

CORONAVIRUS: PAY AND SICK PAY, CHILDCARE AND LAY OFFS

KEYSTONE LAW

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THE CURRENT PANDEMIC HAS CAUSED QUITE UNDERSTANDABLE CONCERN AMONGST EMPLOYERS AND EMPLOYEES AS REGARDS HOW EMPLOYEES WILL BE PAID IF THEY CONTRACT THE VIRUS, THEIR WORKPLACE IS CLOSED OR IF THEY ARE REQUIRED TO SELF-ISOLATE BECAUSE THEY HAVE RETURNED FROM OFF-ISLAND, THEY ARE EXPERIENCING SYMPTOMS OF COVID-19 OR A MEMBER OF THEIR HOUSEHOLD IS EXPERIENCING SYMPTOMS.

WHERE WE HAVE COME FROM...

Employees are entitled to be paid if they are ready, willing and able to work. If they are able to do so but the employer has no work for them, then they are entitled to be paid but issues of redundancy and lay-off can arise.

If employees are incapacitated, sick pay can be provided for in contracts and the Government may pay incapacity benefit from day 3 of a period of illness provided that they meet the criteria (ordinarily resident in the Isle of Man, under state pension age and have paid the relevant national insurance contributions).

CHANGES SO FAR AS A RESULT OF THE CORONAVIRUS PANDEMIC

Emergency legislation has been introduced to:

- make it clear that self-isolation (and quarantine) counts as incapacity for incapacity benefit purposes and the benefit can be claimed from day 1 of illness/isolation.
- assist employers by giving any employers who have contractual sick pay and decide to make a discretionary payment to an employee who is having to self-isolate, compensation of £20 a day for up to 10 working days, for each employee.
- Provide a wage support scheme to help businesses retain staff (of up to £280 per week per member of staff for a limited period)
- provide earnings replacement allowance for people out of work due to COVID-19.

There are other support measures in place for business and the information is being regularly updated. If interested, employers should check the [covid19.gov.im](https://www.gov.im/covid19) page for up to date information and the latest developments.

As of 26 March 2020 non-essential shops and community spaces have been closed. Certain businesses (banking, CSPs, e-Gaming etc) have been told to do what they can to facilitate employees working from home unless it is essential for the employee to go in to work. Even so, there will be times when it is not clear how certain employees should be treated.

WHAT DO EMPLOYEES GET PAID IF THEY SELF-ISOLATE?

If self-isolated in accordance with Government requirements, they are incapacitated irrespective of actually being unwell and incapacity benefit may be available. Even if there is a contractual sick pay scheme in place, the employer does not have to pay this because the employee is not ill.

But if, for example, the employee self-isolating has no symptoms or is self-isolating because a member of the same household has symptoms and is able to work from home, then they can continue to work, wouldn't get sick pay and would be paid in the normal way.

If the employee carries out a role that they cannot do from home then in these circumstances the employer does not have to pay them.

CAN EMPLOYEES BE ASKED TO TAKE HOLIDAY?

Holiday can be agreed and may be an alternative to receiving only incapacity benefit where the employee is well, required to self-isolate but not able to work from home.

Employers may request that employees take their holiday at certain times to relieve pressure from the business, in which case the employer would have to give the employee twice as many days' notice as they are requiring the employee to take (for example, 2 weeks' notice must be given if the employee is being asked to take one week of annual leave).

CAN EMPLOYERS SEND EMPLOYEES HOME TO SELF-ISOLATE?

Assuming the employee is still attending work (rather than working from home), if the employee falls under Government guidance to self-isolate (i.e. they are displaying symptoms identified in that guidance or would otherwise be required to self-isolate due to recent travel or contact or for other reasons as per such guidance), then the employer should send the employee home. This is consistent with health and safety duties to other employees, and Government guidance regarding cleaning and possible closure of the workplace should be observed.

The employee sent home would in such circumstances qualify for incapacity benefit and contractual sick pay might be triggered but if they can work from home, then they would be paid in the normal way instead.

WHAT IF AN EMPLOYEE WON'T COME TO WORK DUE TO FEARS ABOUT CORONAVIRUS?

In the absence of a Government lockdown prohibiting attending at a particular workplace and assuming the employee isn't sick and self-isolation requirements don't apply, then incapacity benefit is not triggered.

Therefore, if absence is unauthorised, there would usually be no right to pay and not attending work can be a disciplinary issue. If the employee is one with medical issues that might amount to a disability, then those issues would need to be very carefully considered – ideally with legal advice – to avoid possible discrimination claims.

A practical approach would be to consider homeworking and other options such as unpaid leave or taking holiday in all such circumstances.

WHAT ABOUT THE SELF-EMPLOYED?

A self-employed person unable to work might be able to claim incapacity benefit if they are eligible or they should discuss the other benefits available with the Isle of Man Social Security department.

SOME SCENARIOS TO MAKE THIS EASIER TO FOLLOW...



GEOFF

Geoff is employed full time with a local firm, Business Docs R Us Ltd, to carry out scanning at the office. He is entitled to two weeks' paid sick leave a year. Earlier this year Geoff had a nasty infection and was absent from work for one week. Geoff has just returned home from his holiday to Spain. He does not feel unwell but is required by Government guidelines to self-isolate for 14 days.

Due to the nature of his job Geoff cannot work from home so is classed as ill. The company does not have to pay Geoff contractual sick pay because he is not ill, but they may exercise a discretion to pay him. If they do pay him some sick pay, then they can claim £20 per day back from the IOM Government. Geoff may also be able to claim incapacity benefit.



ALICE

Alice is also employed by the same company. She is responsible for drafting the company's press releases and marketing material and works full time. Her husband is a frequent traveller and has just returned home from South Korea with a persistent cough and a temperature. He is required to self-isolate and so must Alice according to Government guidelines. Alice has a company laptop and access to broadband.

Alice is able to work from home and should receive her full pay throughout the period of quarantine. Her sick pay allowance will be unaffected.



BOB

Bob calls in sick because he has a cough and a temperature. He is off work for two weeks. During this period he gets paid his contractual sick pay.

WHAT IF EMPLOYEES NEED TIME OFF TO CARE FOR PEOPLE?

For many working parents, the closure of schools will present enormous childcare issues, particularly given the advice that grandparents should not look after their grandchildren and instead should be isolating at home and “largely shielded from social contact”.

So, what are employees’ entitlements to time off to care for elderly relatives who become unwell or children who would ordinarily be at school or in nursery?

There is no statutory right to parental leave in the Isle of Man. Employers should therefore check their policies and employees’ contracts of employment. Some employers offer paid time off to care for dependants in emergencies for a limited period of time. Any discretion for the employer to pay full pay to employees for time off to care for dependants should be exercised reasonably and consistently, in order to avoid discrimination claims.

Given the unprecedented circumstances we are currently in, employers may decide to extend unpaid time off for employees to care for a dependant (and contractual paid time off to care for a dependant if this is in place) longer than would usually be offered (this tends to be 2-3 days).

Other available options are that the employee could:

- request the right to change the hours, times of place that they are required to work
- be equipped to work from home.
- be enabled to work at more unusual hours (such as after children have gone to bed) to enable them to keep up with their job.
- take a period of unpaid leave. It is not clear yet but if the schools do close, the Government may widen the scope of the available benefits as they have already done for incapacity benefit and job seeker’s allowance. At this stage it looks as though the employee might be able to claim the Manx Earnings Replacement Allowance of £200 per week if they are not being paid by their employer.

FLEXIBLE WORKING IN THE EVENT OF SCHOOL CLOSURES

Pre-COVID-19 it would have been wholly appropriate, and usual, for employers to refuse homeworking requests on the basis that adequate childcare provisions were not in place; it would never be appropriate for employees to have screaming children interrupting what was then “business as usual”. But as the COVID-19 outbreak escalates, employers must rethink this and take a realistic, pragmatic approach to what lies ahead. If schools and nurseries close, the majority of parents in the workplace will face this issue and putting a blanket ban on working from home while also looking after children simply will not work.

Employers must be prepared to take a more relaxed approach to homeworking and allow employees to work around their childcare responsibilities. The alternative is to encourage staff to use statutory rights to time off to care for dependents or annual leave.

WHAT CAN EMPLOYERS DO TO MAKE THE SCHOOL CLOSURES EASIER TO MANAGE?

If they haven’t done so already, employers should consider the following points.

It’s important to consider the effect that school and nursery closures will have on the business and employees. At this stage, employers should look to identify business-critical roles and how they can be maintained.

An assessment of employees with parental responsibilities can be carried out and while employers must take care to avoid any discriminatory acts in consequence of such an assessment, employers should look to ascertain the number of employees within the business who will have childcare responsibilities due to the school/nursery closures. This, tied in with careful COVID-19 communication, could be a useful planning tool. For example, employees could be asked to complete a questionnaire confirming:

- the number of dependent children within their household;
- whether the employee would be the primary carer in the event of school closures;
- whether it would be possible to share the caring responsibilities with a partner; and
- whether the employee anticipates that effective homeworking can be facilitated following a school closure and, if so, would they suggest any adjustments to their current working arrangements?

With social distancing generally, employers and employees need to make a concerted effort to stay in touch with colleagues. Employees should be encouraged to speak to at least a number of their colleagues every day without fail. Of those colleagues, employers may want to ensure that an employee has a “buddy” for every matter they are working on, sharing key dates, critical work/business with them. This may help to alleviate the state of anxiousness that some employees are feeling, as well as reassure them that if for any reason they cannot deal with a matter, then they have another employee to call on.

Employers may also want to consider implementing agile working allowing for contact with colleagues and clients at flexible times and outside the “usual” hours of work – perhaps picking up the slack once the children have gone to sleep or are otherwise occupied.

Employees need to be able to carry out their work as productively as possible and to facilitate this they should be encouraged to:

- plan their work so that they know what critical tasks need to be done and by when;
- ensure that any meetings can be held remotely via Skype, video or voice conference calls and that the facilities at home are reliable; and
- ideally, employees should have access to secure internet/high-speed broadband.

Employers will have some difficult policy decisions to make. Will it be a case of operating with a skeleton workforce or embracing the benefits of acting flexibly to allow as many employees as possible to continue working by allowing work to fit around childcare. This will, of course, depend on the nature of the business and any business imperatives.

SCENARIO TO MAKE THIS EASIER TO FOLLOW...



ALICE

Alice has just come out of quarantine; it turned out that her husband had a cold and both parents are now well. Alice has three children all at the local primary school. On 23 March the school announced that it will now be closed and Alice has no one to look after her children. Her husband is a nurse and is unable to take any time off.

Alice takes two weeks of annual leave and then requests that she alter her hours so that she now only works two days per week whilst the school is closed. There has been a downturn in productivity at the company so they agree to this. Alice is able to work from home and at times to suit her. The company is able to accommodate this and is glad to have a reduced salary to pay.

LAY-OFFS AND REDUNDANCIES

All businesses will be affected by the coronavirus crisis but we know that certain businesses, and indeed, whole industries, have been and will be affected more than others. Employers will be considering what they can do to keep their businesses going.

Before making lay-offs, employers should consider the alternatives including: restricting recruitment, withdrawing job offers for new employees, deferring the start date for any new joiners, voluntary unpaid leave/sabbaticals, asking employees to take holiday (bearing in mind the employer needs to give 2 days' notice for each day it wants the employee to take off) and overtime bans.

However, if employers suffer a downturn in work or need to close their businesses temporarily and need to lay staff off or reduce their hours, can they? Laying off employees is where the employer provides its staff with no work (and no pay) for a period while retaining them as employees. The employer can do this if there is a specific term allowing them to do this in the contract of employment.

Similarly, with short time working, an employer can reduce an employee's contractual hours if there is a term in the contract which allows them to do so. If there is no term in the employment contract (and such a term tends to be found only in limited industries), the employer and employee can agree to a lay-off or reduction in hours and pay.

The employer should consult with employees (and any relevant trade unions or representative bodies) to see whether agreement can be reached. A voluntary discussion could also take place before any formal process is commenced.

Whilst employees and trade unions would not usually agree to such measures, there may be a willingness to agree in the current climate and particularly if the alternative is job losses or business closure.

If agreement cannot be reached, the employer may decide (following careful consideration) that it has to take the risk of acting in breach of contract and make the decision to lay off or reduce hours or proceed with a redundancy process.

There is no limit to how long an employer can lay off someone. The employee can apply for redundancy and claim statutory redundancy pay (if eligible) if s/he has been laid off for four weeks in a row or six weeks in a three-month period. If the employer does not pay them during the period of lay-off, then the employee should be able to claim job seeker's allowance from the Isle of Man Government.

If it is anticipated that the crisis is going to result in requiring a smaller workforce after the crisis abates, then the employer may need to consider making redundancies.

SCENARIO TO MAKE THIS EASIER TO FOLLOW...



BUSINESS DOCUMENTS R U LTD

Business Documents R Us Ltd has taken a big hit since the coronavirus measures were implemented. Their main source of income was from travel companies and car rentals and this has all but dried up. There is no sign of the economy picking up and they are struggling to pay their staff.

There is no contractual right to lay off staff in their contracts. The first thing they do is gather together the staff and explain the situation.



GEOFF

Geoff has recently received some inheritance and wants to devote more time to his allotment in the hope of becoming self-sufficient. He would like to be made redundant. Geoff is given his notice and the statutory redundancy pay and his employment is terminated.



ALICE

Alice is finding working for two days at home with her children difficult. Although there is no right to impose a lay-off, Alice is happy to agree to be laid off until business picks up. She contacts the Government to see if she is eligible for job seeker's allowance and the MERA.



BOB

Bob is driver for the business. He does not agree to be laid off as he thinks the company can manage and he relies upon his salary. He is unable to work from home and the company no longer requires a delivery driver. The company tells Bob that he is laid off and stops his salary. Bob resigns.

Bob might choose to bring an employment tribunal claim as there has been a breach of his contract (the obligation to pay him). The company will say that in the circumstances how they behaved was reasonable and in effect Bob was redundant. We do not yet know how a tribunal will deal with this situation which to a large extent is unprecedented.

CONTACT US

These are difficult times and there are difficult decisions to be made. We are happy to assist with any queries that you may have. In the meantime, stay safe everyone. We will get through this!



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