

COVID-19 restrictions in England

Introduction

On 21 February 2022, the English government announced plans to lift all remaining COVID-19 related restrictions. The plan is contained within the paper “COVID-19 Response: Living with COVID-19”, which can be found [here](#).

The purpose of this note is to set out briefly what the plan is and what the employment law implications of the announcements may be. There is a lot of information in the paper, so it is important that you read it to ensure that you take note of any provisions that may affect you or your business/organisation.

What is the plan?

[Section 3](#) of the paper sets out what the plan is. In summary:

21 February:

- *Remove the guidance for staff and students in most education and childcare settings to undertake twice weekly asymptomatic testing.*

24 February:

- *Remove the legal requirement to self-isolate following a positive test. Adults and children who test positive will continue to be advised to stay at home and avoid contact with other people for at least 5 full days and then continue to follow the guidance until they have received 2 negative test results on consecutive days.*
- *No longer ask fully vaccinated close contacts and those aged under 18 to test daily for 7 days, and remove the legal requirement for close contacts who are not fully vaccinated to self-isolate.*
- *End self-isolation support payments, national funding for practical support and the medicine delivery service will no longer be available.*
- *End routine contact tracing. Contacts will no longer be required to self-isolate or advised to take daily tests.*
- *End the legal obligation for individuals to tell their employers when they are required to self-isolate.*
- *Revoke The Health Protection (Coronavirus, Restrictions) (England) (No. 3) Regulations.*

From 24 March:

- *Remove the COVID-19 provisions within the Statutory Sick Pay (SSP) and Employment and Support Allowance regulations.*

From 1 April:

- *Remove the current guidance on voluntary COVID-status certification in domestic settings and no longer recommend that certain venues use the NHS COVID Pass.*
- *Update guidance setting out the ongoing steps that people with COVID-19 should take to minimise contact with other people. This will align with the changes to testing.*

- *No longer provide free universal symptomatic and asymptomatic testing for the general public in England.*
- *Consolidate guidance to the public and businesses, in line with public health advice.*
- *Remove the health and safety requirement for every employer to explicitly consider COVID-19 in their risk assessments.*
- *Replace the existing set of 'Working Safely' guidance with new public health guidance.*

Note that this only applies in England, although Statutory Sick Pay (SSP) is not a devolved issue, so it may be that provisions regarding that may affect the rest of the UK.

Regarding businesses and other organisations, the papers states:

From 24 February:

- *Workers will not be legally obliged to tell their employers when they are required to self-isolate. Employers and workers should follow Government guidance for those with COVID-19.*

From 1 April:

- *Remove the health and safety requirement for every employer to explicitly consider COVID-19 in their risk assessments. The intention is to empower businesses to take responsibility for implementing mitigations that are appropriate for their circumstances. Employers that specifically work with COVID-19, such as laboratories, must continue to undertake a risk assessment that considers COVID-19.*

From 1 April:

- *Replace the existing set of 'Working Safely' guidance with new public health guidance. Employers should continue to consider the needs of employees at greater risk from COVID-19, including those whose immune system means they are at higher risk of serious illness from COVID-19. The Government will consult with employers and businesses to ensure guidance continues to support them to manage the risk of COVID-19 in workplaces.*

We await the updated workplace guidance.

What are the possible employment law implications?

There are a couple of factors employers will have to bear in mind once these provisions are enacted.

1. Employees who test positive

From 24 February 2022, there is no longer a legal requirement for employees to self-isolate if they have COVID-19. One question will be; what should employers do with an employee who has tested positive – should they be sent home and, if so, what pay would they be entitled to?

Unfortunately, the situation is not straightforward.

As you'll note above, it will still be necessary for employers to explicitly address COVID-19 issues in any risk assessments undertaken until 1 April 2022. In any event, there are general H&S duties to protect the health and wellbeing of employees.

The government guidance for individuals who test positive can be found [here](#). At the time of writing (25 February 2022), this stated:

“If you have COVID-19, stay at home and avoid contact with other people

If you have COVID-19 you can infect other people from 2 days before your symptoms start, and for up to 10 days after. You can pass on the infection to others, even if you have mild symptoms or no symptoms at all. If you have COVID-19 you should stay at home and avoid contact with other people.

You should:

- *not attend work. If you are unable to work from home, you should talk to your employer about options available to you. You may be eligible for Statutory Sick Pay”*

As mentioned, this is now guidance and not a strict legal requirement – it states “should” rather than “must”.

From a health & safety perspective, it will continue to be important for employers to carry out risk assessments and consider official public health guidance. Specialist advice should be sought.

From an employment law perspective, there are a couple of scenarios:

- If an employer is not requiring employees to stay away from the workplace if they have COVID-19 (NOTE: take specialist health and safety advice on whether this is a feasible option for you), but the employee wants to stay away on the basis that they are following public health advice, the employer should allow this. Pay will be SSP until 24 March 2022 when SSP will end (unless the employee meets the normal SSP criteria, i.e. they are too sick to work), or occupational sick pay (OSP), depending on the terms of the scheme/policy. Beyond 24 March 2022, an employer may take a pragmatic view that they will continue to pay some form of sick pay to an employee who wants to self-isolate if they want to encourage such behaviour.
- If an employer is requiring employees with COVID-19 to stay away and they cannot work from home, the employee is likely to be entitled to full pay on the basis that this is the employer’s decision to suspend the employee on health & safety grounds when they are ready, willing and able to work, unless there is a contractual provision in the employee’s contract of employee permitting otherwise. They could try and say that they are only entitled to SSP/OSP since this is available for such individuals until 24 March 2022, particularly if the employee is agreeable to that, but there will be a risk of breach of contract claims if they are not paid in full.
- If the employee is too sick to work in any event, they will be entitled to SSP.

This creates a bit of a problem for an employer. On the one hand there are health & safety obligations which are likely to be impacted by allowing employees who have tested positive for COVID-19 on site, and on the other it will cost them to not have them on site if they can’t work from home. One option may be to put in place other measures that will mitigate the risk of having positive COVID-19 cases on site, e.g. distancing, reallocating roles, working from home. It may also be that attention is focused on those who are most vulnerable and look to put in place adjustments for them, particularly since they are likely to be disabled for Equality Act 2010 purposes. However, it will be very important that specialist health and safety advice is obtained to ensure that any alternative measures are adequate and appropriate, bearing in mind the impact a COVID-19 outbreak may have on employees and your business/organisation.

2. Employees showing symptoms at work, or are known to be a close contact of someone with COVID-19

Very similar considerations will apply where the employee is showing symptoms or is a known contact of someone with COVID-19, but not had a positive test (as far as the employer knows). The legal obligation to self-isolate in these circumstances has been lifted, so it will come down to whether the employer is requiring an employee to stay away from the workplace and whose decision it is to self-isolate. Also check the most up-to-date public health/government guidance to see whether the advice is to still self-isolate in these circumstances.

3. Workplace testing

Testing in most workplaces has never been mandatory in England (other than health, social care and education settings). If an employer is requiring employees to be tested, whether randomly or because they are showing symptoms/are a close contact, they must ensure that they have a legitimate reason for doing so, for example this may be identified as a necessary health and safety measure because of the nature of the work or workplace. The one change is that free testing will cease from 1 April 2022. If an employer requires employees to be tested beyond that date, then any cost should be covered by the employer.

What about Wales, Scotland and Northern Ireland?

The provisions mentioned above only apply to England. The devolved nations have their own plans in respect of lifting COVID-19 restrictions. Information regarding the current position can be found in the following links:

- [Wales](#)
- [Scotland](#)
- [Northern Ireland](#)

We strongly recommend seeking advice before taking any action against employees. Please speak to your Employment Law Adviser or, if you are not yet a WorkNest client and would like specialist guidance, call 0345 226 8393 for support.

The information in this note is correct as at 25 February 2022. Please check government guidance for the most up-to-date position.