Here are some more participant questions from our Coronavirus webinar earlier this week.

1. **What do we do if one of our employees triggers self-isolation by going to a high-risk area despite FCO advice? Can we stop him going?**

   However attractive might be the prospect of Venice without the crowds, it must be unlikely that someone aware of the risk would go there (or any other high-risk area) without absolutely needing to.

   You cannot physically prevent your employee from going on holiday to a high-risk area, (assuming of course that he can still get there at all!). You can point him to the FCO website and make it clear that in these very unusual circumstances you would regard it as a breach of a reasonable management instruction if he goes nonetheless. You can and should tell him that if he does and is either then self-isolated or actually ill, no company sick pay will be paid. More constructively, given the disruption and possible costs of temporary cover, you might consider a contribution to any lost holiday costs, if that is his driver for still going, as this might be cheaper than losing him for the self-isolation period.
If he insists on going anyway, then what? Based on the new SSP Regulations (see Part 1 in this series) the resulting self-isolation would be in line with Government guidance and so should be paid at least at the SSP rate. However, the need for self-isolation arose from actions flying in the face of Government guidance, i.e. his going to the high-risk area in the first place, which would point away from his being paid. In reality, the argument around SSP is probably not worth having, but what about company sick pay on top? First, check your contracts – if the sick pay entitlement can be suspended where the employee contributes to his absence by his own deliberate act (dangerous sports, not following doctor’s orders, etc.) then you would be on pretty safe ground in withholding company sick pay. If it does not, but you had told the employee both that he should not go and that he wouldn’t be paid for the isolation period if he did, then we think an Employment Tribunal would be less than sympathetic to an unlawful deductions or breach of contract claim.

2. Presumably civil liability would arise if the employer failed to put in any reasonable precautions and an employee contracted the virus?

In theory, potentially so. However, the legal difficulty would be establishing the necessary causation from the employer’s failure to the employees becoming infected. In a normal workplace injury that is not much open to doubt, but that is not the case here. Such is the likely prevalence of the virus than an employer could take all the precautions in the world, or none, and the employee could still pick up Covid-19 on the way in.

That position might change when the virus becomes less omnipresent or if that workplace were a particular hotspot such that it could be shown more likely than not that it was failures there which led to the illness. Right now, however, establishing the necessary causation would be a significant hurdle to anyone contemplating those proceedings.

That is not to say that the employer should have no interest in doing this right. The Health & Safety at Work Act would potentially allow the prosecution of an employer in those circumstances for failing to maintain a safe place of work, even without any employee actually becoming unwell.

As a related point, the taking or not of those precautions might also be relevant to employees’ rights under Sections 44(1)(d) or 100(1)(d) Employment Rights Act 1996. These are the rights not to be subjected to a detriment or dismissed as the result of those employees absenting themselves from the workplace where “in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work”. If despite all Government advice my employer is still not doing anything to combat the spread of what is clearly a serious virus within my workplace, it seems to me more than likely that I could bring myself within those definitions. If I am then penalised or dismissed for not going in, I would have a solid claim for compensation in the Tribunal.

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