

HR COVID-19 UPDATE – FEBRUARY 2022

End of COVID-19 rules: what employers need to know

The government appears to have accepted that we are still in the pandemic phase of the virus. Its new guidance [COVID-19 response: Living with COVID](#) (published on 21 February) talks of responding to the virus in a similar way to other existing respiratory illnesses 'once' we reach the endemic stage.

To help you to prepare, we provide answers to the most frequently asked questions about the end of COVID-19 rules.

1. What legal rules are changing and when will this happen?

From **Thursday 24 February**:

- Anyone with COVID-19 won't be under a legal duty to self-isolate. Adults and children who test positive will continue to be advised to stay at home and avoid contact with other people for at least five full days and then continue to follow the guidance until they have received two negative test results on consecutive days.
- Employees won't be under a legal duty to notify their employers that they have the virus.
- Anyone who is fully vaccinated who has been in close contact with someone with the virus isn't expected to test themselves daily for seven days.
- Anyone who isn't fully vaccinated won't have to self-isolate if they are in close contact with someone with the virus.

From **Thursday 17 March**:

- The SSP rebate scheme will close, and employers won't be able to claim back SSP for coronavirus related absences or self-isolation that occur after that date. Employers have until 24 March 2022 to submit any new claims for absence periods up to 17 March, or to amend any claims they have already submitted.

From **Thursday 24 March**:

- The COVID-19 provisions in respect of SSP will end. This means that employees will only receive SSP if they are ill (so it won't cover precautionary self-isolation) and anyone who is ill with the virus will have to wait until they have been ill for at least four days before they become entitled to SSP.

From **Friday 1 April**:

- The general public will have to pay to take a COVID-19 test even if they have symptoms. Only those people who are in the oldest age groups, are the most vulnerable or who work in certain high-risk settings (such as care homes) will have access to free tests.
- The health and safety requirement which currently requires every employer to explicitly consider COVID-19 in their risk assessments will be removed. And the government will replace the existing set of Working Safely during COVID-19 with new public health guidance.
- The government will update its guidance for people with the virus to explain what steps they need to take to minimise contact with other people. The Prime Minister told Parliament that, from this date,

people should exercise "personal responsibility" just they do if they have the flu or a cold to avoid spreading it to others.

2. Should we prevent staff from coming into work if they have COVID-19 or have been in close contact with someone with the disease?

Living with COVID-19 doesn't mean that you should abandon the measures you have in place to protect your staff - at least not yet.

You have a duty under the common law to take reasonable steps to prevent foreseeable harm to your staff. What constitutes 'reasonable steps' is a question of fact, but if you follow broad industry standards (including government advice), that will, in principle, help to show that you have taken a reasonable standard of care. You also have an on-going duty under health and safety legislation to identify what could cause injury or illness in your business (hazards), decide how likely it is that someone could be harmed and how seriously (the risk) and take action to eliminate the hazard, or if this isn't possible, control the risk. COVID-19 hasn't suddenly become a trivial disease and those people who are unvaccinated are most likely to become seriously ill or to die if they contract the virus. These risks increase with age and clinical vulnerability.

Therefore, even though the legal requirement to self-isolate ends on Thursday 24 February, you can decide what rules to apply in your own workplace in line with your risk assessment and broader public health advice. The government and its own scientists are still advising that people should self-isolate if they have COVID-19 and have warned that rates will increase if people don't comply.

However, the government is no longer recommending that unvaccinated people self-isolate after being in close contact with someone with the virus. The test and trace system is being wound down and your staff may not know if they've been in close contact with someone with COVID-19. It's therefore possible that they could, unwittingly, spread the disease to others they work with if they contract it but are asymptomatic.

Your staff may be confused by the new public messaging, and we therefore recommend that you clearly explain what rules you have in place (and why), how much they will be paid if they self-isolate and what may happen to members of staff who ignore them.

3. Do we still have to continue to follow the 'Working safely during COVID-19' guidance?

These guidelines are in place until 1 April and you should continue to follow them for the time being. And, although, from that date, you aren't explicitly required to consider COVID-19 as part of your risk assessments you still have an overriding duty to identify workplace risks and reduce them to the lowest level possible. COVID-19 infection rates are still likely to be high in 5/6 weeks' time and you will, inevitably, have to consider what steps you need to take to protect your staff from contracting the disease or spreading it at work. Bear in mind that your risk assessments should also look at different groups of workers, for example, pregnant workers and those who are clinically vulnerable, and you may need to take extra measures to protect them.

Chris Witty recommended that, going forward, employers follow "standard public health advice" by improving ventilation, asking staff to regularly wash their hands and, for the time being, to wear masks in enclosed spaces. The government's guidance says that businesses will be '*empowered to take responsibility for implementing mitigations that are appropriate for their circumstances*' and focusses on the need to properly ventilate workplaces. It has said that it will publish new guidance for businesses which hopefully will recommend specific action points employers can take.

In any event, you may have to go further than these recommendations and ask staff who suspect they have the virus to remain at home until they have obtained a negative test (which may take longer than usual as testing

winds down) and to self-isolate if they test positive. If you do this, you will have to consider whether to pay any member of staff who can't work from home (the answer to question 7 sets out the legal issues you may need to consider).

4. We have staff who are either clinically vulnerable or live with someone who is? How do we protect them?

Your risk assessment should address how to keep staff who are clinically vulnerable safe. However, you may also need to assess how they travel to work. There is real concern that many people will not be able to afford to follow government advice to self-isolate if they develop COVID-19 and will continue to go to work and interact with others. As a result, travelling via public transport may become riskier in the short-term.

If staff can't work from home, one option may be to provide N95 masks which provide better filtration and protection over cloth masks or disposable ones. Another may be to stagger their start and finish times so that they can commute during less busy times. Talk to any members of staff who are worried about travelling on public transport and explore what other options are available. Those conversations will be easier if your organisation has already implemented hybrid working. Contact ourHRpeople to find out how to introduce hybrid and flexible working practices into your organisation.

You do not owe a duty of care to people who live with your employees but, given the nature of this disease, you may also want to factor this in when assessing risk.

5. Do we need to take specific steps to protect pregnant employees?

The [NHS recommends](#) that all women should be vaccinated against COVID-19 if they become pregnant as this provides the best protection against becoming seriously unwell if they contract the virus. Women who catch COVID-19 in their third trimester are considered to be most at risk - particularly if they are unvaccinated. You may therefore need to ask pregnant members of staff if they are vaccinated as part of your risk assessments in order to determine whether it is safe for them to continue to work.

The [government advice for pregnant employees](#) contains recommendations for pregnant women, which differs according to the number of weeks into pregnancy. You should conduct a workplace risk assessment for all pregnant women. If your assessment identifies a significant risk, you are expected to take steps to reduce it. Ultimately, if there is no other way of alleviating the risk (such as assigning them to a different role) you may have to suspend on full pay.

6. Can we ask staff to continue to test themselves for COVID-19 and who pays once free tests are removed?

Whilst infection rates remain high (currently between 1 in 20/25 people have the virus) it's likely to be a reasonable management instruction to ask staff who come into close contact with vulnerable colleagues or members of the public to continue to test themselves regularly, even if they don't have symptoms. Free LFT's are still available, and your staff can order these direct from the [government's coronavirus hub](#). A pack contains seven tests and, currently, people can order a pack every three days.

However, from 1 April, most people won't be eligible for free tests (even if they have symptoms). Therefore, if you require staff to test regularly, you will need to provide them with the tests. A pack of seven tests is expected to retail at around £20 - £25 and these costs will quickly add up if you have a lot of staff.

7. Do we have to pay staff if they are self-isolating either because they have the virus or have been in close contact with someone with it?

If you require staff to self-isolate, you will have to consider what they will be paid if they can't work from home. You can pay SSP for self-isolation until 23 March, but after that date the old rules apply. Your staff may not be able to afford to self-isolate unless you continue to pay them at, or near to, their usual rate of pay. Plus, if your requirements go further than the government recommends and you withhold pay from staff who are self-isolating, you risk breach of contract claims, unlawful deductions from wages claims and, potentially, constructive unfair dismissal claims.

You'll also have to consider how you record the leave. Will you record it as sick leave even if they aren't unwell and will their absence count towards any absence thresholds? This is a particularly tricky issue, and you may need to contact ourHRpeople for further advice.

Note: the government's new guidance doesn't differentiate between people who are vaccinated and unvaccinated. Therefore, if you've introduced new rules to your sick pay scheme which treat unvaccinated employees less generously than those who are vaccinated, you may have to re-visit these to ensure that your policies don't unlawfully discriminate against protected groups in your organisation.

8. Can staff refuse to return to work because they are concerned about COVID-19?

Potentially, yes but this will become more difficult. Under sections 44 and 100 of the Employment Rights Act 1996, employees are protected from being subjected to a detriment (such as being suspended or having their pay deducted) or being dismissed for exercising their right to leave their workplace. To be protected, the employee must have a 'reasonable belief' that their workplace poses a serious and imminent threat to them, or to others - including members of the public and their own families. There are a number of claims which suggest that tribunals are taking a fairly robust attitude towards health and safety issues in the context of coronavirus.

However, the issue of whether someone's workplace posed a danger to them will be judged by reference to the knowledge about COVID-19 available at the time the employee refused to return (or walked out). We know much more about the disease than we did in 2020 and what steps we can take to protect ourselves and others. In this context, the key issue is likely to be about vaccination. The government and our leading medical advisors have said that being vaccinated is the best way people can protect themselves. Anyone who chooses not to be vaccinated may, therefore, find it much more difficult to bring a successful claim because they aren't doing everything they can to protect themselves.

And finally.....

Should you have any questions related to the items in this newsletter or need assistance with implementing any new policies, do contact me.

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