



**The Professional Trades Union for Prison,
Correctional & Secure Psychiatric Workers**

National Chair: Mark Fairhurst
General Secretary: Steve Gillan

Headquarters:
Cronin House
245 Church St.
Edmonton
London N9 9HW
t. 020 8803 0255
f. 020 8803 1761
e. general@poauk.org.uk
w. www.poauk.org.uk

North Regional Office
1 Linden House
Sardinia St.
Leeds
LS10 1BH

t. 01132 428833
f. 01132 429075
e. adminnro@poauk.org.uk

Northern Ireland
Castell House
116 Ballywalter Rd.
Millisle Co Down
BT22 2HS

t. 02891 861928
f. 02891 861839
e. adminni@poauk.org.uk

Scotland
21 Calder Rd.
Edinburgh
Scotland
EH11 3PF

t. 0131 443 8105
f. 0131 444 0657
e. adminscot@poauk.org.uk

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Dear Colleagues

COVID-19 BRIEFING NO 2

Please find enclosed COVID-19 Briefing No.2 from Thompsons Solicitors.

Yours Sincerely

STEVE GILLAN
General Secretary

Yours Sincerely

MARK FAIRHURST
National Chair

ENCLOSURE

Briefing on employer and employees responsibilities in the wake of Coronavirus No. 2

The social landscape in response to Coronavirus is fast changing. Emergency legislation giving ministers new powers to respond to the Coronavirus outbreak is currently progressing through parliament with the Coronavirus Bill, expected to become law by the time this briefing goes to press. On Monday 23 March 2020 the Prime Minister declared a “moment of national emergency” which meant requiring people to stay at home, except for very limited purposes, closing non-essential shops and community spaces and stopping all gatherings of more than two people in public. This followed a number of announcements over the last week covering protection of pay for workers and a proposed introduction of benefits for the self-employed but what does it all mean?

This is the second in a series of briefings we are publishing in response to the issues arising from Coronavirus in the workplace for trade unions and workers. The first focussed on health and safety issues and sick pay. In this briefing we will attempt to answer some of the key questions that are arising in workplaces across the country, initially with a focus on the Coronavirus Government Retention Scheme and then with a consideration of some practical issues facing workers.

The Coronavirus Government Retention Scheme

What is a Furloughed Worker?

Furlough is not a legal term and it's not defined. We believe that a furloughed worker is a worker who will remain on his or her employer's payroll but will not be provided with work as a consequence of the Coronavirus outbreak as opposed to a worker who has his or her contract terminated.

What is the Coronavirus Government Retention Scheme?

The Coronavirus government retention scheme provides a mechanism whereby a government provides a grant to reimburse employers for 80% of a furloughed employee's wage costs up to a cap of £2,500 per month for those designated as “furloughed”. The guidance states that an employer can then choose to top-up that pay for its employees who earn more than this amount although there is no obligation to do this to access the scheme. The Chancellor has stated any employer will be eligible to access the scheme on behalf of its employees who are paid through PAYE. The scheme is intended to apply to employers who cannot cover staff costs due to Coronavirus. We do not yet know whether there will be any further eligibility criteria to determine whether a decision to furlough an employee has been taken because of Coronavirus or not. The scheme is initially open for a three month period.

How will the Coronavirus Government Retention Scheme work in practice?

There are still many unanswered questions around this. In short, as described above, employers who access the scheme will be provided with a government grant to reimburse them for 80% of the furloughed employee's wage costs. Employers will claim this money back through an online portal. An employer could choose to fund the differences between this payment and the full salary but does not have to. The scheme is not intended to override the contract of employment and therefore basic contractual principles still apply. Furthermore, there will be no statutory right to require that an individual must be "furloughed". For the scheme to operate fairly we would advise:

The Government says that a "furloughed employee" is "subject to existing employment law and... may be subject to negotiation". It is not common for employment contracts to contain a lay off clause and therefore in the majority of cases the furloughing of workers should be done by agreement between the employer and affected staff. The alternative would be that workers might be laid off or made redundant so our advice would be agree where possible to the Scheme.

- In workplaces where an employer is unable to provide all of its employees with work as a result of the Coronavirus and a trade union is recognised, employers should agree a collective agreement with that union to provide a right to furlough employees which would be incorporated into their individual contracts of employment.
- The collective agreement negotiated with the recognised trade union should also contain an agreed selection criteria as to how it will be determined which employees should be furloughed if it is envisaged that some employees will remain in work. It may be appropriate in the first instance to invite volunteers in the workforce who are willing to be designated as "furloughed" and only revert to further selection criteria if there are not enough volunteers or indeed too many.
- In the absence of a recognised trade union employers should consult with employees to seek their agreement to vary their contract to provide an employer with a right to furlough them if the employer is unable to provide them with work as a result of the Coronavirus and the basis upon which selections will be determined.
- If contracts of employment already provide provisions that entitle an employer to lay off an employee without pay it will be important for unions and workers to persuade employers to use the scheme rather than lay employees off. Although there is no legal mechanism to force an employer to do this the provisions on furlough leave have been

specifically introduced in order to deter employers to lay-off staff without pay or make redundancies.

What about workers who have already agreed with an employer to reduce hours or pay in response to the crisis?

Unfortunately, as things stand it does not appear the scheme addresses this issue because in order to be able access the scheme the worker has to be furloughed and not doing any work at all. There are calls for the scheme to be widened to address this point and we await further detail on that. If the scheme does not address this it will cause some inequitable outcomes.

Does the Coronavirus Government Retention Scheme apply to those who are off sick?

It does not appear the scheme is intended to address the circumstances of those who are off sick or who are self-isolating. Those individuals may be entitled to contractual sick pay if the contract provides for this or statutory sick pay (SSP) (currently £94.25 per week - £95.85 from 6 April) if it doesn't. We will need to see further detail on the mechanics of the scheme to ascertain whether there is any possibility of an employer designating an employee on furlough leave who is ill or self-isolating which would enable them to be reimbursed for a proportion of contractual sick pay or would enhance the very meagre SSP entitlement.

Are the self-employed covered by the Coronavirus Government Retention Scheme?

No they are not. There are strong calls for further legislation to be introduced to protect those who are self-employed but as things stand now they fall outside of this scheme. The position in respect of “workers” is less clear. In the UK there is a distinction between “employees and “workers”, the latter have fewer rights which are limited to things like holiday pay. The government guidance does not make clear whether “workers” are covered. However, a statement from the chancellor indicated everyone covered by PAYE would be included. The intention being to apply the scheme to as broad a range of individuals as possible. It is hoped therefore that workers paid through PAYE will be covered but it is likely those that are self-employed will fall outside the scheme.

How will earnings be calculated under the Coronavirus Government Retention Scheme?

Unfortunately the position on this remains unknown and it is not clear whether the government grant will be for 80% of basic salary only or whether it will encompass all earnings (overtime, bonuses etc.) based on an average that workers have been paid in previous weeks. Consideration will also need to be given as to how pay will be determined for those on zero hour contracts and who work variable hours.

What is the position if I have already been laid-off without pay?

The scheme will cover wages backdated to 1 March 2020. On this basis it would appear it is possible for workers and employers to still make use of the scheme where a decision occurred after 1 March 2020 because the employer was not able to provide work as a result of coronavirus. However, this is uncertain until we see the rules of the scheme. It appears unlikely that the scheme will cover those who have had their contract terminated since 1 March 2020.

My employer is threatening to make redundancies now – what should I do?

Every effort should be made to persuade employers to take advantage of this scheme now rather than make redundancies. If employers assert they need to do something urgently, and are reluctant to wait for further details of the scheme to be published, it should be pointed out they may be able to access a Coronavirus Business Interruption Loan.

What if the employer is adamant it will proceed with redundancies?

The normal rules around a redundancy process should apply. Therefore if an employer is proposing to dismiss as redundant 20 or more employees at one establishment it should consult with a trade union where it is recognised or “appropriate representatives” where there is no union recognised (see section 188 1B of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULRCA)). An employer may well argue that Coronavirus amounts to “special circumstances” which render it not reasonably practicable to consult but that will very much depend on the circumstances. In most cases there should be some form of consultation. In addition, there will also be a requirement to consult with individual employees in order to ensure a fair process when dismissing an employee on the grounds of redundancy.

Some practical issues facing workers

Am I still required to attend work following the announcement by the Prime Minister on Monday 23 March 2020?

If you are Critical Worker you are expected to attend work provided you are well and do not need to self-isolate in accordance with government [guidance](#). Critical workers include a wide range of workers who are not just those working in health and social care, education and childcare but also those in public services (such as those paying social security benefits), food and other necessary goods, those employed in public safety such as the police, fire service, border security, prison and probation staff, transport workers, those working in utilities, communication and financial services (workers in oil, gas, electricity and water, banks building societies etc.)

What if it is not possible to work from home because of the nature of the work?

The employer should abide by government [guidance](#) to maintain social distancing in the workplace. This may involve making adjustments to how the work is done in order to reduce the risk to the health safety and welfare of workers and other such as client's customers and service users. The employer is also under a duty to carry out a risk assessment and take steps to reduce or eliminate that risk. The workforce and the appropriate health and safety representatives should be informed and consulted on any measures the employer proposes to introduce including any adjustments to how the work is done. If the employer suspends a worker from work because there is no alternative measure, the employee should usually be entitled to their normal pay during the period of suspension. Employers should also consider adjustments to your working pattern to ensure you are able to maintain social distancing in respect of your journeys to and from work.

If work can be done from home does the employer have to provide the equipment?

You should first check if the employer has a home working policy or practice. This should set out what equipment the employer will provide and if the employer will reimburse any expenses such as telephone calls. If there is no home working policy and bearing in mind the Government's guidance is to work from home wherever possible, the employer should consult with the workforce and recognised trade union on what support and assistance it can provide. As the current position is expected to develop the employer should review the arrangements in consultation with the workforce and the recognised trade union after three weeks and again in accordance with government guidance at that time.

What payments are those who are classed as vulnerable workers entitled to receive?

The government [guidance](#) for employers' states that employees from defined vulnerable groups should be strongly advised and supported to stay at home and work from there if possible. Therefore, those who are in a vulnerable group but who are not unwell or have symptoms of coronavirus and can work from home should be paid their normal rate of pay. [Vulnerable workers](#) who are unable to work from home will not be expected to attend their workplace. These employees should ask to be suspended on full pay or furloughed in accordance with the scheme.

What is the position of parents who care for a vulnerable child?

Parents who are caring for a vulnerable child are entitled to unpaid dependants leave in an unexpected event or emergency. However, this is unpaid and only for a short period. Parents should check if there is a dependants leave policy which provides for pay. Employees with one years' continuous service are entitled to 18 week's parental leave per child. However, this too is unpaid and limited to four weeks per year. Another option is to consider flexible working which could include condensed hours (5 days work in 4 for example). Where an employer disciplines a worker because they are not able to work in these circumstances the worker may be able to argue that they have been treated less favourably because of their association with a child who has a disability.

What is a pregnant worker entitled to be paid?

A pregnant worker who is able to work from home and has not triggered their entitlements to maternity leave and pay is entitled to be paid their normal pay. Where a pregnant employee is unable to work from home and there is no suitable alternative work the pregnant employee should be treated as having been suspended under the Maternity and Parental Leave etc. Regulations 1999 and entitled to be paid full pay. This is because an employer has an additional responsibility to protect the health and safety of pregnant employees.

Are workers entitled to personal protective equipment (PPE) such as apron gloves and face masks?

The government has advised that there is very little evidence that face masks provide any benefit outside of a clinical setting. However, what personal protective equipment, if any, workers are entitled to will depend on the risk assessment carried out by the employer. The employer is required to carry out a "suitable and sufficient" risk assessment to identify the risks to health and safety of employees and worker as well as visitors', clients and customers. This should set out what steps is reasonably practicable for them to take to eliminate or reduce that

risk. This may or may not include the provision of PPE. You can request a copy of the risk assessment from your employer.

What are the options for an employee if the employer does not apply social distancing measures at work?

If the workplace has a recognised trade union the employee should bring it to the attention of the union health and safety representative or safety committee. If the workplace is not recognised the employee should bring it to the attention of the health and safety representative if there is one.

If it is not reasonably practicable to bring it to the attention of a recognised health and safety rep/safety committee or there is no health and safety rep in a non-recognised workplace, the employee should bring it to the employer's attention. When doing so we recommend that the employee makes clear to the employer that they are bringing this to their attention because:

- i. they reasonably believe it is harmful or potentially harmful to the health safety and welfare of employees and others including clients/customers/service users and visitors,
- ii. government guidance on social distancing is not being followed, and
- iii. there is either no safety representative or safety committee or it is not reasonably practicable to bring it to the attention of the appropriate health and safety representative or safety committee (e.g. because they have tried but not been able to contact them)

If the employer still does nothing the employee may take appropriate steps to protect themselves or others and can even include removing themselves from the premises if they reasonably believe they are in circumstances of danger which are serious and imminent. What is appropriate action by an employee will depend on all the circumstances of the case including the employee's knowledge of the facts, as well as the facilities and advice available to them at the time. This would include government guidance. It is important that the employee seek the advice of their union as to what steps are appropriate for them to take as there is a risk an employer may fairly discipline or dismiss them if their actions were so negligent that a reasonable employer 'might' have treated the employee as the employer did. An employee who blows the whistle on an employer who fails to comply with the duty to ensure the health and safety and welfare at work of all their employees could also have a whistleblowing claim.

25 March 2020