

SLAUGHTER AND MAY

Slaughter and May Podcast

COVID-19: Employee Absence and Holidays

Clare Fletcher	<p>Hello and welcome to the fifth in our series of Slaughter and May podcasts, looking at key topics for employers in the context of the COVID-19 pandemic.</p> <p>My name is Clare Fletcher and I am a professional support lawyer in the Employment team here at Slaughter and May.</p>
Katherine Flower	<p>And I'm Katherine Flower, senior counsel in the Employment team.</p>
Clare Fletcher	<p>Today's podcast focuses on absence and holidays in the context of COVID-19. Katherine and I will talk through a number of scenarios involving COVID-related absence, and how these should be managed by employers. We will then end with some key practical takeaways.</p> <p>I should mention this podcast is being recorded on 4 August, and reflects the law and guidance as it stands today.</p> <p>Katherine, let's kick off with the most obvious type of absence – sickness with COVID-19 (or its symptoms).</p>
Katherine Flower	<p>Although this is the most obvious and straightforward, it is also probably the least prevalent (at the moment at least!).</p> <p>The government did however confirm last week that people who test positive for COVID-19 or have symptoms must now self-isolate for 10 days, rather than the previous seven. This is in the context of fears about a resurgence of the virus.</p> <p>Employees in these circumstances will be entitled to statutory sick pay. SSP is payable at a current rate of £95.85 per week for a maximum period of 28 weeks. Employers should be aware that SSP may be payable for more than one COVID-related absence; we'll discuss some of these in a moment.</p>
Clare Fletcher	<p>There have been a number of changes to SSP in relation to COVID; can you talk us through those?</p>
Katherine Flower	<p>Sure, there have been three main changes:</p> <p>Firstly SSP will be payable from the first day of COVID-related sickness absence, rather than usual fourth day. The three waiting days have been temporarily suspended – but only in relation to absence related to COVID.</p>

	<p>Secondly, the evidence requirements for SSP have also been relaxed. Employees are able to apply online through an NHS portal for a 'COVID isolation note', instead of obtaining the usual fit note from their GP.</p> <p>Finally, a Statutory Sick Pay Rebate Scheme has been put in place for employers with fewer than 250 employees. These employers can reclaim up to two weeks of SSP per employee, for absence related to COVID-19.</p> <p>Of course employers may of course have an enhanced sick pay policy that might be applicable here.</p>
<p>Clare Fletcher</p>	<p>So the next scenario we want to look at is an employee who doesn't have COVID-19 symptoms, but who is self-isolating. This could be for a number of reasons, such as because someone they live with has COVID-19 symptoms, or because they have been notified through NHS Test and Trace that they have come into close contact with someone who has tested positive.</p> <p>Well these self-isolating individuals will also be entitled to SSP under regulations enacted to deal with the COVID outbreak.</p> <p>However, SSP will only apply if, by reason of that isolation, the individual can't work. The main example of this is people whose jobs can't be done from home. It probably doesn't cover a scenario where the employee could do their job from home, but can't during the period of self-isolation. For example because they also have children at home and no other childcare provision.</p>
<p>Katherine Flower</p>	<p>It's quite a novel situation, giving sick pay to employees who may well be fit and able to work. It's not likely to be that popular with employees either is it, given the relatively low rate of SSP?</p>
<p>Clare Fletcher</p>	<p>No absolutely. There is real concern about how successful Test and Trace will be, if employees don't want to have the financial penalty of self-isolating. We know that the government is being lobbied on this to increase SSP entitlement.</p> <p>In the meantime however, employers need to come up with a policy for managing this type of absence. This could involve offering enhanced sick pay for self-isolation (if this is financially viable for the employer). An alternative which is suggested by the NHS Test and Trace workplace guidance is that employers should consider offering the employee the chance of taking holiday, as a fully-paid alternative and we'll come back to holiday later in the podcast.</p>

<p>Katherine Flower</p>	<p>Let's move on to look at the position of those who are shielding – or I should say have been shielding, until recently.</p> <p>The guidance on shielding was of course paused on 1st August, at least in relation to England, Scotland and Northern Ireland (it will continue until at least 16 August in Wales). It is also still continuing in areas of local lockdown, such as Leicester and Blackburn and we are likely to see this being a feature of local lockdowns in the future.</p> <p>Where people are shielding, they are entitled to SSP. However where shielding has ended, so will the entitlement to SSP, and the expectation seems to be that those individuals will return to work. The COVID-secure workplace guidance has been updated to state that “From 1 August, clinically extremely vulnerable individuals can go to the workplace as long as it is COVID-secure, but should carry on working from home wherever possible”.</p> <p>Of course many individuals will be understandably reluctant to return to the workplace.</p>
<p>Clare Fletcher</p>	<p>Yes and home working will presumably continue to be the best first option in that scenario.</p>
<p>Katherine Flower</p>	<p>Yes – and we think this would include offering alternative roles that can be done from home, if their usual role can't.</p> <p>Employers will need to carry out specific risk assessments, and potentially involve occupational health, to determine the best way forward for returning shielders.</p> <p>It is likely that employers will need to make reasonable adjustments for returning shielders, whether as a result of them being classified as “disabled” under the Equality Act, or as a result of the employer's duty to take reasonable steps to protect the health and safety of its employees. These adjustments may include providing more stringent social distancing and COVID-secure measures in the workplace. It may also include a further period of company sick pay, even where SSP no longer applies, if there is no viable alternative.</p>
<p>Clare Fletcher</p>	<p>Now the shielding regime is of course for those who are defined as “clinically extremely vulnerable”.</p> <p>There is an important distinction between those individuals, and those who are classed as “clinically vulnerable”. This latter category aren't within the scope of the shielding regime, and they are not entitled to SSP unless they fall within one of the other categories.</p> <p>However, that is not to say that the clinically vulnerable group do not have relevant protections. That group includes for example pregnant women, for whom employers already owe enhanced health and safety obligations. So if a</p>

	<p>pregnant women does not feel able to return to the workplace, one solution may be a health and safety suspension on full pay.</p> <p>The employer might also need to consider the position of employees living with those who are shielding or have other vulnerabilities. These employee won't again be entitled to SSP, but may have similar reservations about attending the workplace. We discussed the position of reluctant returners in our first podcast – there are a number of options which should be considered, in consultation with the employee.</p>
<p>Katherine Flower</p>	<p>So moving away then from the health context to another big challenge that the pandemic has created – the challenges of caring for children and other dependents. The early stages of lockdown saw schools and childcare providers forced to close, leaving many parents juggling childcare with working from home.</p> <p>Although schools are due to re-open in September, the recent increase in the prevalence of the virus puts that in question. There is also the possibility of local lockdowns closing schools and childcare providers.</p> <p>Employees have a statutory right to take a "reasonable" amount of time off work to take care of their dependants.</p> <p>There is no statutory right to pay for this time off, but some employers might offer to do so depending on the contract or workplace policy.</p> <p>The amount of time off an employee takes to look after someone must be 'reasonable' for the situation. The pre-COVID case law and guidance has interpreted this as not usually exceeding two days, on the basis that the intention is for the time to be used to deal with the emergency – by, for example, arranging alternative care for the dependants.</p>
<p>Clare Fletcher</p>	<p>However in the context of the COVID outbreak, it will not be easy to make such alternative arrangements. We think employees might therefore be entitled to longer periods of absence than has previously been the case.</p>
<p>Katherine Flower</p>	<p>Other options besides dependants leave include unpaid parental leave. Parents who have been continuously employed for at least a year are entitled to up to 18 weeks' unpaid parental leave per child. However unless the employer agrees otherwise, employees are not able to take more than four weeks' leave (in respect of any individual child) per year, and must take the leave in blocks of at least a week at a time.</p> <p>Other than that, employers may agree another period of unpaid leave, or offer the option of the employee taking annual leave to cover their parental responsibilities.</p>

<p>Clare Fletcher</p>	<p>The next topic I want to look at is one that has been a very hot one politically in the last few months – quarantine following return to the UK after international travel.</p> <p>These rules were first imposed on 8 June, requiring most arrivals into the UK to self-isolate for 14 days.</p> <p>Unlike Test and Trace, the quarantine regime is subject to criminal enforcement; a breach of this type of self-isolation could result in a £1,000 fixed penalty notice in England, or potential prosecution and an unlimited fine.</p> <p>Employers will need to consider how they would treat an employee who needs to self-isolate under the new quarantine rules. An instruction to work from home (where feasible) is likely to be the first option.</p> <p>If however the employee cannot work from home, it seems that unlike other types of self-isolation, they won't be entitled to SSP. We aren't seeing many examples of employers offering company sick pay in these circumstances. The options appear to be requiring the employee to take additional annual leave, or unpaid leave, during the quarantine period.</p>
<p>Katherine Flower</p>	<p>Of course employers may feel unable to support employees being absent from the workplace for an additional 14 days on top of any holiday period.</p> <p>Employers do have the ability to restrict when employees take holiday, under the Working Time Regulations 1998, by providing notice of at least the same length as the holiday period. Employers may consider using this power to restrict employees taking holiday for as long as the quarantine restrictions remain in place.</p> <p>However, such a policy is likely to be unpopular from an industrial relations perspective, particularly with employees who struggle to take holiday at other times of year (such as those with school aged children). And employers need to be mindful of the benefits of employees taking annual leave at the moment, and in particular on mental health.</p> <p>It is also something of a blunt instrument, since employers cannot regulate whether employees choose to go abroad on holiday rather than stay in the UK (and it would therefore prevent any holidays in the UK as well as abroad).</p>
<p>Clare Fletcher</p>	<p>There is also of course the possibility that employees might want to travel abroad for reasons other than holiday, for example to visit a sick relative.</p> <p>And in that scenario, employers need to be mindful that they do not indirectly discriminate against some groups of employees by adopting a blanket policy or a blunt instrument as you say Katherine which could put these employees at a disadvantage, at least without adequate justification.</p>

	<p>What about work-related travel? There are some exceptions from the requirement to quarantine, including in relation to work-related travel. If however these exceptions don't apply, and the employee is needs to quarantine after a period of work travel, we would say it would be reasonable for the employer to pay them for this period, and a distinction could validly be drawn from holiday-related quarantine.</p> <p>There have of course been some easing of the quarantine measures from early July, with the introduction of "travel corridors". However, the apparent resurgence of the virus in Europe, and the recent reintroduction of restrictions on travel from Spain and Luxembourg, shows that the quarantine rules will continue to pose challenges for employers for some months to come.</p>
<p>Katherine Flower</p>	<p>I want now to look at annual leave more generally – and some of the particular challenges we have seen employers face.</p> <p>In the early days of lock down we had a lot of queries about whether employees could cancel a period of holiday, for example because their flights had been cancelled. Legally, the employer does not have to allow this, and can insist that the employee takes the holiday, although we would suggest that some discretion is exercised depending on the circumstances.</p> <p>The flip side of that is whether employees can be required to take holiday as I mentioned a bit earlier. There are some circumstances when this would not be possible - including if the employee is entitled to SSP during that period. However, in other circumstances employers must take care not to use this right unreasonably. The law on this is still developing, but our view is that if the requirement to take holiday is limited, for example in proportion to the period of lockdown, the risk of challenge should be low.</p>
<p>Clare Fletcher</p>	<p>I agree. The government was obviously aware quite early on in the pandemic that holiday entitlements could cause issues for employers. At the end of March the government introduced a change in the law, to allow workers to carry over some or all of their holiday entitlement into the next two leave years where it was not reasonably practicable for the employee to take some or all of their leave...as a result of the effects of Covid-19.</p> <p>What does this mean in practice? The guidance we have so far suggests that the carry over right could apply if an employee is self-isolating or too sick to take holiday; or if they have had to continue working during lockdown.</p>
<p>Katherine Flower</p>	<p>So is it what's "reasonably practicable" for the employer, or the employee?</p>

<p>Clare Fletcher</p>	<p>Well both it seems – the analysis will depend both on the employer’s circumstances (so their business and ability to arrange cover) and the individual’s circumstances (their health and their need for a break).</p> <p>The emphasis in the guidance is however that carry over should not be the default approach, and employers need to try to ensure that workers are able to take as much of their leave as possible in the current leave year.</p>
<p>Katherine Flower</p>	<p>Employers will need to amend their annual leave policies to deal with this new carry-over right. They will need to consider not just when to allow carry-over and how much, but how any carried-over holiday should be dealt with (bearing in mind there are some restrictions on).</p> <p>We would suggest that workers should be allowed to take their ‘new’ holiday before they take their ‘carried over’ holiday, since the carried over holiday entitlement lasts for longer.</p> <p>It would also be good practice for the employer to inform workers of both (i) the right to carry forward leave if it can’t be taken, and (ii) how much leave will be carried forward.</p>
<p>Clare Fletcher</p>	<p>The final point I’d like to note very briefly is how furlough interacts with each of these types of leave and absence. Furlough is only likely to be relevant until the CJRS closes at the end of October, and since the scheme is now closed to new entrants all of what I am about to say assumes that the individual in question can still be furloughed at this stage because they have been previously furloughed pre-10 June.</p> <p>If then an individual is entitled to SSP (such as those who are self-isolating or shielding), it might be possible for them to be furloughed instead. However the guidance is not very clear on this, it suggests that the entitlement to SSP must have ended before the individual can be furloughed, or that there needs to be a “business case” for an individual to be furloughed in these circumstances. So some caution needs to be exercised here and we would suggest that employers here get specific advice is sought in these particular circumstances.</p> <p>More straightforward would be the possibility of furloughing someone who is struggling to balance childcare and work. It may also be possible to furlough an individual for the period of quarantine following international travel.</p>

<p>Katherine Flower</p>	<p>So pulling all of this together, what are the key takeaways for employers?</p> <ul style="list-style-type: none"> • Self-isolation is going to continue to be an issue. You need to make sure your policies are fit for purpose. • You'll also need to think about the impact of COVID-related absence on other areas of your business. Will you treat it in the same way as other absences, for example in the triggers for an absence management process, or for benefit accrual? • Consider what your policy will be on holidays – whether that is carry over / cancellations / required absences • Finally, keep records – this is important for SSP and holidays in particular.
<p>Clare Fletcher</p>	<p>Thanks Katherine. That brings us to the end of today's podcast. Thank you all for listening. We have one more episode in this series, on flexible working, which we will be publishing next week. You can find all the previous podcasts in this series on our website.</p> <p>In the meantime if you would like more information about anything we have discussed in this podcast, please feel free to contact either Katherine or me, or your usual Slaughter and May contact. Thank you and goodbye for now.</p>