

## COVID-19: Katten's Latest UK Employment Law Q&A

March 24, 2020

---

Amidst the constantly changing landscape here are the facts employers need to know today.

### UK Government Support

#### *Is the Government stepping in to help employers with their payroll costs/protect wages?*

Yes. On Friday (20 March) the Government announced a new "Coronavirus Job Retention Scheme". Under this, all UK employers will be eligible to access support to continue paying part of their employees' salary for those employees that would otherwise have been laid off during the coronavirus crisis. The support is backdated to cover those employees who were on an employer's books on 1 March. Employers wishing to make use of the scheme will need to:

- designate affected employees as 'furloughed workers' (i.e., put on short-time working or laid off) and notify their employees of this change; and
- submit information to Her Majesty's Revenue and Customs (HMRC) about the employees that have been furloughed and their earnings through a new online portal. Further details on the information required is yet to be released.

HMRC will reimburse 80% of furloughed workers wage costs, up to a maximum of £2,500 per-worker per-month. Existing systems are not currently in place to facilitate payments to employers, so HMRC are working to set up a system for reimbursement.

Grants will be backdated to 1 March 2020 and last for three months, although the scheme may be extended for longer if necessary. The Government is aiming to start paying the first grants within weeks, although the Government has stated that it may take until the end of April for employers to get reimbursed.

### Explaining the Terminology

The legal term for keeping someone on as an employee but not paying them is calling "laying off". This term is confusingly sometimes also used in colloquial terms to refer to someone who has been made redundant (i.e., had their employment terminated). The term "furloughed" (which is more commonly used in the US) means those who are being kept on as employees and still being paid but not being provided with work.

#### *What does the Coronavirus Job Retention Scheme mean in practice for employers?*

You will note from the above, that an employer can legally only put its employees on short-time working or lay them off (and not then pay them) if it has the contractual right to do so under the employment contracts. If it does not have this contractual right, then this would be a breach of contract, and employees would be entitled to bring a claim for the deduction in wages. So in practice, employers who do not have such clauses in their employment contracts need to secure their employees' consent if they want to reduce their pay during these uncertain economic times and/or when faced with a temporary place of work closure.

---

For employers who wish to “furlough” their employees (i.e., still pay them, but not provide them with work) and then may wish to take advantage of the Coronavirus Job Retention Scheme need to officially designate their employees as “furloughed”, and tell them that that is the case. Only then can the employer make a claim on the scheme for up to 80% of the wages that they are continuing to pay (capped at reimbursements up to £2,500 per month). Some employers may choose to pay employees just the amount that they can reclaim from the Government (and in which case they will need to secure an employee’s agreement to this otherwise it is a deduction from wages). Others may choose to pay the full wage and reclaim what they can, depending on their economic circumstances. Either way, “furloughing” an employee is a unilateral variation in terms, and depending on the employment contract, it may only be possible be subject to negotiation/agreement with the employee.

### ***Can I ensure that my employees take annual leave whilst furloughed, laid off or on short-time working?***

Employees continue to accrue holiday while laid off, furloughed or on short-time working. Employers may therefore wish to order their employees to take holiday while they’re temporarily absent from work. This will help to ensure that employees do not return to work with a significant amount of their statutory annual leave still to take. Employees can be required to take holiday at a specific time provided they are given notice of at least twice the length of the period of leave that they are being required to take.

If an employee develops COVID-19, or any other illness, before or during a period of pre-arranged statutory holiday, then they should in general be able to reschedule the holiday for a later date. If they have used their full 28-day statutory holiday entitlement and develop COVID-19 during a period of leave, then any deferral or carry over would be subject to terms of their contract of employment.

## **Communication**

Katten is also advising employers to continue to communicate with all their staff, on the current position and likely next steps. Aside from promoting a strong workplace culture and allaying any potential fears or quashing rumours, by doing this an employer might also help to minimise the risk of any employment-related claims down the line. The Government wants to minimise the impact of the coronavirus on people’s jobs, and we are supporting our clients to try to achieve this aim, in times where an employer’s cashflow might be severely impacted.

## **Other Cost Saving Measures**

### ***What does laying employees off without pay mean, and in what circumstances can you do this?***

Some contracts of employment allow an employer to require employees to stay away from work for a period and not pay them. This is called “short-time working” (where you reduce someone’s hours or days per week) or “lay-offs” (where you require them not to work for a period of time, and do not pay them), and is common in seasonal businesses such as the hospitality sector. Short-time working (reduced hours/reduced days) and temporary “lay-offs” (no work for days/weeks at a time) is only allowable where the employment contract gives the employer the express right not to provide an employee with any work for a short period of time. If employees are “laid off” for four weeks or more and they have more than two years’ service they can claim statutory redundancy pay. No notice is required by an employer to begin short-time working or lay-offs where the employment contract allows them to do this.

### ***Can I make employees redundant where the place of work has closed down, (e.g., because the Government has mandated it)?***

Redundancy is an option where the employer ceases to carry out the work for which the employee was employed, or there is a diminished requirement for that particular type of work. This applies in a permanent or temporary reduction in work situation. It would be unlikely to cover a temporary shutdown of a place of work of less than four weeks. If an employer makes an employee “redundant” where they envisage a workplace closure of less than four weeks then this would likely be an unfair dismissal, and employees with two or more years of service would have a claim against their employer.

## Holiday

An alternative (e.g., where an employer does not have the benefit of a short-time working clause in their employees' employment contracts), is to require employees to take accrued but untaken holiday. On giving an employee twice as much notice as the length of holiday that it requires an employee to take, an employer can require an employee to take holiday. Please note that this will be on full pay unless you have shift workers then their holiday pay will be calculated on the basis of a normal "week's pay", which could for example reflect the reduced hours that some staff already have been working. Also, if an employee is not able to take holiday due to sickness, then sick pay provisions will apply and the employee will be able to claim the holiday entitlement back again.

## Sickness Absence and Pay

### ***Can I require employees to self-isolate?***

Yes, you can have a policy requiring employees to stay at home if you have any concerns that they may have, or may have come into contact with, the coronavirus. If you are requiring them to stay at home, then you must continue to pay them full pay (unless they are off sick in which case your sick pay terms apply). Also, if you employ any people who the Government has "strongly advised" to socially distance themselves (those in the 70 or over category, or who are pregnant, or who have underlying health conditions), you should require them not to come into work (and to work from home where possible). You should still pay them in these circumstances (although if they are unable to carry out their work from home, the statutory sick pay terms may apply – see below).

### ***What are the sick pay terms?***

Statutory sick pay (SSP) is payable from the first day of absence with coronavirus or to those displaying symptoms, and is payable for up to 28 weeks' absence. Employees can 'self-certify' in the first week of absence, and thereafter an employer is likely to require them to provide medical evidence (the NHS is now providing an "isolation note" rather than the usual "fitness for work certificate") for continuing absence. However, the Government has asked employers not to enforce this evidence requirement too strictly in the circumstances. SSP is paid by employers at the rate of £94.25 per week (£95.85 from 6 April). Employers with fewer than 250 employees can claim the first 14 days of SSP back from the Government. In addition, some employers may have a contractual policy of paying more generous sick pay than just SSP.

### ***Do you have to have coronavirus in order to receive sick pay?***

No. The temporarily amended SSP provisions in the face of the coronavirus threat extend SSP to those who are sick themselves from COVID-19, or have symptoms, or they live with others who have symptoms, as well as those who have been "strongly advised" by the Government to work from home, who are entitled to SSP where they are unable to undertake their role from home. This applies to those aged over 70, pregnant women or those who have an underlying health condition, including chronic respiratory diseases and those with a weakened immune system.

### ***In what circumstances do I continue to pay employees full pay rather than sick pay?***

If they are off work sick or otherwise entitled to SSP as above, then your sick pay terms apply. If your place of work is closed (e.g., because the Government has mandated that it is closed) then you must continue to pay your employees full pay, unless the contracts of employment allow you to lay them off for a period of time without pay (see below), or you choose to make your employees redundant. Where you choose to lay them off without pay, they will remain your employees (albeit not working or being paid for the time being); where you make them redundant, their employment will be terminated.

---

## CONTACTS

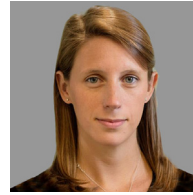
For more information, contact your Katten lawyer or any of the following.



**Christopher Hitchins**  
+44 (0) 20 7776 7663  
christopher.hitchins@katten.co.uk



**Brigitte Weaver**  
+44 (0) 20 7770 5235  
brigitte.weaver@katten.co.uk



**Emma Phillpot**  
+44 (0) 20 7776 7657  
emma.phillpot@katten.co.uk

# Katten

katten.com

Paternoster House, 65 St Paul's Churchyard • London EC4M 8AB

+44 (0) 20 7776 7620 tel • +44 (0) 20 7776 7621 fax

Katten Muchin Rosenman UK LLP is a Limited Liability Partnership of Solicitors and Registered Foreign Lawyers registered in England & Wales, regulated by the Law Society.

A list of the members of Katten Muchin Rosenman UK LLP is available for inspection at the registered office. We use the word “partner” to refer to a member of the LLP. Attorney advertising. Published as a source of information only. The material contained herein is not to be construed as legal advice or opinion.

Katten Muchin Rosenman UK LLP of England & Wales is associated with Katten Muchin Rosenman LLP, a US Limited Liability Partnership with offices in:

CENTURY CITY | CHARLOTTE | CHICAGO | DALLAS | HOUSTON | LOS ANGELES | NEW YORK | ORANGE COUNTY | SHANGHAI | WASHINGTON, DC

3/24/20