

Living with Covid: what does the end of self-isolation mean for employers?

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On 21 February 2022, the Prime Minister announced the end of the Government's Covid restrictions in England and a move towards personal responsibility. In this briefing we explain the changes and the key risks for employers.

What is changing and when?

The following changes will take effect on **24 February 2022**:

- **Self-isolation:** between 24 February 2022 and 31 March 2022 (the **self-isolation transitional period**) those who test positive for Covid will be advised to stay at home and avoid contact with other people for at least five full days if they can, but they will not be legally required to do so. They may resume their normal routine once they have tested negative on two consecutive days (from day five onwards).
- **Notifying employers:** individuals will no longer be required to notify their employers that they have been advised to self-isolate.
- **Support payments and SSP:** the £500 self-isolation support payment for people on low incomes will end. However, the special Covid provisions for Statutory Sick Pay (**SSP**) will end a month later on 24 March 2022 (i.e. from this date, Covid sickness or self-isolation will no longer mean an individual is automatically deemed incapacitated and entitled to SSP from day 1 of their sickness or self-isolation).
- **Contact tracing:** routine contact tracing will end. Those who are fully vaccinated (or under 18) and are close contacts of a positive case will no longer be asked to test daily for seven days. Those who are not fully vaccinated and are close contacts of a positive case will no longer be required to self-isolate.

The following further changes will take effect on **1 April 2022**:

- **Self-isolation:** those with Covid symptoms will be encouraged to “exercise personal responsibility” and show consideration to others, but will not be required, nor advised, to stay at home.
- **Covid testing:** free LFT and PCR testing will end for the general public (PCR tests will remain available for social care workers and certain vulnerable groups).
- **Risk assessments:** the requirement for employers to explicitly consider Covid in their health and safety risk assessments will be removed.
- **Guidance for employers:** the “Working safely” guidelines for employers in different sectors will be replaced by new public health guidance, which will urge employers to continue to consider the needs of those at greater risk from Covid.
- **Covid certification:** the use of voluntary Covid-status certification will no longer be recommended for use (although the NHS app will still allow people to indicate their vaccination status for international travel).

How should employers handle Covid positive employees during the self-isolation transitional period and what are the risks?

During the self-isolation transitional period, employees will still be able to access free LFT and PCR tests and discover whether they have Covid. Where they test positive, the Government’s advice is that they should self-isolate for at least five full days, but this is no longer a legal requirement. Employees will not be legally required to notify the employer that they have tested positive for Covid and advised to self-isolate. It would, therefore, be sensible for employers to introduce their own requirement for employees to notify them if they test positive for Covid.

Where a Covid positive employee is unwell during this period, they will usually take sick leave in the normal way. However, where a Covid positive employee is fit to work the employer will need to decide its approach. Will such employees be permitted to attend the workplace or directed to stay at home? Below we consider four possible scenarios that may arise and the associated employment law risks.

Scenario 1 – Employer directs the Covid positive employee to come into the workplace / Covid positive employee wishes to stay at home:

If an employer instructs a Covid positive employee to attend the workplace in these circumstances this would not breach any Covid-specific law, but it would be contrary to Government guidance and it may also breach wider health and safety legislation.

The employee may be able to argue some or all of the following:

- It is not a reasonable management instruction and, therefore, non-compliance does not put them in breach of contract. If the employee was dismissed for non-compliance, they could argue the dismissal was unfair.
- The instruction puts the employer in breach of (i) the implied duty to take reasonable care of the health and safety of employees; and/or (ii) the statutory duties arising under the Health and Safety at Work Act 1974. In theory, the employee could constructively dismiss himself / herself in response to those breaches.
- That they will not comply with the instruction to attend the workplace because they are concerned about the health and safety risks of passing Covid onto their colleagues and the public at large (especially vulnerable and pregnant people) and the employer's instruction puts those people at risk of serious and imminent danger. If the employee is subjected to a

detriment (e.g. not paid) and/or dismissed as a result, then they may have claims for unlawful detriment and/or automatically unfair dismissal.

- That the voicing of concerns about attending the workplace in these circumstances represents a whistleblowing disclosure. If the employee was subjected to a detriment and/or dismissed as a result, then they may have claims for unlawful detriment and/or automatically unfair dismissal.
- That they have a philosophical belief in the protection of public health and the compliance with Government guidance on the same, meaning that the instruction to attend the workplace is indirectly discriminatory. A similar argument failed in [this](#) recent case, but an employee may have more success if they could show that their belief concerned wider public health rather their own / their partner's wellbeing.

Scenario 2 – Employer directs the Covid positive employee to come into the workplace / Covid positive employee is willing to attend the workplace:

In this scenario, the employer and employee are aligned but other employees may object to the attendance of a Covid positive employee at work (especially if they are vulnerable or pregnant). They could argue:

- It is not a reasonable management instruction to ask them to attend work alongside a Covid positive employee and they may refuse to attend work. If an employee was dismissed for non-compliance with the instruction, they could argue the dismissal was unfair.
- The instruction puts the employer in breach of (i) the implied duty to take reasonable care of the health and safety of employees; and /or (ii) the statutory duties arising under the Health and Safety at Work Act 1974. In theory, the employee could constructively dismiss himself/herself in response to those breaches.

- That they will not comply with the instruction to attend the workplace because they are concerned about the health and safety risks of catching Covid and the employer's instruction puts them at risk of serious and imminent danger (particularly pertinent if they are vulnerable or pregnant or live with someone who is). However, there have been cases where this argument has been run by employees who were dismissed earlier in the pandemic, and such dismissals were held to be fair. The difference now is that the employer would knowingly be placing an employee in close proximity to someone who had Covid, and they would be doing so contrary to Government guidance. If the employee was subjected to a detriment and/or dismissed as a result, then they may have claims for unlawful detriment and/or automatically unfair dismissal.
- The voicing of concerns about attending the workplace in these circumstances represents a whistleblowing disclosure. If the employee was subjected to a detriment and/or dismissed as a result, then they may have claims for unlawful detriment and/or automatically unfair dismissal.
- If the employee is pregnant, they may be able to argue that the employer has failed in its duty to assess specific risks for them and take measures to address those risks (i.e. keep the Covid positive employee out of the workplace), failing which they must be suspended from work on full pay.
- If the employee is vulnerable and disabled, they could argue that an instruction to work alongside a Covid positive employee is indirect disability discrimination. If the employee is not disabled themselves, but has caring responsibilities for someone who is, then they could argue that the instruction to work alongside a Covid positive employee amounts to "associative" indirect disability discrimination.

Scenario 3: Employer directs the Covid positive employee to stay at home / Covid positive employee wishes to stay at home:

In this scenario, the employee and employer are aligned, and this shouldn't present any problems provided that the employee is able to work from home. However, if the employee's role cannot be performed from home, the question is how should such leave be treated? The position during the self-isolation transitional period is complicated.

As discussed above, the special Covid provisions for SSP will remain in place until 24 March 2022. This means that anyone who is sick or self-isolating due to Covid is automatically deemed to be incapacitated and is entitled to SSP from day 1 of their sickness or self-isolation (rather than the usual day 4). Therefore, if the employee stays at home and adheres to the self-isolation guidance, they will be entitled to SSP and contractual sick pay if applicable. However, if the employee refuses to adhere to the self-isolation guidance then they will not be entitled to SSP and the employer will need to decide how to treat this leave.

Further, from 24 March 2022, the special Covid provisions for SSP will be removed, meaning that an employee will only be entitled to SSP if they qualify in the normal way. One such qualification is that they are incapacitated. Therefore, a Covid positive employee who is fit to work will not be entitled to SSP. Again, the employer will need to decide how to treat this leave.

In such cases, the employer may elect to treat this leave as sick leave and pay it in the usual way. However, given that the absence it is not really attributable to sickness, will it count for (i) entitlement to contractual sick pay; and (ii) the purposes of any sickness absence management threshold? If it is counted for such purposes, then this could present issues at a later date if the employee becomes sick for

another reason and has exhausted their entitlement to contractual sick pay and/or they are disciplined for their level of absence.

To avoid such issues, the employer could elect to treat the absence as some sort of special leave, but the key question will be whether or not it is paid. If it is paid, there should be no problem. If it is not paid, the employee could argue that the employee is in breach of the implied duty to pay wages and/or the implied duty of trust and confidence.

The employee is likely to raise a grievance and may constructively dismiss himself/herself in response to those breaches.

Scenario 4: Employer directs the Covid positive employee to stay at home / Covid positive employee wishes to attend the workplace:

Here, the employee and employer are not aligned. However, this is likely to be a reasonable management instruction (given the Government guidance during the self-isolation transitional period) and so the employee should usually comply with it.

Again, this scenario shouldn't present any problems provided that the employee is able to work from home. However, if the employee's role cannot be performed from home, then the same issues outlined in scenario 3 above will arise.

How should employers handle Covid positive employees from 1 April 2022 onwards?

From 1 April 2022, free Covid tests will be withdrawn and so it will become harder to identify when employees have Covid. Where an employee reports Covid symptoms and is unwell enough not to attend work during this period then the assumption could simply be made that they have Covid without the need for a test. Such employees would take sick leave in the normal way.

Where the employee has some symptoms but is fit to attend work, then their status could be confirmed by way of a private Covid test. The Government has said that it is working with retailers to ensure that everyone who wants a Covid test can buy one. One question for employers will be who pays for the test in these circumstances? If the employer is asking the employee to take the test in order to be allowed to attend the workplace, then it would be reasonable for the employer to pay.

In addition, some employers have instituted routine Covid testing arrangements for staff. These arrangements may continue if the employer wishes, but, again, if the employer is asking the employee to take these tests before attending work it will probably have to foot the bill for them.

Where an employee tests positive for Covid after 1 April 2022, they will not be required, nor advised, to self-isolate. In tandem, the requirement for employers to specifically assess Covid risks will be removed, as will the special Covid "Working safely" guidance. On the face of it, therefore, it appears that employers will have greater flexibility to instruct Covid positive employees to attend work, without facing the risks that arise during the self-isolation transitional period. However, employers should review the new public health guidance when it is published and consult with their workforce before deciding their approach.

[Prime Minister's Statement](#)

[Living with Covid-19](#)

BDBF is currently advising many employers and employees on the challenges presented by the coronavirus pandemic. If you or your business needs advice on any coronavirus-related matter please contact Amanda Steadman (amandasteadman@bdbf.co.uk) or your usual BDBF contact.

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