



CORONAVIRUS

GIBRALTAR EMPLOYERS & EMPLOYEES

Your Questions Answered

EMPLOYER'S RIGHTS AND OBLIGATIONS

1. What legislation has Gibraltar put in place relating to Coronavirus 2019-nCov ("Coronavirus")?

The Civil Contingencies Emergency (Coronavirus) Regulations 2020 came into force on 11 February 2020 and were subsequently replaced on 4 March 2020 by The Civil Contingencies Emergency (Coronavirus No.2) Regulations 2020 ("the Regulations"). As they currently stand the Regulations allow for the screening and imposition of restrictions and requirements on persons who meet certain criteria, including there being reasonable grounds to suspect the person is or may be infected or contaminated or has left any of the following countries within 14 days of their arrival in Gibraltar:

- (i) Cambodia
- (ii) China
- (iii) Hong Kong
- (iv) Iran
- (v) Italy
- (vi) Japan
- (vii) Republic of Korea
- (viii) Laos
- (ix) Macau

- (x) Malaysia
- (xi) Myanmar
- (xii) Singapore
- (xiii) Taiwan
- (xiv) Thailand
- (xv) Vietnam

In particular, all travellers returning to Gibraltar from an at-risk country have a legal duty pursuant to Regulation 5 of the Regulations, to report to a Borders and Coastguard Officer if arriving by land or air, or an Officer of the Gibraltar Port Authority if entering by sea. A person commits an offence if s/he fails without reasonable excuse to comply with Regulation 5 and such offence is punishable on summary conviction to a fine not exceeding level 3 on the standard scale.

Pursuant to Regulation 11, the Government Minister with responsibility for public health, on the advice of the Director for Public Health may require a person to be kept in isolation if he has reasonable grounds to believe that the person is infected or contaminated with Coronavirus and he considers it necessary and proportionate to do so in order to reduce or remove the risk of the person infecting or contaminating others.

In addition, Coronavirus was added to the definition of "notifiable disease" under section 146 of the Public Health Act 1950 by way of Gazette on 31st January 2020. In the circumstances, there is a duty pursuant to section 144 of the Public Health Act 1950

to notify the Public Health Director if a person living in your household contracts Coronavirus.

2. What is the nature and extent of an employer's obligations to employees with respect to Coronavirus?

There is a general legal duty on employers to ensure, so far as is reasonably practicable, the health, safety and welfare at work for all of their employees including in relation to the Coronavirus. Employers have a duty to ensure they:

- Undertake a risk assessment at the workplace;
- Provide employees with information, instruction and training on Coronavirus and its prevention; and
- Take reasonable preventative measures within the workplace.

3. What steps and/or precautions must / should an employer in Gibraltar take?

In order to ensure prevention, an employer can take the following measures:

- Provide employees with such information, instruction, training and supervision as necessary to ensure, so far as reasonably practicable, the health and safety of his employees. For example, by remaining abreast of advice issued by official sources e.g. Government of Gibraltar website and press releases; and by informing employees of any steps and measures taken to prevent the virus from spreading.
- Provide and maintain a working environment for employees that is, so far as reasonably practicable, safe and without risks to health, and adequate as regards facilities and arrangements for their welfare at work. This can be achieved by adequately providing materials and equipment in the workplace such as hydro-alcoholic solutions for hand sanitising and masks

if the risk becomes heightened. Putting arrangements in place, such as signage reminding staff to wash their hands regularly and after they cough and/or sneeze, and requiring visitors to wash their hands upon entry to work premises can also mitigate the spread of the virus and ensure that an employer remains compliant with the relevant regulations to ensure health and safety at work.

In order to identify the measures that the employer needs to take to comply with the requirements and prohibitions imposed upon him by statute, employers should make a suitable and sufficient assessment of:

- The risks to the health and safety of their employees, to which they are exposed whilst they are at work; and
- The risks to the health and safety of persons not in his employment but who their employees may come into contact with when undertaking their work.

Where an employer employs 5 or more employees, he must record the significant findings of the assessment and any group of his employees identified by it as being especially at risk. If there is reason to suspect that the assessment is no longer valid or there has been a significant change in the matters to which it relates, the assessment shall be reviewed by the employer.

4. Does an employer have additional obligations to high-risk individuals?

If an employer identifies a group of his employees to be especially at risk, and has 5 or more employees, he shall record this in his risk assessment (as outlined at 3 herein), and take any necessary reasonable precautions to minimise the risk of contracting the virus to those individuals. The steps taken should be well documented in order to prove that preventative measures have been taken. The needs of these particular high-risk individuals should be kept under close scrutiny and review, in response to the developing situation regarding the virus.

5. Can an employer prohibit an employee from making a private trip to a high-risk area or a country listed in the Schedule to the Regulations?

If the arrangements and plans are made in the context of an employee's private life then an employer has no right to prohibit it. However, they can actively discourage it, point the employee in the direction of useful official advice and warn the employee that they may be denied access to the workplace for a minimum of 14 days upon their return. If the employer nevertheless travels to the high-risk area or country listed in the Schedule to the relevant regulations, the employer can then deny them access to the workplace upon their return, on the basis of protection of other employees, and require that they submit to a medical assessment prior to their return to the workplace.

6. Can an employer suspend or prohibit an employee suspected of having Coronavirus from entering the workplace?

Pursuant to the Regulations, persons who have visited a country listed in the Schedule within the 14 day period immediately preceding their arrival in Gibraltar, must report this information to an officer of the Borders and Coastguard Agency, or of the Gibraltar Port Authority, they may then be refused entry into Gibraltar, or be required to self-isolate for a period of 14 days.

However, in the event that an employer suspects that an employee has coronavirus and is attempting to enter the workplace, the employer may regard the risk of allowing the employee to remain at work, and therefore potentially breaching their health and safety at work obligations towards other employees, as outweighing any employment law risk which could exist in suspending them. An employer should consider whether it has an express contractual right to require the employee to stay at home. It is common for there to be no such right. Provided it continues to pay an employee's wages, it is unlikely to be a breach of an employer's

duties towards an employee to require them to stay at home, assuming that there are non-discriminatory, reasonable grounds for concern, and the matter is dealt with appropriately, proportionately and sensitively.

7. Does an employee have any obligations to suspend all business-related travel until such time as the emergency regulations are in force?

There is no specific obligation to suspend all business-related travel. Official advice as to travel is currently under constant review and there are restrictions in place in respect of high-risk areas. It is therefore prudent for employers to take heed of this advice, monitor the developing situation and respond accordingly.

8. What should an employer do if an employee becomes unwell at the workplace?

An employer should send an employee home and advise that they call the 111 helpline in order to obtain advice from the Gibraltar Health Authority.

9. What can an employer do if an employee with Coronavirus comes to the workplace?

An employer is advised to send the employee home immediately (if they have attended the workplace in the knowledge that they are infected with the virus). Although there is no obligation to do so an employer should also consider whether or not every employee who has come into contact with the infected individual should self-isolate at home for a period of 14 days and the offices should be deep cleaned on an urgent basis to avoid contamination of others. Out of an abundance of caution and to avoid widespread contamination, an employer is advised to contact any clients who the employee may have been in contact with in the period preceding 14 days since they first began having

symptoms and to advise that they contact the 111 helpline and inform them that they have been in contact with an infected person.

10. Can an employer oblige an employee who cannot come to the workplace to work remotely?

If the job allows for an employee to work remotely, then an employer can oblige them to do so and an employee's unjustified refusal to do so can be sanctioned by the employer. Employers must however bear in mind that if the employee has a medical certificate exempting them from work, then they cannot oblige them to work remotely. Further, any costs related to remote work are borne by the employer, and any necessary resources and equipment, such as laptops, must be provided.

11. What are the data protection obligations which an employer has in respect of information they may hold on infected or potentially infected employees?

There is no obligation on an employer to divulge any information they hold in respect of infected or potentially infected employees. The usual data protection obligations apply. Under Gibraltar law, personal data concerning health is "special category data" which requires extra measures of protection. Therefore, employees need to ensure that any communication sent does not contain any personal data in respect of any individual who is absent due to infection. For example, it would be compliant with data protection legislation to communicate that there is an employee who has been infected, but it would be a breach of data protection rights to communicate the identity of the specific individual who is absent.

12. Can employers be liable for discrimination and harassment to their employees?

In the event that an employer has no reasonable justification for their belief that an employee is either

infected by, or there is a high risk that they have contracted the virus, they must not act in a manner which is likely to put an employee at a disadvantage to his colleagues. Employers must be cautious about taking any unjustified action in respect of an employee if they do not hold such reasonable justification, simply due to their nationality or ethnicity, and should ensure, insofar as reasonably possible, that other employees also refrain from acting in a manner which harasses or discriminates against a colleague due to their nationality, ethnicity, or if they have had/have Coronavirus.

Employers seeking information about an employee's travel plans needs to be careful not to act in a manner which is discriminatory or harassing and cannot be justified. For example, requiring employees who have travelled to places listed in the Schedule to the Civil Contingencies Emergency (Coronavirus No.2) Regulations to disclose that they have done so is likely to be considered justifiable.

EMPLOYEE'S RIGHTS AND OBLIGATIONS

1. Is there an obligation on the employee to inform the employer of possible exposure to Coronavirus?

There is no legal obligation on the part of the employee to inform his/her employer of a possible exposure to the Coronavirus. However, on the grounds of obligations of trust and confidence that govern all employment relationships, employers are entitled to expect to receive such information as it will enable them to take reasonable preventative measures at the workplace. It is good practice for employers to communicate with their employees and stress the importance of transparent information.

2. Nature and extent of the employee's duty to employers

There is a legal duty on employees while at work to:

- Take reasonable care for their health and safety and of other persons who may be affected by their acts or omissions at work;
- Cooperate with their employer so far as is necessary to enable the employer's duty to be performed or complied with; and
- Not to intentionally or recklessly interfere with anything provided in the interests of health and safety.

In the circumstances, all employees must cooperate and not interfere with any preventative measures imposed by the employer and they must take reasonable measures not to expose himself or others to Coronavirus at the workplace.

3. Is an employee entitled to sick pay and leave if diagnosed with Coronavirus?

The workplace's usual sick leave and pay entitlements apply if someone is diagnosed with Coronavirus. Provided certain conditions are met, employees are entitled to two weeks full pay and four weeks half pay in any given 12-month period pursuant to the Employment (Sick Pay) Order 1974.

4. What are employees entitled to if they are required to go into self-isolation pursuant to the Regulations?

There is currently no statutory right for an employee to be paid in circumstances where s/he has been advised by a medical professional to self-isolate or has had to go into quarantine. Consideration would need to be given to the terms of the employee's contract of employment and, if silent, employers have discretion to apply their own pay policies.

Similarly, if the employee is fit to work, s/he would not qualify for statutory sick pay. However, if the employee is not fit to work whilst in self-isolation, s/he would qualify for statutory sick pay. Employers have discretion to accept different forms of evidence as proof of sickness and could

decide that self-isolation (or part of it) qualifies for statutory sick pay.

UK Government announced on 4th March 2020 that statutory sick pay would be made available to employees from day one when self-isolating. This change is intended to be a temporary measure to respond to the outbreak and will lapse when it is no longer required. It remains to be seen whether The Government of Gibraltar will follow suit.

If an employee is not sick but their employer tells them not to come into work, they should get their usual pay. For example, if an employee has had contact with someone who has returned from one of the countries listed in the Schedule to the Regulations and their employer asks them not to come into the workplace.

6. What are employees entitled to if they require time off work to care for someone with Coronavirus or someone in self-isolation?

Employees are entitled to five days special unpaid leave to help a dependant in case of sickness which makes the immediate presence of the employee indispensable and to up to 4 months unpaid parental leave for children under five. This would apply to situations relating to Coronavirus, for example:

- If they have children they need to look after or do not have childcare because their school or nursery has closed; or
- To help their child or another dependant if they're sick, or need to go into isolation or hospital.

There is no statutory right to pay for this time off, but some employers might offer pay depending on the employee's contract or the workplace policy.

7. What are employees entitled to if they refuse to come into work for fear of contracting Coronavirus?

An employer should listen to any concerns staff may have. If there are genuine concerns, the employer must try to resolve them to protect the health and safety of their staff. For example, if possible, the employer could offer flexible working from home.

If an employee still does not want to go into work, they may be able to arrange with the employer to take the time off as holiday or unpaid leave. The employer, however, has no obligation to agree to this.

If an employee unreasonably refuses to attend work, it could result in disciplinary action being taken pursuant to the employer's usual disciplinary policies.

8. What are employees entitled to if the employer decides to close the workplace?

In some situations, an employer might need to close down their business for a short time. Unless it says in the contract or is agreed otherwise, they still need to pay their employees their usual pay during this time.

Where work can be done at home, the employer could:

- Ask staff who have laptops or mobile phones to take them home so that they can carry on working; or
- Arrange paperwork tasks that can be done at home for staff who do not work on computers.

9. What are employees entitled to if they become stuck abroad due to travel plans?

Normally employees are entitled to be paid only when they are working or on authorised leave. If the employee was travelling abroad on business and became stuck abroad through no fault of their own, it would be reasonable for the employer to continue to pay their salary as usual until they return or could reasonably do so. If an employee has been unable to return from holiday, the decision on whether to pay the employee falls to the discretion of the employer. The employer could choose to pay the employee on a one-off discretionary basis or ask the employee to take the time as annual leave or unpaid leave.

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