled out and if the roadmap unlocking continues more employees will be starting to return to the workplace. However, many may still have concerns about their commute and using public transport. It is worth bearing in mind that throughout the pandemic public transport has always been available and therefore deemed by the government as safe to use (subject to the requisite COVID-secure measures being in place). It is,

however, advisable to listen to employee concerns and if it is possible, you could adjust an employee's start time and finish times so they can avoid being on public transport at peak times until they feel more comfortable in the commute. Those designated clinically vulnerable or employees with disabilities which might be relevant should be treated with particular care as alleviating difficulties with the commute may constitute a reasonable adjustment. Consider what other arrangements you could put in place to help with the commute – for example many employers are taking advantage of the Cycle to Work Scheme or have made additional car parking spaces available and/or have reallocated car parking according to need. Be aware that the disability and health and safety issues discussed above may also apply to the commute.

Workplace testing

As lockdown restrictions are eased and workplaces start to operate more normally, some employers may want to ask asymptomatic employees to undergo regular testing for COVID-19 (carried out either at the workplace or at home). Anecdotally employers who offer testing on a voluntary basis are reporting that it is received positively by employees. However requiring employees to take a test is not without its challenges. Employees who would receive sick pay only if they had to self-isolate as a result of a positive test may be reluctant to participate. Equally if you would require testing to be mandatory you need to consider what you would do in the event that someone refuses. GDPR issues also arise. You may therefore wish to seek legal advice if you are planning to introduce mandatory testing.

Further information on the government's workplace testing programme can be found [here](#) and to read more about the issues related to workplace testing please see our briefing note ['COVID testing at work – what employers need to know'](#).

Self-isolation

From 28 September 2020, Regulation 7 of the Health Protection (Coronavirus, Restrictions) (Self-Isolation) (England) Regulations 2020 made it an offence for an employer to knowingly allow a worker (including an agency worker) who is self-isolating to attend any place other than the designated place they are self-isolating at during the isolation period for any purpose relating to their employment. Employers who contravene these Regulations will face a fixed penalty starting at £1,000.

Regulations 8 and 9 of the above regulations require workers and agency workers to notify their employer or agent of their requirement to self-isolate and the start and end dates of the isolation period. Individuals will commit an offence if they contravene the requirement to self-isolate.

Absence from work and entitlement to pay



COVID-19 means people will be absent from work for a number of reasons. Some will be ill themselves, others will need to look after dependants who are ill and some will be unable to work because their children cannot attend school or nursery. This means employers will need to carefully consider the question of pay – not least because of the ongoing high levels of absence.

Entitlement to sick pay

At the outset, there was a lot of uncertainty around entitlement to SSP in relation to self-isolation but the government clarified many of the areas of concern.

Statutory sick pay: summary

An employee who is absent from work because they are ill is entitled to SSP of £96.85 per week. This is generally paid by the employer. Key temporary changes to SSP have been made by the government in response to COVID-19 as follows:

- SSP is payable from day 1 where an employee has or may have COVID-19; an employee will be entitled to SSP

if they are self-isolating to prevent infection or contamination with COVID-19 in accordance with Schedule 1 of the Statutory Sick Pay (General) Regulations 1982 (SI 1982/894) (“**SSP Regulations**”) (“**Schedule 1**”) and by reason of that isolation is unable to work. Please note that the current self-isolation period of ten days begins the day after symptoms start and/or a positive COVID-19 test result is received. In summary, Schedule 1 states that a person is incapable of work where:

- (a) the employee has symptoms of coronavirus, however mild, and is staying at home for 11 days, beginning with the day the symptoms started (“day 1”);
- (b) the employee lives with someone who is self-isolating under paragraph (a) above, and so is self-isolating in consequence;
- (c) the employee is staying at home under paragraph (b) above and develops the symptoms of coronavirus, however mild,

Absence from the workplace and entitlement to pay

and is staying at home for 11 days, beginning with the day the symptoms started;

- (d) the employee has been advised by a 'relevant notification' (from Public Health England or similar) that they have had contact with a person who at the time of the contact was infected with coronavirus and they are staying at home until the date specified in a relevant notification; or
- (e) the employee has received a pre-surgery notification and has been advised to stay at home for a period of up to 14 days before the date on which they will be admitted to hospital for the procedure referred to in the pre-surgery notification and is staying at home in accordance with that advice.

- an employee will be entitled to SSP if they are shielding in accordance with Schedule 2 of the SSP Regulations ("**Schedule 2**"). Shielding was paused on 1 April 2021 and therefore employees who were shielding are no longer eligible to receive SSP. However, notifications to shield may be issued if the government deems it necessary for some people to shield again and those who receive further notifications would again be entitled to SSP while they were shielding.

- the SSP Regulations also address SSP provisions for those households that are now forming 'bubbles' with each other. If an employee is in a 'linked' or 'extended' household, and is self-isolating due to someone in that 'linked' or 'extended' household having COVID-19 symptoms, and the employee cannot work from home, SSP will be payable to that employee while they self-isolate. If the individual who has COVID-19 symptoms receives a negative COVID-19 test result, SSP will stop being payable.

Point to note: currently people required to quarantine on return to the UK from abroad are not entitled to SSP if they are self-isolating after entering or returning to the UK and do not need to self-isolate for any other reason.

- where an absence is due to COVID-19, small employers with fewer than 250 employees (as at 28 February 2020) will be refunded for up to 14 days' SSP per employee affected; refunds to employers of SSP will only be payable within the "eligible period", which commenced on 13 March 2020. Payments of SSP made by employers to self-isolators before this date may not be refundable.
- medical evidence supporting the absence is not required for the first 7 days. After 7 days it is for the employer to determine

Absence from the workplace and entitlement to pay

what evidence it requires. If evidence is required to [cover self-isolation or household isolation](#) beyond the first 7 days of absence then employees can get an isolation note from [NHS 111 online](#) or from the [NHS website](#). However, government guidance strongly suggests that employers use their discretion around the need for evidence where an employee is absent because they are ill with COVID-19 or is self-isolating in accordance with Schedule 1 (or shielding under Schedule 2 although this is currently paused in England). GPs will not be issuing Fit notes for COVID-19 related absences.

- keep records of staff absence in the usual way.

Point to note: A furloughed employee is not entitled to receive SSP so if an employee who had been receiving SSP is moved onto furlough they should no longer be paid SSP.

Company sick pay

Many employers operate enhanced sick pay schemes. The fact that an employee is entitled to receive SSP does not mean they are necessarily entitled to receive enhanced sick pay under your scheme and often the terms of the scheme will allow the employer the discretion to decide whether to pay the enhanced sums.

Whilst decisions should be taken in line with scheme rules, given the scale of absence, it will be necessary to consider how you will exercise any discretion. For example:

- should you reduce levels of payments – if so should this be a blanket reduction or just for those who are unwell or absent due to COVID-19.
- a person who is well but is self-isolating under Schedule 1 (or shielding under Schedule 2 although this is currently paused in England) is entitled to go onto sick leave and to receive SSP. However, they do not have to do this. Consider whether you want to ask employees in this position who can work from home to do so (in which case they will not be on sick leave and will continue to receive their normal pay).
- an employee who needs to self-isolate under Schedule 1 (or shield under Schedule 2 although this is currently paused in England) but cannot work from home will need to take sick leave (unless they have been furloughed). Employers with discretionary sick pay schemes will face some difficult decisions in these circumstances. If the employee would normally receive full pay for a period of sick leave and the employer chooses not to pay at this level, then you face the risk of an employee who should

Absence from the workplace and entitlement to pay

be self-isolating coming into work thus presenting a health and safety risk.

These decisions are not easy and will depend on how your scheme is drafted and your organisation's specific circumstances.

Impact on revenue and levels of absence will vary dramatically from business to business and sector to sector. This means it will be sensible to review your approach on a rolling basis rather than taking blanket decisions at the outset.

Point to note: if your sick pay scheme is contractual, it will be difficult to reduce any payments provided for under the scheme. You may want to seek legal advice to understand your options.

Holidays

Employees who are working continue to be entitled to take holidays and should be encouraged to do so. Employees taking holiday should receive pay in the usual way (see '**Managing holiday and extension to 'carry-over' provisions**' below.)

Where international travel is permitted, employers will need to consider how they approach the quarantine periods which may attach where an employee returns from abroad. The quarantine period should not affect an employee who can work from home but employees who need to attend the workplace will be in a

more difficult position as the quarantine requirements mean that they will not be able to return to the workplace for 10 days (or a potentially shorter period if they can use the 'Test to Release' scheme – further details of which are set out under 'Business Travel' below) following their return to the United Kingdom. Currently those required to quarantine following a trip abroad are not entitled to SSP. You may wish to introduce a policy to address how your organisation will deal with quarantine issues. For more information about how to manage issues around quarantine please refer to our video '[A conversation about...COVID-19 and the quarantined employee](#)'.

If an employee falls ill (with COVID-19 or otherwise) whilst they are on holiday, then they are entitled to move to sick leave and to be 'reimbursed' for the balance of any unused holiday.

If the employee's workplace closes whilst they are on holiday they can still be treated as being on holiday until their return at which point they should be treated in line with other employees.

Particular rules apply to those who take holiday whilst on furlough. Please see our briefing '[The Coronavirus Job Retention Scheme – from July to October 2020](#)' for further detail.

AT A GLANCE: Absence and entitlement to leave and pay

Reason for absence	Entitlement to leave and pay
<p>Employee is unwell with COVID-19</p>	<p>Entitled to:</p> <ul style="list-style-type: none"> • take sick leave; • to receive SSP* from day 1 of absence; and • may be entitled to additional pay under any company sick pay scheme. <p><i>Note:</i> an employee who falls ill whilst on holiday will be entitled to switch to sick leave (and SSP/ sick pay) and have the balance of any holiday returned to them.</p>
<p>Employee is well but is required, in accordance with Schedule 1 or Schedule 2**, to self-isolate / shield due to COVID-19.</p> <p>You may be able to keep clinically extremely vulnerable employees who were previously shielding in line with Public Health England (or equivalent) guidance on furlough and/ or re-furlough if they cannot work from home (see ‘The Coronavirus Job Retention Scheme’ below for details).</p>	<p>Entitled to:</p> <ul style="list-style-type: none"> • take sick leave; • receive SSP* from day 1 of absence; and • may be entitled to additional pay under any company sick pay scheme. <p>But consider with the employee if working from home is an option (see ‘Working away from the workplace’ below for detail).</p> <p><i>Note:</i> shielding is currently paused in England. However, further shielding notifications may be issued and those who receive further notifications will be entitled to SSP again while they are shielding.</p>

Absence from the workplace and entitlement to pay

Reason for absence	Entitlement to leave and pay
Employee who cannot work from home is well but is not attending work due to concerns about COVID-19 (and not because they are required to self-isolate/ shield under Schedule 1 or Schedule 2**))	<p>No entitlement to SSP.</p> <p>Check entitlement under any company sick pay scheme.</p> <p>If the employee cannot work from home, the employer should first understand the employee's reasons for refusing and assess the risk. Consider whether a change to hours, transport or job duties may assist in achieving a return to work. Whilst they may not qualify for SSP, you may be able to require the employee to take holiday or you could offer a period of unpaid leave to cover their absence. Furlough may, in some circumstances, also be an option.</p> <p>Disciplinary action and / or withholding pay may ultimately be justified but, given the current circumstances, should only be considered as a last resort. There are arguments that in doing so you may be subjecting the employee to an unlawful detriment which could result in employment tribunal claims. You may wish to seek legal advice in these circumstances.</p> <p style="text-align: right;">➤</p>

*Subject to fulfilling usual SSP eligibility criteria

Absence from the workplace and entitlement to pay

Reason for absence	Entitlement to leave and pay
	<p><i>Continued</i></p> <p>See 'Can an employee refuse to attend the workplace?' above for information about circumstances where an employee may be justified in staying away as a result of health and safety concerns.</p> <p>The clinically vulnerable and clinically extremely vulnerable are in a different position – see 'Protecting people who are at higher risk' above.</p>
<p>Employee is unwell but not related to COVID-19</p>	<p>Entitled to:</p> <ul style="list-style-type: none"> • take sick leave; • receive SSP* but only from day 4 of absence and SSP will not be refunded; and • may be entitled to additional pay under any company sick pay scheme.

Absence from the workplace and entitlement to pay

Reason for absence	Entitlement to leave and pay
<p>Employee who cannot work from home is well but is required to self-isolate due to someone in their 'linked' or 'extended' household experiencing COVID-19 symptoms</p>	<p>Entitled to:</p> <ul style="list-style-type: none"> • take sick leave; • receive SSP*; and • may be entitled to additional pay under any company sick pay scheme.
<p>Employee is well but self-isolating on the employer's instruction (and not because they are required to do so under Schedule 1**)</p>	<p>Entitled to receive their normal pay unless the company sick pay scheme covers this situation.</p>
<p>Employee is well but absent from work due to child needing to self-isolate from school or nursery and/or school/ nursery closure</p>	<p>Consider if holiday/ parental leave/ unpaid leave or furlough is appropriate if available if employee cannot work from home – see below for details.</p>
<p>Employee is well but absent from work due to workplace closure as a result of COVID-19</p>	<p>Entitled to receive normal pay even if they cannot work from home (see 'Working away from the workplace' below for detail).</p> <p><i>Note:</i> consider whether employees can be furloughed – you may want to take legal advice.</p> <p>Employees who are unwell during a workplace closure should be treated as being on sick leave.</p>

Absence from the workplace and entitlement to pay

Reason for absence	Entitlement to leave and pay
<p>Employee is well but is required to quarantine on return to the UK following a work trip abroad</p>	<p>No entitlement to SSP.</p> <p>If the employee can work from home then they are entitled to receive their normal pay.</p> <p>If the employee cannot work from home then they should be paid at their normal rate of pay during the quarantine period.</p>
<p>Employee is well but is required to quarantine on return to the UK following a holiday abroad</p>	<p>No entitlement to SSP.</p> <p>If the employee can work from home then they are entitled to receive their normal pay.</p> <p>If the employee went abroad through their own choice and cannot work from home then consider unpaid leave and/ or additional holiday to cover the quarantine period. Disciplinary action may be possible if the employee was instructed by the employer that the quarantine period would not be sanctioned as leave.</p>

*Subject to fulfilling usual SSP eligibility criteria

**of the SSP Regulations

Employees with childcare issues



Whilst schools and nurseries are open, outbreaks of COVID-19 in educational settings (or where a child has been tested for COVID-19 at school and had a positive result) may mean that children are sent home to self-isolate and employees may need to stay away from work to care for them.

If an employee can work from home, discuss potential arrangements with them – can you flex their hours – whilst the schools were closed many parents shared the childcare operating on ‘shift systems’ so one worked whilst the other looked after the children or can the employee use holiday to cover some of their hours?

If the employee cannot work from home and cannot make alternative arrangements for their children’s care, then consider what alternative options might be available. In the short-term, as an emergency measure, for example when a test result turns out to be positive

employees may need to rely on their right to take time off to care for a dependent. Employees do not have a right to be paid in these circumstances unless this is included in their contract and/or any dependents’ leave policy.

Eligible employees may also be able to take unpaid parental leave. Employees with over 1 year’s continuous employment are entitled to 18 weeks’ parental leave per child.

If an employee has no entitlement to parental leave or has used their entitlement and has no holiday entitlement left, then consider offering unpaid leave. Disciplining or dismissing an employee who cannot work for childcare reasons is unlikely to be reasonable in the circumstances so, unless you suspect the employee is taking advantage of the situation, it would be sensible to agree to unpaid leave as a last resort.

Working away from the workplace



The government continues to advise that individuals should work from home if they can (and employers should continue to facilitate this as far as possible); however, the end of the 'stay at home' rule means that employees now have more options to attend the workplace. Employees can, for example, attend meetings in-person with other colleagues or individuals where it is necessary for work. Employees may also decide to attend their workplace if they cannot work effectively from home, and the workplace guide for offices and contact centres advises employers to consider whether home-working is appropriate for all employees, especially with reference to any mental or physical health considerations for an individual or where their home environment may not be conducive to home working. If home-working is not always possible, employers should encourage a blend of home and office working. Where an employee does attend work, COVID-secure measures should be implemented to reduce the risk of transmission of the virus (see above **'Working Safely'**).

Where employees are continuing to work from home or from a different location then, even in these difficult times, you are still under various obligations as their employer. For example, you are still responsible for an employee's health and safety and you still need to carry out a risk assessment. If an employee uses specific equipment, for example, a particular office chair or an adapted keyboard, then you may need to arrange for the equipment to be transported to the employee's home/new location, particularly if the homeworking is continuing.

It is also important for employers to consider their employees' mental wellbeing. Despite the reduced rates of COVID infections after more than a year of living through a pandemic many people continue to be fearful of leaving their homes. If you are planning for a return to the office for most people, consider how you will approach those whom you know are reluctant to return. Even though a return to the office approaches, continue to keep in touch

Working away from the workplace

with employees – virtual coffee breaks, team WhatsApp and buddy-up schemes have proved vital for many.

Also consider the following (many of which will apply to ongoing hybrid working arrangements after restrictions ease on 21 June):

- remember that as an employer you have health and safety obligations towards your employee even if they are working from home and these will continue if you plan to allow hybrid working on an ongoing basis (see above).
- GDPR obligations have not disappeared because of COVID-19. Keep under review steps/restrictions in place to protect personal data which is being taken off-site.
- if employees use their own devices, such as PCs and tablets, how does this affect confidentiality requirements?
- does your insurance cover homeworking?
- how do you supervise work?
- review touch points with employees – are you staying in touch with employees on a frequent enough basis?

- do you need to provide employees with stationery, paper and printer ink for example? How will you reimburse people for expenses e.g. telephone bills, postage etc?
- keep arrangements under regular review and plan ahead for a return to the workplace, when possible.

As we approach a return to the workplace, employers may find that employees start to submit formal requests to work flexibly to enable them to continue to work from home and/ or to continue a different pattern of working on a permanent basis. To find out about how employers can best manage these requests please refer to our video [‘A conversation about... flexible working in a COVID-19 world’](#) where we discuss these issues.

In addition, many employers are thinking about introducing hybrid working arrangements to allow home-working to continue in some form in the future. We discuss the considerations that these working models create for employers in our video [‘A conversation about... hybrid working’](#).

Business travel



The 'stay local' rule ended in England on 17 May 2021 and in the absence of any local variations, restrictions on national and international travel have eased. The government continues to advise that if individuals need to use public transport to attend work, they should avoid busy times and routes where possible.

If you need an employee to stay overnight away from home, and can do so within the parameters of the government guidance, you will need to log their stay centrally and make sure that any accommodation meets social distancing guidelines.

Restrictions on travel are easing under the roadmap but restrictions on international travel may remain for some time. You should also make sure you are aware of the different rules across the devolved nations on international travel, if relevant. At the time of publication, the government has removed restrictions on international travel from England and announced a 'traffic light' system, with different requirements and guidance depending on the traffic light

rating in place for a country (which will be reviewed every three weeks). All individuals in England who travel internationally will require proof of a negative test(s) and will be subject to the following rules:

- **'Green' countries** – individuals can travel for any purpose and there is no requirement to quarantine on return.
- **'Amber' countries** – individuals are advised to only travel for certain purposes (such as work) and not for leisure. There is a requirement to self-isolate at home for ten days (or for five days using the 'Test and Release' scheme) on return.
- **'Red' countries** – individuals are advised to only travel for certain purposes (such as work) and not for leisure. In addition, the UK government has banned arrivals from these countries by anyone who does not have resident rights in the UK and UK residents are required to undertake a ten day quarantine period in a government-approved hotel or facility on their return to the UK.

Business travel

Many other countries have similar quarantine or testing requirements in place on entry or they may restrict access from overseas visitors. If you are asking an individual to travel internationally, you will need to consider paying for the necessary tests as well as any stay in a hotel or facility that is required by the destination country or on return to the UK.

You will also need to consider how quarantine requirements might impact on an individual when returning home – if the quarantine requirements leave the employee with difficulties, for example, because of childcare arrangements, this may impact on whether your decision to ask them to go abroad for work is reasonable.

Please note that there are exemptions in place from the travel restrictions but these apply in very limited circumstances.

Even with international travel being legally permitted, the FCO continues to advise against all non-essential travel to some countries and territories (details of the country-specific COVID-19 advice can be found on the FCO website and is updated regularly). Given this guidance, and taking into account possible restrictions to enter the UK and that any country or area may restrict travel without notice, an employee may be entitled to refuse to travel abroad for business especially in respect of any countries that are designated as 'red' or that the FCO has advised against visiting.

A 'Test to Release' scheme is in place and allows individuals in certain cases to pay for a private test and reduce their isolation period. The earliest a test can be taken is five full days after the individual has left the country in question. If you are asking an individual to travel internationally, you may want to consider paying for this test.

Businesses should continue to assess their approach to international travel in line with FCO guidance. In deciding what approach to take in relation to travel, your start point should be the [FCO guidance on travel](#).

If an employee refuses to travel within the UK or abroad overseas, and your request that they travel is in line with government guidance, listen to their reasons for refusing and see if you can address these concerns in the first instance. Many employees will still be very reluctant to take public transport – particularly planes – and health and safety protections will apply to employees being asked to travel for work purposes (see '**Working Safely**' above for more detail). In addition, employees may well want to avoid the period of self-isolation that foreign travel may require on return to the UK for a number of justifiable reasons including caring for clinically vulnerable people and/or childcare reasons.

The Coronavirus Job Retention Scheme



Overview of the scheme

On Friday 20 March 2020 the Chancellor of the Exchequer announced the introduction of the Coronavirus Job Retention Scheme – known also as the furlough scheme – in an effort to help employers avoid the need to make mass redundancies as a result of the impact of COVID-19. The scheme has been extended until the end of September 2021.

The scheme is not without its complexities and the supporting guidance has changed on a regular basis. We have written a briefing for employers explaining more about the operation of the extended scheme which you can read [here](#). Our previous guidance notes on how the scheme works are also available on our website.

The Coronavirus Job Retention Bonus, which was to be paid in February, has now been withdrawn and it remains to be seen whether any replacement scheme will be introduced.

Practical tips



- Adhere to government guidance on COVID-19 as a base line. As the level of cases and variants fluctuates these changes continue apace – always check the latest government guidance before taking decisions. [COVID-19: UK government response](#).
- Remember that restrictions are easing at different rates across the United Kingdom. Always check government guidance pertinent to your area before making decisions.
- Even with the end of restrictions in sight, ensure your COVID-19 core team continues to communicate regularly with employees.
- Make sure all staff contact details are accessible and up to date and put in place a mechanism so you know where employees are.
- Seek to act consistently across the business at any given time (bearing in mind that approaches may need to be adapted depending on how the situation develops over time). Make sure managers understand what is required of them.
- Whilst consistency is important, there will be occasions when you will need to consider an employee's particular circumstances, so avoid introducing blanket policies which offer no flex.
- Many employers will want to be generous in relation to paying employees who are absent from work. Whilst contractual terms will need to be adhered to, be careful to make it clear if a payment is discretionary so that if the situation escalates as larger numbers of employees are affected you can review your approach.
- Start planning for the anticipated return to the workplace in line with the government's roadmap and consider how you need to prepare for employees being back at work. Remember to keep up to date with government guidance and the reviews that form part of the roadmap's progression.

This guide gives general information only and is not intended to be an exhaustive statement of the law. Although we have taken care over the information provided, you should not rely on it as legal advice. We do not accept any liability to anyone who does rely on its content.

www.burges-salmon.com

One Glass Wharf, Bristol BS2 0ZX T +44 (0) 117 939 2000 F +44 (0) 117 902 4400

Atria One, 144 Morrison Street, Edinburgh EH3 8EX T +44 (0) 131 314 2112 F +44 (0) 131 777 2604

6 New Street Square, London EC4A 3BF T +44 (0) 20 7685 1200 F +44 (0) 20 7980 4966

Burges Salmon LLP is a limited liability partnership registered in England and Wales (LLP number OC307212), and is authorised and regulated by the Solicitors Regulation Authority. It is also regulated by the Law Society of Scotland. Its registered office is at One Glass Wharf, Bristol BS2 0ZX. A list of the members may be inspected at its registered office. Further information about Burges Salmon entities, including details of their regulators, is set out on the Burges Salmon website at www.burges-salmon.com.

© Burges Salmon LLP 2021. All rights reserved. Extracts may be reproduced with our prior consent, provided that the source is acknowledged.