



# **Covid-19 Pandemic**

## **RETURN TO WORK Q&A**

**UNISON**  
*the public service union*

## **Returning to work Safely - Frequently Asked Questions**

### ***Introduction***

Following the introduction of ‘lockdown’ measures earlier this year, on 11 May 2020 the UK Government published its advice and [guidance](#) for employers and workers to work safely during the coronavirus pandemic. This was most recently updated on 6 January 2021 and covers 14 different types of work covering a wide range of industries in England, with separate guidance for Wales, Scotland and Northern Ireland. Unfortunately, this has created numerous concerns for UNISON staff and members.

We summarise the main issues and the basic legal position in this document. This is separate to our existing guidance on matters relating to COVID-19 [[JRSQA](#)]. Please note that this is a continuing piece of guidance that will need periodic updating as the UK Government and other relevant bodies amend their advice. Each situation must be viewed in light of what was happening at the material time and which relevant laws applied in each of the UK countries. For example, the original Lockdown brought in new restrictions for England that were eased from 4 July 2020 (when many more businesses were allowed to re-open and the 2-metre social distancing rule relaxed) but were then changed again with effect from 14 September 2020. Further restrictions were subsequently introduced due to local risk that have been applied with different approaches being taken in the devolved UK nations. Most recently, the second Lockdown and categories of Tiers that commenced before the third Lockdown in January 2021 has prompted further questions about what laws apply where and when.

Members will face different situations, so it is not possible to provide a one-size-fits-all or conclusive legal guidance or advice. In each situation across the UK where issues around unsafe workplaces arise Branches and Regions should take steps to investigate the claims on the basis of this generic guidance, and then make a proper referral to Thompsons of all of the relevant information.

Hopefully this guidance will be of assistance to you representing members and point the way for further investigations of any concerns in order to get appropriate legal advice on individual circumstances where required.

This guidance is applicable to a variety of situations where members have concerns about their safety at work.

In addition where members have raised concerns about unsafe work practices such that they believe they have suffered injury by way of contracting COVID-19 due to their work, and in tragic

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cases where members have died in similar circumstances as a result of COVID-19, they/their families should be referred for support and legal assistance.

UNISON has streamlined its processes to access legal assistance in light of the pandemic. This includes setting up a 24 hour helpline to allow access to PI legal assistance during this time <https://www.unison.org.uk/news/article/2020/05/new-ways-members-get-legal-help/>

### **1. Can an employer force me to return to work from furlough?**

The short answer is ‘yes’ but an employer’s decision in the current circumstances may well be subject a variety of qualifying conditions.

There may well be potentially serious legal risks for an employer in reopening its workplace in the current situation. In particular, the employer needs to provide a safe working environment for its workers, should comply with all relevant UK statutory law (e.g. carry out health and safety risk assessments) and should also follow all the guidance from the Government and specialist bodies. For example, the Health and Safety Executive and Public Health England have produced specialist advice and guidance for employers seeking to reopen after lockdown.

There are legal rights to protect employees from suffering detriment or dismissal if they are unable to return to work. The key point is that an employee may only refuse a reasonable instruction to return to work if s/he has a good reason to do so.

Special considerations also apply for those who have a protected characteristic under the Equality Act 2010 (EqA 2010) and also for workers who suffer detriment or dismissal after making a protected disclosure.

The employer’s reasons for requesting a return to work should be provided to the employee before a decision can be made. Advice should be sought if an employer is attempting to return staff to work without their consent.

This guidance seeks to provide an outline of the various legal issues that might arise in relation to return to work after lockdown.

### **2. Can an employer end furlough earlier than originally planned?**

This may be permitted if it is agreed with the Employee. Whatever consent was agreed in writing will be important to consider, as well as any collective agreement that may have been reached.

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If it is proposed that the Employee returns to their normal role, then this is unlikely to be controversial. However, if the Employer attempts to unilaterally impose further variations to the contract (or lay off) or proposes to dismiss the Employee as redundant, then advice should be sought as it might give rise to a number of legal claims.

### ***3. What are my employer's duties to keep me safe under its contract of employment with me?***

The main pieces of legislation that impose duties on employers are the Health and Safety at Work Act (1974) and the Management of Health and Safety at Work Regulations (1999).

Breaching those duties does not lead to civil liability in a civil claim for personal injury (Enterprise and Regulatory Reform Act 2013). Such a claim could arise where a claimant can prove their employer has been negligent (they have breached their common law duty of care to their employee and that has caused their injury and that injury was reasonably foreseeable). However, such breaches do inform the common law position on negligence.

An employer is obliged to take all steps that are reasonably practicable to ensure the safety of its employees. An objective test is used to measure whether or not an employer has breached the obligation; did the employer in question act as a reasonable employer would have done in the circumstances?

An inquiry into such a question will undoubtedly look at the risks to the employee in carrying out their duties, whether that employer made a proper assessment of those risks to health and safety and the steps taken to minimise those risks. If an employer does not know what the risks are (because it does not carry out a proper assessment) or fails to act on its risk assessment to reduce those risks accordingly then it may be held liable in common law negligence

Where the risk is not obvious, an employee will only succeed if it can show that the state of knowledge in the relevant industry at the relevant time was such that the employer knew or ought to have known of that risk.

Additionally with COVID-19, although there may be evidence that an employer has breached its duty of care to an employee; proving that the subsequent injury – by way of infection was caused by that breach may prove difficult because of the fact COVID-19 is prevalent within the population and can arise from contact within the community generally.

### ***4. What are my rights under sections 44 and 100 of the Employment Rights Act 1996?***

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These laws provide limited protection for staff who are seriously concerned about whether it is possible to safely return to work but are complicated in practice. The rights under sections 44 and 100 ERA 1996 apply only to employees, and so it appears they do not apply for the self-employed and those who are categorised as a ‘worker’. That said, an important case was decided in November 2020 which calls into question the scope of these rights. In *R (Independent Workers’ Union of Great Britain) v Secretary of State for Work and Pensions and another*, the High Court accepted the UK has failed to properly implement the Health and Safety Framework Directive (89/391/EC) by limiting protection from detriment on health and safety grounds under section 44 ERA 1996 to only those categorised as an ‘employee’ and therefore excluding those more widely defined as a ‘worker’ from the necessary protections. It remains to be seen how this will apply in practice. Queries on this should be discussed with UNISON Legal Services.

Aside from any debate on who is covered by these rights, it applies only so far as necessary to *remove* an employee and their colleagues from the immediate and serious danger. Therefore, this may not necessarily mean returning home, but instead to a place where the risk posed by that danger no longer exists. This may involve either remaining in the workplace, but in a safe place, or continuing to be available for other duties.

Section 44 provides protection for employees who suffer any detriment (short of dismissal) by their employer on the ground that the employee did or failed to do certain specified acts. These acts include for present purposes, at section 44(1)(d), employees leaving workplaces or any dangerous part of the workplace in circumstances where the employee faces serious or imminent danger.

Employees who suffer detriment as a result of leaving a dangerous workplace can take employment tribunal claims for compensation arising from the detriment. Again an employment tribunal determining such a claim will need to investigate the nature of the danger, whether or not the risks to the employees were *serious or imminent*, whether there were any steps taken by the employer to eliminate or minimise those dangers, the reasonableness of the employees actions in leaving the place or work or refusal to carry out the employers instructions. This will be an objective analysis of all of the circumstances surrounding the departure from the worksite of refusal to carry out the employer’s instructions. If an employer can show that an employee was negligent in leaving the workplace in the circumstances, the claim under section 44 will not succeed.

Section 100(1)(d) provides additional protection for employees who have been *dismissed* as a result of taking the same specific acts, including leaving the workforce or refusing to carry out the employer’s instructions in the face of serious or imminent danger.

Essentially an ‘employee’ must not be subjected to a detriment (e.g. disciplinary action) or dismissal where they reasonably consider:

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- The danger to the employee, or their colleagues, to be serious and imminent; and
- The steps being taken (or proposed) by the employee are appropriate.

Concerns about the risk of infection by COVID-19 is likely to be a serious and imminent danger, but the context of a situation will be key on whether refusing to return to work or any other steps are appropriate. For example, an employer is expected to follow the law (e.g. health and safety risk assessments) as well as advice and guidance from the Government, the HSE and Public Health England. **This means that an employee cannot automatically refuse a reasonable instruction to return to work without a good reason.**

***5. Will I be protected if I report my employer's breaches of health and safety as a whistleblower?***

Further still, section 47B of the Employment Rights Act protects workers from detriment or dismissal where they disclose information in the public interest and the employees reasonably believes health and safety is endangered. Such claims are difficult for employees to make out and there are a number of procedural steps that need to be complied with before such a claim will be successful.

***6. Can I take industrial action about breaches of health and safety?***

The definition of trade dispute for the purposes of TULRCA 1992 includes “the physical conditions in which any workers are required to work.” This definition will necessarily include matters of health and safety and situations where employees are being asked to place themselves in serious or imminent danger at work.

The stringent balloting and notice provisions will apply to industrial action taken in pursuit of disputes falling under this definition. UNISON’s rules, procedures and guidance on bringing such industrial action will also apply and the Court’s ability to scrutinise and prevent such industrial action is not diminished insofar as health and safety is concerned. Industrial action is a reserved area for specialist legal advice and all queries relating to this topic must be referred for legal advice urgently before any steps are taken.

A question might arise on whether or not action taken by a group of workers in the face of serious or imminent danger amounted to strike action for the purposes of TULRCA. This may be a difficult question to resolve, particularly in health and safety cases, as there is no definition of “strike” in the act.

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If it can be said that the action was a concerted stoppage of work done with a view to improving conditions or to vent a grievance, then this action might well be considered strike action (with all of the sanctions available to employers to stop it). If on the other hand it was considered to be action founded on a genuinely held view by a number of staff that they would be placing themselves or fellow workers in serious or imminent danger by staying at work or continuing to work, then it might well not be considered strike action.

If the union were to be seen as creating a trade dispute from a concern about health and safety (i.e. because we are actively supporting members wish to leave the workplace or not return to work) then an employer might exploit the vicarious liability provisions to create a serious problem for both the union and our members. Section 20 of TULRCA defines “vicarious liability” so widely that the union is likely to be fixed with liability for organising unlawful industrial action and face potential claims for damages. If individuals collectively take matters into their own hands and simply walk off the job then, unless section 100 is engaged, they face the risk that they will be deemed to have participated in “unofficial” industrial action. In those circumstances, section 237 TULRCA effectively shuts off their protection from unfair dismissal.

The complex legal requirements to take industrial action mean there are lots of pitfalls that can affect whether industrial action is authorised and lawful. There are very serious legal and financial risks for both UNISON and individual members who participate in ‘unofficial’ industrial action.

## **7. What is the Government’s guidance on COVID-19 return to work?**

The first point to make about this guidance is that it is advisory and not mandatory in nature. The language is not always prescriptive, and the guidance includes various caveats. It does not legally require employers to take certain steps to avoid the transmission of COVID 19 at its workplace nor does it provide for sanctions for employers who do not comply with the terms of the guidance. In short it does not create any additional legal duties over and above those set out previously in relation to workplace safety. However, the existence of the guidance and the recommendations made in it will be of assistance to any employees wishing to make any of the claims against employers under any of the various heads set out above. The present pandemic certainly creates additional risks for workers and employers are bound under their existing duties to assess those new risks in respect of their workforce and take all necessary and reasonable steps to eliminate and or minimise those extraordinary risks for its workers.

Apart from the obvious course of action in separating sick employees or those displaying symptoms of COVID 19, a primary recommendation in the guidance is for employers to **“Carry out a COVID-19 risk assessment”**

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Information on what a risk assessment of COVID-19 should involve can be found on the UNISON Health & safety knowledge page <https://www.unison.org.uk/get-help/knowledge/health-and-safety/risk-assessment/>)

Before restarting work, the UK Government is advising employers to ensure the safety of the workplace by:

- carrying out a risk assessment in line with the [HSE guidance](#) or specific guidance (see Schools' guidance)
- consulting with your workers or trade unions
- sharing the results of the risk assessment with your workforce and on your website

This is a powerful statement and one which reinforces the general legal position in the common law and under health and safety regulation.

#### **8. What about PPE when returning to work?**

PPE is provided by the employer when the risk assessment deems it necessary taking into account the risks to staff and the persons with who they might interact with or provide a service to. Generally speaking, employers will look at other measures such as social distancing, social distancing, hygiene and fixed teams or partnering, before considering PPE.

To find out more about UNISON's views on PPE, please visit our dedicated webpage ([www.unison.org.uk/coronavirus-rights-work/](http://www.unison.org.uk/coronavirus-rights-work/)) which provides information on how and when PPE is provided along with links to guidance agreed for the various sectors of work.

Employers who fail to carry out the recommendations that have been outlined in guidance and/or who fail to protect their employees in accordance with the appropriate health and safety legislation run the risk of facing the types of claims identified above, particularly in relation to common law duties in negligence (based on an objective assessment of the known risks or those that employer could reasonably be expected to know) as well as statutory duties in the HSWA 1974.

#### **9. Does an employer have to consult health and safety representatives about a return to work?**

This depends on whether the union is recognised and whether Health & Safety representatives have been appointed by that union. Regulation 4A(1)(a) (requirement to consult where changes

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are being made to H&S) and regulation 7 (inspection of documents) in the Safety Representative & Safety Committees Regs 1977 clearly require consultation with health and safety representatives appointed under that regulation. These provisions do not seem to apply where no safety representatives have been appointed by the union. The requirements are for such consultation or production of documents to be made only to safety representatives appointed under Regulation 3(1) of the regulations.

The Information and Consultation in Employment Regulations would apply but these regulations do not provide a standalone requirement to consult employees on risk assessments in the absence of safety reps being appointed or at all.

#### **10. Does the employer have to share its risk assessment and consult about this?**

The employer must carry out a risk assessment, and this should explain how it has followed the guidance of Government and relevant statutory bodies. This information should be provided before the employee is required to return to work. Note that Government guidance states that if social distancing cannot be followed in full, then those work activities should only continue if they are necessary for the business to operate.

The government COVID-19 return to work guidance contains a broad and bold requirement that employers consult with employees over the return to work but surprisingly there does not seem to be any specific provision requiring a risk assessment to be provided except to safety representatives. All the union is left with is an argument about whether such consultation is adequate in the absence of any risk assessment that may have been made. It is hard to see how consultation can be properly conducted without details of the risk assessment being provided but essentially what is being consulted over are whether the workplace is safe, what measures are to be taken in respect of distancing/infection control etc. It may be possible for a proper consultation to take place if all of the information necessary for proper consultation of employees is provided to the union during that consultation process. This may or may not include the written risk assessment.

A good employer would always provide all necessary information to the union to enable a proper consultation to take place, including provision of any risk assessment/s. Unfortunately, the law is not at all robust when it comes to forcing compliance in situations where employers do not properly consult with their employees.

#### **11. Who is responsible for enforcing health & safety law?**

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The body responsible for enforcing health safety law in the England, Scotland and Wales is the Health & Safety Executive (HSE). In Northern Ireland it is the Health & Safety Executive (Northern Ireland) (HSENI). However, the HSENI is a separate body and the timing of implementation of some regulations may sometimes vary. Workers in all four countries still broadly work under the same regulatory system, with trade union safety reps enjoying the same rights.

Whether inspectors are employed by the HSE, or by the local authority will depend on the sector you are working in. However regardless of who carries out the inspections, the way they enforce the law should be consistent and in compliance with how the HSE says it should be enforced. To find out more about the HSE and how it operates go to its website (<https://www.hse.gov.uk/>). If you work in Northern Ireland go to <https://www.hseni.gov.uk/>.

### **12. Does the employer have to RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013) report cases of COVID-19?**

RIDDOR puts duties on employers to report certain serious workplace work related injuries and illnesses to the HSE (Health & Safety Executive). These include:

- Certain specified injuries
- Occupational diseases
- Exposure to biological agents
- Dangerous occurrences

Unfortunately, COVID-19 is still not formally classed as an occupational disease – which would assist not least due to the benefits that could accrue for workers with such recognition.

However COVID-19 can be reported as a:

- Disease due to occupational exposure of a biological agent;
- Death caused by occupational exposure to a biological agent
- A work-related dangerous occurrence – which only applies in very specific circumstances such as where a vial breaks and the biological agent is released leading to exposure to COVID-19.

### **13. What does the HSE consider reasonable evidence that an illness or death through COVID-19 was work-related?**

The HSE gives detailed advice (<https://www.hse.gov.uk/coronavirus/riddor/riddor-reporting-further-guidance.htm#work-death-reasonable>) to employers for them to consider whether a case of disease or death through COVID-19 was work related and RIDDOR reportable.

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Significantly it says that “for an occupational exposure to be judged as the **likely** cause of the disease, it should be more likely than not that the person’s work was the source of exposure to coronavirus as opposed to general societal exposure”, and that “such cases may not be easy to identify when COVID-19 is prevalent in the general population”.

It says that; “work with the general public, as opposed to work with persons known to be infected, is not considered sufficient evidence to indicate that a COVID-19 diagnosis is likely to be attributable to occupational exposure”, and that “such cases do not require a report”. As such the guidance seems to focus the reporting on employers within health and social care, although there may well be some specific circumstances where RIDDOR reporting should take place outside of a clinical setting.

Employers are not required “to conduct extensive enquiries in seeking to determine whether a COVID-19 infection is work-related. The judgement should be made on the basis of the information available” and “there is no requirement for RIDDOR reports to be submitted on a precautionary basis, where there is no evidence to suggest that occupational exposure was the likely cause of an infection.”

In terms of necessary medical evidence to report –

(i) in cases of disease the HSE does concede that as many cases of COVID-19 are currently being confirmed without a registered medical practitioner’s written diagnosis, such written confirmation may not be necessary. Therefore, for it to be RIDDOR reportable, generally the HSE would generally expect there to be either:

- Written confirmation from a GP; or
- Any other official confirmation such as that provided by a public testing body.

In addition, the HSE accepts cases would be reportable where a registered medical practitioner has highlighted the significance of work-related factors in their diagnosis of COVID-19.

(ii) in cases of a death the death must be caused by an occupational exposure to COVID-19. The guidance here refers to the disease being a significant cause of death and that medical evidence such as a death certificate is likely to be an important consideration as to whether to report.

#### **14. What should I do if I think a case of COVID-19 was work related?**

Although whether to RIDDOR report is a matter for the employer, certain practical steps can be taken on behalf of members.

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Firstly, a health and safety rep can document the issues. Secondly, members should be directed for legal advice as appropriate.

Regardless of whether you consider such a case meets the conditions as provided by the HSE on it being RIDDOR reportable, it is important to document any cases of COVID-19 that you consider to be work-related, especially if there is a possibility that the exposure was caused or aggravated by an employer's actions/omissions. Such information could well prove useful, for example, in any future personal injury claims that may be brought on behalf of members or family members (in the tragic circumstances where that exposure has led to the death of our member). The basis of such a claim in negligence is set out above.

As outlined in the introduction UNISON has set up a special legal helpline where members/family members can be directed to seek advice in this respect <https://www.unison.org.uk/news/article/2020/05/new-ways-members-get-legal-help/>

**15. What if I disagree with my employer's decision not to RIDDOR report?**

In this situation a health and safety rep may wish to report the employer to the HSE. This could arise where you believe the employer failed to meet its legal obligations to protect and keep its employees safe. This could include issues over RIDDOR reporting or any other failure by the employer, such as carrying out a full & sufficient risk assessment. For further information please refer to UNISON's guidance specifically for health and safety reps during the COVID-19 pandemic.

**16. What if I am shielding or a vulnerable individual?**

The legislation that introduced lockdown refers to those who are 'clinically vulnerable' and 'extremely clinically vulnerable'. Which category a member falls into, depends on their individual circumstances, but in short, these individuals were required to 'shield' themselves to avoid risk of contracting COVID-19.

Both categories of vulnerable individuals are potentially 'disabled' for the purposes of the EqA 2010, and if so, will have further legal protections. Additionally, there are separate legal rights for those who are pregnant or on maternity leave and for workers from a particular age category, such as those who are over 70.

Employers must always consider the health and safety implications for its returning workers but in particular for those who are shielding or vulnerable and any staff who 'associate' with someone (such as someone in their household or who they care for) who has a protected characteristic under the EqA 2010.

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[Government guidance on shielding should be taken into account.](#) It was first introduced from 6 July 2020 to reduce restrictions that applied from March, with the decision to ‘pause’ shielding from 1 August 2020, and most recently updated on 31 December 2020. Currently, it does not reflect the announcement made by the Government on 4 January 2021 regarding a third Lockdown. Where shielding has commenced or been ‘paused’, an employer should have consulted with H&S reps in good time and update the risk assessment to reflect steps to be taken for those who are shielding (or live with someone who is shielding), particularly if it plans to ask such employees to return to work.

Despite the updated guidance, formerly shielding employees should still have been permitted to work from home in most circumstances after 1 August 2020, unless the employer can show the workplace is ‘secure’ from COVID-19. This work could be in the usual role or a redeployed role. However, there are likely to be many situations where an employer attempts to force a formerly shielding worker to decide between the risk of facing some sanction for not returning to the workplace or agreeing to enter a workplace that they do not know is sufficiently safe. Advice should be sought where this happens as the relevant circumstances will need to be considered carefully. For example, to assess whether the employee may have been subjected to some form of disadvantage under the EqA 2010.

**17. What happens if the employer wants to reduce my days/hours of work or my pay?**

Unfortunately, some employers may exploit what is happening and attempt to try and force through unilateral variations of contract that worsen an individual’s terms and conditions of employment.

The terms of the individual’s contract may permit some limited variation of work / pay, but these tend to be interpreted restrictively by the courts. Potentially, an employer risks dismissing an employee as redundant if it insists that there must be a reduction in work / pay.

Any proposed variation must be agreed by the individual for it to be legally binding. This means that any individual who is concerned about an employer attempting to force through something unacceptable must clearly object, or else risk that the employer will infer that it has been agreed.

If an employer varies an employee’s terms and conditions of employment without agreement, then this may well give rise to individual legal remedies being available to that employee.

**18. When furlough ends and staff come back to work, they will need to undertake alternative duties. Can this be imposed/agreed at this point in time?**

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No, unless this is a requirement to undertake alternative duties to deal with the pandemic. We would still expect the employer to agree these with the employee. Advice should be sought if the Employer attempts to unilaterally impose changes to the Employee's contractual terms without the individual's consent.

**19. What if my employer wants to lay off staff or make redundancies after furlough ends?**

Unfortunately, many employers could decide to make their employees redundant after furlough ends. There are particular legal issues that arise where dismissal is by reason of redundancy.

For example, the employer has obligations to act fairly towards its employees and those with 2 years qualifying service may complain about unfair dismissal or seek a redundancy payment if this is not paid. Additionally, the employer may also be required to collectively inform and consult with a member's union (where there is union recognition), or with the members, where the employer proposes to dismiss 20 or more employees from a single workplace establishment.

The right to lay off staff and pay guarantee payments depends on whether this is something that is permissible under the individual's contract. If an employer attempts to introduce lay off without any contractual term permitting its introduction, then the employee will need to decide whether to accept the proposed unilateral variation.

Advice should always be sought if there are concerns with what is being proposed by an employer. Due to modifications to the relevant law that calculates 'a week's pay' that came into effect on 31 July 2020, it has been confirmed that 'normal' pay (ie not the lower furlough rate of pay) must be used for statutory redundancy pay and statutory notice pay amongst other rights.

Please note that the government is reviewing whether employers should be eligible to claim furlough payments for employees serving contractual or statutory notice periods and will change the approach for JRS claim periods starting on or after 1 December 2020. Under the fifth Treasury Direction, Employers cannot apply for support on any day where an employee is serving contractual or statutory notice from 1 December 2020.

**20. Can collective redundancy consultation take place when affected employees are on furlough?**

The statutory obligations to adequately inform and consult on collective redundancy situations will begin when an Employer proposes to dismiss 20 or more affected employees at a single establishment. This should commence when strategic decisions are made by the Employer and

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(for example) are likely to crystallise when contemplating reintegration of the workforce. The timing depends on the relevant circumstances.

With electronic communication, an Employer should be able to provide information to union reps. However, it is likely to be more difficult for the Employer to show that it has also conducted adequate individual consultation with employees who are on furlough. A key point to remember is that the Employer must complete its collective and individual consultation before issuing the notice of redundancy dismissal.

### **21. How does the right to be accompanied work with virtual hearings?**

There is a statutory right for an employee to be accompanied at a disciplinary or grievance hearing by their chosen representative which is supplemented by the [Acas Code of Practice](#). Tribunals will expect to see flexibility from Employers in the context of pressures caused by lockdown, particularly around the use of technology and ensuring a fair process takes place.

### **22. What can be done for staff who have childcare responsibilities? Are they entitled to stay at home?**

According to the Government's guidance for the Coronavirus Job Retention Scheme, an employer is permitted to place an employee on furlough if s/he is unable to work because of caring responsibilities resulting from the coronavirus.

There are relatively few stand-alone legal rights for those who have children. The main ones are *dependant's leave* which permits 'reasonable' time off under s.57A Employment Rights Act 1996 (ERA 1996) to assist, make arrangements where dependent (including a child), is sick or where care arrangements have been disrupted or terminated, or there is an unexpected occurrence in an educational establishment; and parental leave of 18 weeks unpaid leave per child under s.76 ERA 1996 and the Maternity and Parental Leave etc Regulations 1999. These rights are separate to each other and both involve different threshold tests for entitlement. In particular, the rights are for 'employees' only, rather than those who are self-employed or 'worker' status and unless there are special contractual provisions, they are largely unpaid.

Many employers will have additional flexible working policies and arrangements. These must comply with the EqA 2010. For example, the working arrangements required by an employer are most likely to be a 'practice criterion or provision'. This might particularly disadvantage

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workers as a member of a protected group (eg single mothers) and so potential indirect discrimination will need to be objectively justified.

### **23. What about rights under data protection law?**

Workers are data subjects where an employer decides to collect, and process information related to the current crisis. For example, in relation to the health status of the individual or people living in the same household.

There are complex legal issues that can arise in data protection law. In particular, data about an individual's health is a 'special category' under Article 9 GDPR and the Data Protection Act 2018 (DPA 2018). This means an employer can only lawfully collect and process health data in certain circumstances.

The rights of a data subject are enforceable through the Information Commissioner's Office (ICO). The ICO has issued its own [information and guidance](#) which employers are expected to follow. This includes a number of recommendations and suggestions, but in particular, that employers ought to seriously consider conducting a data protection impact assessment in order to reduce the risks of breaching data protection law.

### **24. Non-employment law questions: During the COVID-19 crisis what should a member do about a non-employment related legal query (i.e. they have suffered a personal injury or need assistance as they are facing work related criminal allegations)?**

Given the current situation and the most recent government advice due to the COVID-19 outbreak UNISON has had to adapt its processes and UNISONdirect will be unable to process calls for members wishing to use our Legal Assistance scheme.

Members should instead call **0808 252 2783** where they are seeking personal injury advice following a work or non-work accident/injury they have suffered, or a non-work related accident suffered by their families; criminal law advice or to access UNISON's initial free legal advice scheme; or if they want legal help with wills and conveyancing This number is open 24/7. Members should have their UNISON membership number to hand when they call.

If members want advice in relation to a work-related personal injury stress case then branches still need to follow the Stress Protocol. If the case warrants completing the Stress Form then this should be done and can then be sent to the address on that form. However in the current situation, if it is easier to scan and e-mail the information, this can be sent to [LETNEWCASES@thompsons.law.co.uk](mailto:LETNEWCASES@thompsons.law.co.uk).

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Occasionally members also complete forms (FLA, CR, PI) to access other non-employment legal matters. The addresses on these forms are still valid too, or if easier these forms can also be e-mailed to [LETNEWCASES@thompsons.law.co.uk](mailto:LETNEWCASES@thompsons.law.co.uk). Although the simplest and quickest way for members to access help is to call the number listed above, and they should be advised of this.

If Members want to look through in more detail the terms and conditions for our Legal Scheme which also outlines scope eligibility, please signpost them to our Legal Services web pages and refer to our Legal Services Guide.

**25. What should a member do if they need employment law advice?**

Please contact your branch and find their details here: <https://branches.unison.org.uk/>

**26. How can branch reps contact the legal helpline for advice during Covid?**

Our branch's accredited stewards should talk to the branch officers to check the matter is suitable for helpline advice. Accredited stewards and branch officers can then contact UNISONdirect at <https://www.unison.org.uk/get-help/online-enquiries/>, who will check that you are eligible to use the service.

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