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Napthens HR3 Webinar – Coronavirus and Employment Law Update

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WHAT ARE WE LOOKING AT?

- SSP and Self Isolation
- Corona Virus Job Retention Scheme (Furlough Leave)
- Lay off's and redundancy
- Unpaid Leave – cutting the wage bill.

ARE WE ON A LOCKDOWN?



SELF ISOLATION AND SSP.



Statutory Sick Pay (SSP) – When is it payable?

- In order to qualify for SSP an employee must be absent from work due to incapacity.
- Emergency legislation was introduced to take effect from 13th March 2020 which provides that a person is deemed incapable of work where he is:
 - “isolating himself from other people in such a manner as to prevent infection or contamination with coronavirus disease, in accordance with guidance published by Public Health England, NHS National Services Scotland or Public Health Wales and effective on 12th March 2020”*.
- There is no requirement for an employee to provide written notification of their absence in respect of self-isolation from GP.
- Self isolation notes now available. 111.nhs.uk

*Regulation 2(1)(c) Statutory Sick Pay (General) (Coronavirus Amendment) Regulations 2020

Further changes to SSP

- **Emergency legislation** – introduced emergency legislation to temporarily make SSP payable from the first day of sickness.
- **Reimbursement** - employers will be reimbursed for any SSP paid to employees in respect of the first 14 days of sickness related to COVID-19. Fewer than 250 staff as at 28th February.

What is the current Government guidance on self-isolation?

- Anyone who is displaying symptoms of COVID-19 (high temperature or a new continuous cough) regardless of whether they have been in contact with an infected person or been to an affected area should self-isolate for **7 days**.
- Anyone living in a household with someone who is showing the symptoms above should self-isolate for **14 days**.

Does an employer have to pay contractual sick pay?

- Whether or not an employer has to pay contractual sick pay could depend on the wording of the contract.
- If the contract defines “incapacity” then whether or not self-isolation is included could be determined based on the contractual definition.
- Cannot be right that CSP is payable – not implied that the contractual scheme must mirror the statutory scheme?
- SSP scheme has other provisions – length of payments etc
- Worst case scenario – unlawful deduction.

Can an employer send employees home to self-isolate where no symptoms?

- If actually working then fine.
- Is there an express or implied right?
- If possible the employer can offer remote/home working as an alternative to suspension for the purpose of self-isolation.
- What pay the employee is entitled to depends on the circumstances:
 - **Suspension for reason not falling within government self-isolation advice** – Unless there is no express contractual provision to the contrary, the employee is entitled to full pay. Withholding pay may discourage employees from being honest about any possible risk of infection which could harm other employees.
 - **Suspension for reason falling within government self-isolation advice** – The employee will be eligible for SSP. Employer could treat them as being on sick leave and pay them in accordance with a contractual sick pay policy if required.

What if an employee has mild symptoms but no COVID-19 diagnosis?

- If the employee is showing symptoms of a cough and/or fever they should follow government guidance on self-isolation. In which case they will be entitled to SSP.
- The employer may pay contractual sick pay depending on the terms of the contract.

What if an employee refuses to attend work due to fears about COVID-19?

- If the employee can work from home, this should resolve this issue.
- If home working is not permitted, the employer should consider the following:
 - Current public health advice;
 - The specific reason the employee is fearful; and
 - Whether it would be discriminatory to refuse home working. (e.g. is there a disability in play.)
- If there is no possible discrimination and current guidance states that the employee should continue to work then the employer can follow the disciplinary procedure on the basis of misconduct.
- If the absence is unauthorised then the employee would not be entitled to pay.

Could holidays be used to cover period of absence?

- Employees may wish to take annual leave instead of a period where they would otherwise be on SSP or no pay.
- The employer cannot compel the employee to take annual leave during sickness absence.
- Employees who are not on sick leave can be instructed to take statutory annual leave by their employer provided they are given the required level of notice.
- The notice must be at least twice the length of the period of leave that the worker is being ordered to take.

How to deal with employees who has anxiety and is afraid to work?

- In line with government guidance, employers should allow employees to work from home where possible.
- If an employee has anxiety and this is heightened by travelling or attending work during the pandemic, it is possible that they could be classed as being on sick leave and therefore entitled to SSP or contractual sick pay.
- Severe anxiety can amount to a disability under the Equality Act 2010.
- check with the appropriate medical professional or occupational health to ascertain whether the anxiety is so severe that the employee is classed as disabled.

SOCIAL DISTANCING.

- The recent advice from the government on 21st March 2020 confirmed that measures will be introduced for those who are vulnerable including those who are over 70, pregnant or suffer from pre-existing medical conditions such as an auto-immune condition or respiratory conditions to be “strongly advise(d)” to stay at home. for 12 weeks (Shielding)

Where an employee falls into one of the categories the government has “strongly advised” to work from home, can the employer require them to come into work if their role cannot be carried out remotely?

- Be careful
- Possible breach of contract in light of government guidance
- In theory no law to stop you asking them to come in..
- Risk assessment should be carried.
- Equality Act Considerations.

Where an employee falls into one of the categories the government has “strongly advised” to work from home, what are they entitled to be paid if they remain at home and it is not possible for them to work remotely?

Pay?

- But social distancing may be required for many months.
- Why can they not work from home?

What special considerations apply where the employee is in one of the categories the government has “strongly advised” to work from home because of a protected characteristic?

- Many vulnerable will have a protected characteristic.
- Requiring an employee to stay at home without pay may be discriminatory
- Ultimately the employee and employers decision whether they come into work or not.
- Places employer in a very difficult situation as it could be a breach of the employers duty of care to allow the employees to come into work.
- May be get further measures from government?

SUSPENSION

Medical Suspension?

- Medical Suspension: Employment Rights Act ss64-65
 - Remuneration on medical grounds
 - Paid up to 26 weeks
 - Right to suspend not obligation
 - Lead at work regulations 1980
 - Ionising radiation regs 2017
 - Control of Substances Hazardous to Health Regulations 1988
 - No right to suspend in current circs.
- Pregnant Women – Management of Health and Safety at work Regulations 1999, reg 16 Maternity and Parental Leave etc Regulations 1999, reg 6(1)

What if an employee refuses to attend work because they have a disability which they believe puts them at high risk of serious illness?

- If the employee is part of a vulnerable group in line with the most recent public health guidance, it is **recommended** that they should stay at home and avoid face to face contact for up to 12 weeks.
- If employees have a disability that puts them into a high risk category and an employer requires the employee to continue to travel to work, or does not pay or dismisses the employee due to their absence, this could amount to disability discrimination.
- Where it is possible for an employee to work from home, employers should facilitate a request from a disabled employee to work from home. If the employer does not, it could be liable for a failure to make reasonable adjustments.

Health & Safety obligations for employers

- During a pandemic, employers are under a duty to protect the health and safety of its employees.
- Employers must keep themselves and employees informed about health related risks.
- Employers should have reliable and effective systems for communicating with employees i.e. ensuring contact details are up to date and that there is an emergency communication system in place.
- Employers must take steps to ensure that there is good hygiene in the workplace including handwashing facilities and increased level of cleaning.

TERMINATION?

- Frustration of Contract:
 - - A frustrating event is an event which:
 - -occurs after the contract has been formed
 - Is so fundamental as to be regarded by the law both as striking at the parties when they entered the contract.
 - Is not due to the fault of either party
 - Renders further performance impossible, illegal or makes it radically different from that contemplated by the parties at the time of the contract.
 - Some other substantial reason
 - Health and Safety section 100 1(d) and (e)
 - If principle reason of dismissal was that the employee believed to be in danger and leave the workplace then automatic unfair dismissal.

FURLOUGH LEAVE



Corona Virus Job Retention Scheme (Furlough Leave)

- What do we know?
- All employers can claim a grant from HMRC to cover 80% of the wage costs (all employment costs) of employees who are not working but kept on payroll of up to £2500 a calendar month.
- 80% will be calculated by referring to a previous pay period. Not yet been worked out. Desire to help seasonal workers.
- Tax and Ni on payment as normal.
- Must designate employees as Furloughed. Employer still liable for 100% of salary unless agreement. (Furlough Agreement.)
- Notify employees of the intended changes.
- Apply to zero hours employees on PAYE

Relevant Points:

- Must be by agreement.
- Does the scheme apply to short time working?
- Selection must not be discriminatory.
- The scheme is currently set at 3 months
- Employees must not work for the employer during Furlough Leave.
- Sickness and Furlough Leave.

Relevant Points

- Can directors access the scheme?
- National minimum wage not likely to apply.
- It appears possible to furlough in stages.
- We would expect a new starter can be furloughed.
- If there is no work then an employee can be furloughed even if self isolating.

Relevant Points

- Payments must be made by the employer to be reimbursed.
- First payments are not likely to be until end of April – that may be a problem with funding the scheme. – consider lay off?
- Possible that employees laid off or made redundant may now be reinstated and furloughed.
- What selection can be used? Is there a risk? (constructive dismissal?)
- Can you prioritise vulnerable people or over 70's?
- Likely that some one on sick cannot be furloughed.
- Will dismissing for reason of redundancy be unfair?
- Does holiday and benefits continue to accrue?

Relevant Points

- What if an employee takes a new job with their (now) spare time?
• (if hours they worked for you then gross misconduct?)
- Can an employee currently on maternity, paternity, shared parental leave cut their absence short in order to be automatically furloughed in order to increase their payments, funded by the government?
- Can an employer give notice of redundancy during the scheme?
- Can an employer award a temporary 25% pay rise, so that 80% of the new salary matches the original salary?
- Can you pay staff 50% until the new scheme is in place?
- Can you discipline someone on Furlough leave?

RELEVANT POINTS?

- How do you deal with employees who object to their colleagues getting 80% of pay on furlough leave when they still have to work?
- Is it breach of trust and confidence if the employer does not “top up” the extra 20%

SELF EMPLOYED:

- 1) Plan to pay 80% of monthly net earnings, averaged over the last 3 years; or
- 2) £2,917 per month.

Whichever is lower.

Statutory self employment pay.



LAY OFF

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Lay-off and short-time working (if need to continue working.)

- Employers can only lay off or put employees on short time working if they have the **express contractual right** to do so.
- In some industries, where there is a custom and practice of laying staff off or placing employees on short time working, the employer may have an implied right to do so.
- Employees who are already off on sickness or are in self-isolation cannot be laid-off.
- Employees who are laid off are entitled to Statutory Guarantee Pay (SGP) for a period of up to 5 “workless” days in any three months.

What is lay off and short time working?

- Statutory right not to provide work for 4 continuous weeks or 6 weeks in a 13 week period.
- Short time working is where the employee receives 50% or less pay for the equivalent reduction in hours.
- Process is reasonably short..

How is Statutory Guarantee Pay calculated?

- Multiply the number of normal working hours on a workless day by the guaranteed hourly rate.
- The guaranteed hourly rate is calculated by dividing one week's pay by the number of hours the employee would normally work in a week. If the employee works irregular hours then the employee's hours would need to be averaged over the previous 12 weeks.
- There is a **maximum rate** of SGP that is payable which is currently **£29 per day** which equates to **£145 per five days** in any three months.

What can happen if staff are laid off for a lengthy period of time?

- If an employee has 2 years continuous service and have been laid off or kept on short time working (or a mixture of the two) for at least:
 - Four or more consecutive weeks;
 - A total of sick weeks (in any period of 13 weeks).

the employee may claim a statutory redundancy payment.

- The employee must service written notice of their intention to claim.
- An employer, if it is contesting the claim can serve a counter notice.
- If a counter notice is served, the employee must apply to a Tribunal to decide the claim at a hearing.
- If the employer does not serve a counter notice (or served and withdraws) or the Tribunal upholds the employee's claim, the employee must resign without notice.
- If this is a concern, please seek further advice.

LAY OFF AND SHORT TIME – FAQ's

- What if any employees on sick leave? Is lay off effective?
- Is the right to lay off subject to an implied reasonable duration?
- Craig v Bob Lindfield & Sons Ltd
- Resigned after 5 weeks lay off
- Once 4 weeks had expired the employee had a right to claim a redundancy payment "Those provisions left little room for an implied term to operate."

REDUNDANCY

- Individual or collective consultation?
- If Collective 30 or 45 days?
- Protective award of 90 days pay per employee.

- Special Circumstances defence.
- Must do all reasonably practicable.

- Consider alternative employment
- Be careful to select objectively.

EMERGENCY VOLUNTEERING LEAVE:

- Who can take it?
- Workers who are certified by an appropriate authority (NHS, DofH.)
- Taken in blocks of 2, 3 or 4 weeks. One period can be taken in any "volunteering period." Initially there will be one 16 week volunteering period. Beginning on the day the legislation comes into force.
- 3 days notice must be give to an employer. Show the certificate of approval.
- Unpaid leave.
- Workers still entitled to all benefits other than remuneration.
- Compensation fund to be set up.
- Right to return on terms no less favourable.
- Cannot suffer a detriment.

Other Considerations

- Unpaid Leave
- Parental leave
- Ask employees to take holiday
- Variation to terms and conditions – by consent.

Further Questions?

If you have any queries following this webinar, please contact a member of the team.

This is a difficult time for everyone and the fast paced nature of the pandemic means that guidance will be continuously changing.



HR3 Toolkit.

