

**Q&A from Webinar for schools on 14 May 2020: How to manage a phased re-opening during Covid-19**

**Employment**

1. Do we have to pay staff who could attend to work but refuse to do so?

Not necessarily. Key to managing these issues is communication. Schools should take time to discuss concerns with the member of staff to determine if there are any particular vulnerabilities or risks that the employee is concerned about that could be addressed before they return to work and reassure staff that the School is following Government guidance.

Ultimately, staff have a contractual obligation to provide services to the school, and it could ultimately be a disciplinary issue if a member of staff is refusing to attend work. It is a possibility that a staff member who refuses to attend work may sign themselves off on sick leave. Each case will need to be treated on a case by case basis.

2. Now that the furlough scheme has been extended, can a school furlough its teachers over the summer holidays, on the basis that the school will top up the teachers' 80% salary to 100% for the entire period?

There is no specific guidance which explicitly addresses the issue, but we anticipate that, in principle, it may be *possible* to furlough teaching staff during the summer holidays and understand it may be of interest to many as a means of saving costs and reducing the prospect of salary cuts and/or redundancies. If evidence exists to demonstrate that staff often work for significant periods during the school holidays then this may be helpful from a furlough eligibility perspective. There are potential negatives to furloughing staff over the summer holidays and it is not a straightforward issue. We are currently preparing a note addressing this issue in detail which will include matters the school should consider.

3. Can we compel staff back to work unless they fall into a defined medical category?

As with question 1 above, staff have a contractual obligation to provide services to the school, and schools can take advice on how best to enforce their contractual position in the event that staff are reluctant to come to work.

4. Can an employer impose furloughing on a member of staff or must the member of staff agree to this?

Schools will need to discuss and agree the period of furlough with the member of staff. The employee's change in status and consent will need to be confirmed in writing and a record must be kept of the correspondence for five years. In our experience so far, most employees have been willing to accept furlough when the alternative is redundancy, a pay reduction or similar.

5. You have mentioned that we may be able to furlough those staff members who are shielding. Is this open to those employees that receive their pay from government funding?

The guidance confirms that where employers receive public funding for staff costs, and that funding is continuing, the Government expects employers to use that money to continue to pay staff in the usual fashion – and correspondingly not furlough them. This also applies to non-public sector employers who receive public funding for staff costs.

6. If employee asks for PPE but does not have an underlying health condition etc., do we have to provide it or should they provide their own?

Schools should follow the appropriate Government guidance on PPE, which at present, does not require schools to provide staff with PPE.

There may be some staff for whom it may be more appropriate to provide PPE, for example, school nurses, or any staff that are involved in providing personal care. It is however unlikely to be necessary for all staff and pupils to wear PPE when in school, provided that schools are following social distancing requirements. There may also be some staff that are concerned about their safety (or indeed the safety of their families) and may wish to wear PPE whilst in school. We would recommend talking to these staff to understand their concerns in the first instance, with a view to seeing how you can best support them in school.

7. Can you furlough staff if they are sick - even if you are intending to get a supply teacher in to fill that role?

Potentially, but it depends on the circumstances. The guidance says that employees who are currently off sick can be furloughed for business reasons (although clarifies that it is not intended for short-term absences from work due to sickness). That said, the Treasury Direction is inconsistent with this, as it suggests that an employee cannot be furloughed while eligible for SSP. It is possible that this is a mistake in the drafting of the Treasury Direction and the government merely intended to stop an employer claiming both furlough grant and SSP for the same employee in the same period.

With regards to the hiring of a supply teacher, this should not affect the position. The government previously indicated that the furlough scheme was an alternative to redundancy, lay-off or unemployment. Although the guidance for employees refers to furlough as applying when the employer is unable to operate or has no work for the employee to do, the guidance for employers says that all employers are eligible to claim under the scheme and that the government recognises that different businesses face different impacts from coronavirus.

8. Should the school insist on a member of staff taking a Covid test in the event the member suggests he or she has symptoms?

The testing regime is voluntary and ultimately a school cannot force a member of staff to take the test against his/her will. If a member of staff suggests that s/he has coronavirus symptoms, a school can ask him/her to take a Covid-19 test. Arguably, this would be a reasonable management instruction. In the exceptional circumstances in which we find ourselves, there could be cases where a refusal to have a test would amount to misconduct but this would be highly fact-sensitive.

Schools can register and refer self-isolating staff, and employees are able to book a test directly for themselves or members of their household who are exhibiting symptoms.

9. Can teachers and support staff currently get tested or do they need to have symptoms?

The government guidance suggests that staff and pupils in all settings will be eligible for testing *if they become ill with coronavirus symptoms* (as will members of their households). As explained at question 8 above, schools can register and refer self-isolating staff, and employees are able to book a test directly.

On 18 May 2020, the health secretary announced that anyone in the UK aged five or over with symptoms can now be tested for coronavirus.

10. Is it right that if a pupil or member of staff gets symptoms and tests positive that the whole class and teachers (which will be multiple of Year 6 classes) would need to isolate?

Yes, the Government guidance suggests that if a pupil or staff member tests positive, the rest of their class or group within their education setting should be sent home and advised to self-isolate for 14 days. The other household members of that wider class or group do not need to self-isolate unless the child, young person or staff member they live with in that group subsequently develops symptoms.

11. If staff state they would like to wear a facemask and the school's directive is no facemasks where do we stand as a school?

See question 7 above. Schools should follow the appropriate Government guidance on PPE, which at present, does not require schools to provide staff with PPE.

If there are some staff that are concerned about their safety (or indeed the safety of their families) and request that they wear a face mask whilst in school, we would recommend talking to these staff to understand their concerns in the first instance, reassure them of the measures that the school has put in place, and see if there are any other steps that can be taken to alleviate their concerns (for example, it may be that you can explore the option of working from home) with a view to seeing how you can best support them in school.

Ultimately, from a legal perspective, employees have an implied duty to obey the lawful and reasonable orders of their employer. Provided that your policy on not permitting facemasks in school is not unreasonable (for example, the employee has no particular vulnerabilities, or the Government guidance changes to recommend masks are worn) schools can insist that staff comply with the direction. However, it will always be best to communicate with staff and reach an amicable agreement if at all possible.

12. With a zero hours worker or visiting music teachers who usually wouldn't be paid in July and August, can we keep them on furlough and they still get the 80% of their average pay?

When using the portal to make a claim, employers are required to confirm that they are claiming "*costs of employing furloughed employees arising from the health, social and economic emergency resulting from coronavirus*". The Treasury Direction suggests that provided there is a connection between putting employees on furlough and the consequences of Covid-19, the purpose of the Scheme will be met. The idea of instructing a zero hours worker to cease all work in connection with their employment because of Covid-19 is likely to be artificial where they were not otherwise working on a contract at the time and there was no possibility that they would otherwise have been working during this period.

13. Please can you clarify what needs to be published and to whom, regarding schools that have more than 50 staff?

The Government expects that businesses with more than 50 employees will publish the Covid-19 risk assessment (elements of it) on their website. Our FAQs on this issue is available for further explanation. Risk assessments are a crucial element in the wider opening of schools.

14. What would a collective consultation look like if you have some affected staff in school but only in "shifts" and others on furlough and/or in isolation? Zoom meeting? Does it impact on timescales?

Coronavirus has created a situation where many employees are on furlough, working from home, self-isolating etc. This makes collective consultation a challenge. Previous case law has indicated that carrying out information and consultation obligations remotely is permissible, and it is unlikely that this would be regarded as a problem in the current circumstances.

Consultation must start "in good time" to allow the relevant discussions to take place, and a minimum period before the first of the dismissals takes effect - 30 days (where between 20 and 99 dismissals are proposed), or 45 days (where 100 or more dismissals are proposed) and should take place with the "appropriate" representatives of the affected employees. If a school recognises a trade union in respect of the affected employees, you must consult with the union representatives. Otherwise, you can choose whether to consult with existing employee representatives who have the appropriate authority (e.g. a staff consultative forum, depending on its mandate) or representatives elected specifically for the purposes of the consultation.

Schools can hold meetings online to inform employees about the proposals and collective consultation with employee representatives could also be done remotely. Potentially, some meetings could be done in person with appropriate risk assessments and protective measures and subject to consideration of current government guidance. If done remotely, schools should make sure that all the representatives have the technology required to participate and set clear guidelines in advance about how the meeting will be run.

If employee representatives have not already been elected, schools will need to consider what arrangements they need to make to ensure any election is fair. This may include arranging online voting.

15. Can we ask staff to provide online work and be teaching classes?

Schools will have at least some children off site for the remainder of this academic year and will need to consider how best to provide educational provision to those children that are not in school. The majority of schools are likely to already be providing some form of remote learning whilst the school is closed to all but children of key workers and those who are considered vulnerable. This could be continued if this is in the best interest of the children, and the school. This will be a factor for the individual school to consider.

It may be that schools will need to consider a combination of classroom and online teaching in any event to manage the anticipated phased reopening. Schools will need to consider the approach that will best suit the needs of their pupils and staff during this time. Staffing issues surrounding how to manage teaching a class where some children are physically present and some are still at home (the hybrid approach) is an issue which each school should consider and will of course be subject to their own particular circumstances, staffing and resources.

16. What is the best way to identify vulnerable/extremely vulnerable staff? Is it through a self-certification form? Do we ask all staff to provide medical evidence? What if they are not able to provide evidence?

Schools can request that staff self-report whether they fall into the category of “clinically extremely vulnerable” or “clinically vulnerable” by way of a self-certification form, provided schools are clear as to the purpose for the self-reporting, namely to protect the health and safety of the individual and others. The self-certification form should not collect more information than is necessary for that purpose and it should only be shared with those that need to know about it. However, currently, schools cannot *insist* that this information is provided. In some circumstances, schools may need to ask occupational health for input and/or for medical guidance from the employee’s GP. This will usually be with the employee’s consent.

### **Data Protection**

1. Do you have guidance on wording for supplementary Privacy Notice on lesson recordings and Examination processes? Also on SAR regarding examination grading decisions?

The wording in a supplementary privacy notice should mirror the wording in your Privacy Notice where possible. It should be concise and use clear and plain language that is appropriate for the intended audience.

2. For Yr.6 SATs test results can the request come from the parent? These children are only 10-11yrs old.

SATs results are the child's personal data so it is the child's right to access them. Parents can make the request on their child's behalf when the child does not have the capacity/maturity to make the request themselves. There is no specific age in England when a child is presumed to have the requisite capacity. At the age of 10 or 11 children may or may not have this capacity so it is important to consider each request separately.

### Safeguarding/Risk assessments

1. If we keep children in small cluster groups for the school day, are we able to group keyworker children together at the end of the day for wrap around care?

This might be difficult. Children are supposed to stay in their own, small, consistent group so clustering children in different groups for wrap around care would potentially not comply with this part of the Government guidance.

2. If we cannot reopen safely - I am a governor in a small school in a converted house. Will Ofsted /the Government take action against the school?

At the moment this is unlikely although there is the power to require schools to open (as well as close schools). A school must be guided by its risk assessment.

3. Where do we stand re offering on site teaching for year groups beyond those that state sector schools are being asked to open for at this stage?

As stated in the webinar, in our view this is strongly inadvisable. The Government guidance refers specifically to independent schools as well as state schools (and is the only place in the Government guidance that independent schools are mentioned by name) when looking at the year groups which will be part of the first phase of the wider opening of schools and restricting this to Reception, Year 1 and Year 6. The school risks reputational issues if it does not follow the guidance as well as a risk that the school may be directed to close.

4. Nursery/Pre School children. Are these included for Schools (as opposed to child minders/nurseries)? We have a "Pre School" of 3+ and are not an EY registered setting?

There is separate guidance for the opening of early year's providers with effect from 1<sup>st</sup> June. We were unable to cover this in the webinar due to time. A note on early year's providers following updated Government guidance on 15 May, may be accessed [here](#).

5. Does a decision to partially reopen, or to stay closed, require formal approval by the governing body?

If the school has a governing body, they are ultimately responsible for ensuring that the school is safe to open. The governing body should have sight of and approve the risk assessments conducted as part of a wider opening of schools.

6. When children return to school on 1 June, part of the guidance says food must be provided and kitchens re-opened to do so. Can we ask parents to provide food? Our fee discount for this term reflected not using our caterers. Alternatively, can we provide packed lunches rather than hot food to mitigate the cost?

The Government guidance says that schools should provide meal options for all children who are in school. This will depend to some extent on the provision which is available and if children are in schools for a full school day. The type of food and extent of provision is not specified and so may be packed lunches. This is likely to form part of the schools assessment on opening.

7. What about the directive around years 10 and 12 being back during next half term?

The intention is for years 10 and 12 to have some face to face contact time before the end of this academic year. We are expecting guidance on this imminently.

8. I understood in the guidance that the 2m rule was understood as impossible in primary schools and so would not apply?

The focus for younger children is on keeping groups of children in small, consistent groups with the same teacher, if possible. Each group should try and remain socially distanced from other groups. In the classroom, desks should be spaced apart. The Government guidance should be followed and will form part of the schools risk assessment.

**Harrison Clark Rickerbys**  
**21<sup>st</sup> May 2020**