

Returning to Production

Employment and Data Protection FAQs

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WIGGIN



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Employment considerations

1. How do we bring furlough leave to an end?

This will depend on the terms of your furlough agreement.

Assuming that your furlough letter gives you the ability to end the furlough leave on a date of your choosing, you should simply need to inform the individual (ideally in writing) that their furlough leave is ending and that you expect them to return to the production by a particular date.

Further contractual considerations will be required if the furlough agreement did not address how the furlough leave would end or if you intend to terminate the engagement rather than bring the person back to work. You may also want to consider whether any new contractual changes are required to an individual's contract after they return.

2. What changes are being made to the job retention scheme from 1 August 2020?

The job retention scheme will continue to run from 1 August to 31 October 2020 but it will operate differently during this period. Productions will be required to contribute towards the furlough pay being received by their crew members but will be able get the relevant individuals to perform some work for them on a part time basis – this has been labelled by the Government as '*flexible furloughing*'.

Given there are a number of considerations to bear in mind here, we would recommend you take further advice if you are considering utilising the job retention scheme during the period.

3. Are individuals entitled to sick pay if they are unable to work due to COVID-19?

Most production contracts do not oblige the production to pay individuals when they are unable to work due to sickness. However, productions should ensure they are aware of their Statutory Sick Pay (SSP) obligations particularly given the recent changes to these as a result of the COVID-19 pandemic.

SSP should only be payable to eligible individuals who are paid via PAYE. Loan outs and Schedule D workers will not be entitled to SSP. They should therefore not need to be paid if they were unable to work due to sickness or self-isolation unless their contracts stated otherwise, which would be unusual.

4. In what circumstances is SSP payable?

The usual position is that eligible individuals will be entitled to receive SSP if they are unable to work due to illness for four or more days. However, for COVID-19 related sickness absences SSP will be payable from day one of absence and individuals will be deemed to be unable to work if they need to self-isolate because they:

- ▶ are suffering from COVID-19;
- ▶ have COVID-19 symptoms (i.e. a new continuous cough, a high temperature or a loss of, or change in, their normal sense of taste or smell);
- ▶ live with someone who is suffering from COVID-19 or who starts displaying the symptoms; or
- ▶ are shielding in line with public health guidance; and/or
- ▶ have been told to isolate further to the Government's recently announced 'Test and Trace' system.

5. How much is SSP?

SSP is payable for up to 28 weeks. It is £95.85 per week and generally cannot be reclaimed from the Government. However, small companies which had a PAYE payroll scheme on or before 28 February 2020 and which had fewer than 250 employees on 28 February 2020 will be able to reclaim SSP paid in respect of the first 14 days of any COVID-19 related sickness absence.



6. Will the production need to implement any new policies?

Once a production has carried out its COVID-19 risk assessment and identified what measures it will be taking to minimise the risks of COVID-19, it is likely that additional production policies will need to be implemented to ensure these measures are adhered to.

This may include health monitoring policies (e.g. covering temperature checks), policies on quarantining, policies on staggered call times as well as specific departmental policies (e.g. policies for costume / hair and make-up departments).

Given the likelihood of potential sickness absence over the coming weeks, it would also be advisable to review or introduce a production specific sickness absence policy.

Productions should ensure they refer to the relevant Government [guidance](#) and the recently published BFC guidance '[Working Safely During COVID-19 in Film and High-end TV Drama Production](#)' when drafting and implementing these policies.

7. Which individuals are defined as “vulnerable”?

Individuals are “vulnerable” if they are at moderate risk from coronavirus. This includes people who:

- ▶ are 70 or older
- ▶ are pregnant
- ▶ have a lung condition that's not severe (such as asthma, COPD, emphysema or bronchitis)
- ▶ have heart disease (such as heart failure)
- ▶ have diabetes
- ▶ have chronic kidney disease
- ▶ have liver disease (such as hepatitis)
- ▶ have a condition affecting the brain or nerves (such as Parkinson's disease, motor neurone disease, multiple sclerosis or cerebral palsy)
- ▶ have a condition that means they have a high risk of getting infections
- ▶ are taking medicine that can affect the immune system (such as low doses of steroids)
- ▶ are very obese (a BMI of 40 or above).

Vulnerable individuals are advised to follow the advice on social distancing and stay at home as much as possible but they can go to work if they cannot work from home.

8. What can we do if a vulnerable individual refuses to return to work?

As noted above, under the Government guidance vulnerable individuals are able to attend work if they cannot work from home. You should therefore firstly consider whether there is a need for the individual to attend physical production or whether they can carry out their work from home.

Assuming that the individual cannot work from home, we would recommend that you seek to understand why they are unwilling to return and whether there is anything you can do which would make them feel comfortable to do so.

You cannot force an individual to attend work so, if you aren't able to reach agreement, the issue comes down to whether you will continue their engagement and, if so, whether you will pay them. Furloughing may also be an option.

If the individual is unwilling to return because of concerns about their health and safety and their employment status is that of “worker” or “employee”, care should be taken to mitigate the risk of employment disputes arising. You should also bear in mind that individuals in this category may be



regarded as having a disability and be protected from discrimination under the Equality Act 2010. It would therefore be advisable to seek specific legal advice in such circumstances.

9. Which individuals are defined as “extremely vulnerable”?

Individuals are “clinically extremely vulnerable” if they are at high risk from coronavirus. This includes people who

- ▶ have had an organ transplant
- ▶ are having chemotherapy or antibody treatment for cancer, including immunotherapy
- ▶ are having an intense course of radiotherapy for lung cancer
- ▶ are having targeted cancer treatments that can affect the immune system
- ▶ have blood or bone marrow cancer
- ▶ have had a bone marrow or stem cell transplant in the past 6 months, or are still taking immunosuppressant medicine
- ▶ have been told by a doctor that they have a severe lung condition
- ▶ have a condition that means they have a very high risk of getting infections
- ▶ are taking medicine that makes them much more likely to get infections
- ▶ have a serious heart condition and are pregnant.

Individuals in this group should have been contacted to tell them that they are extremely vulnerable and will have been advised to shield and not leave their homes. They should therefore not be required to return to work.

10. What should we do if an extremely vulnerable individual wants to come back to work?

We would advise that you recommend that the individual follows Government guidance and remains at home. If you were to allow the individual to return to work you would be going against Government guidance and exposing the individual to significant risk. It is therefore likely that the production would be found to be in breach of health and safety legislation.

Under the amended sick pay regulations, extremely vulnerable individuals are deemed to have an incapacity for SSP purposes. You may also wish to consider furloughing them (assuming the Coronavirus Job Retention Scheme is still in operation).

11. How should we deal with crew who have protected characteristics?

If individuals have a protected characteristic (e.g. they are disabled or pregnant) they will be protected from discrimination on the grounds of that characteristic. You will therefore need to ensure that any measures you take do not discriminate against individuals on the grounds of these characteristics.

For individuals with disabilities, you should also remember that you have a duty to make reasonable adjustments and this may include putting in place extra health and safety measures for those who may be at greater risk from coronavirus. Similarly, for pregnant individuals you are required to carry out a risk assessment and any COVID-19 risks should be factored into this.

We would always recommend that you seek specific legal advice when dealing with any individual who has or may have a protected characteristic.

12. Can we send someone home if we are worried they have COVID-19?

Yes, you can send an individual home. However, assuming they are fit to attend work under Government guidance (e.g. they don't have symptoms or live with someone who has COVID-19) and they are ready, willing and able to attend work, they should technically receive full pay for the time they spend at home unless their contract permits otherwise. In some circumstances, it may therefore be more advisable to terminate the engagement although care should be taken with this option particularly with employees who have more than two years' service or with individuals who have a protected characteristic.

13. What can we do if an individual doesn't follow the measures we have put in place?

If you have put in place measures to help mitigate the risk of COVID-19 and these measures have been communicated to cast and crew, but an individual fails or refuses to comply with them, it is likely that you could legitimately terminate that individual's engagement. If the individual is an employee with more than two years' service, we would advise that you follow your internal disciplinary procedure before making any decision to dismiss and that you take legal advice in the event that you do wish to dismiss the individual.

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Data protection considerations

1. **Will data protection prevent me temperature testing cast/crew before allowing them on set?**

No, but as this is information relating to an individual it will constitute personal data and therefore you will need to comply with the GDPR in collecting and using this data. It will only be permitted where the purposes for processing this personal data are fair – i.e. in order to manage post-COVID-19 filming and to protect the cast/crew from infection. These FAQs apply only on the basis that temperature testing is being conducted in good faith and to help prevent the spread of COVID-19 on set.

2. **Will I need to get cast/crew consent in order to take their temperature?**

No. Data protection requires if you process personal data you have lawful bases for each purpose. Consent is one such lawful basis but it is not the only lawful basis and often not applicable.

The most applicable lawful basis that production companies should rely on is that the processing is in the legitimate interests of the production company. This lawful basis is only applicable where such interests do not prejudice the rights, freedoms and interests of the individual in question. Given the challenges that COVID-19 presents to many industries, including Film & TV, it is likely that the legitimate interests of the production company in collecting cast/crew temperatures will not prejudice the interest of the individual. Of course, this will only be true where the temperature is being collected for the purpose of ensuring that those on set (and their families) are being protected from contracting COVID-19.

3. **What if someone refuses to let the production take their temperature?**

This is unfortunately not straightforward. If the individual was not obviously exhibiting any COVID-19 symptoms, they wouldn't be entitled to SSP (if eligible) so if you sent them home it is possible you may need to pay them full pay. You could consider not paying them on the basis that they have refused to comply with a reasonable management instruction. However, such measures could easily lead to an employment dispute with the particular individual.

As a first step, we would therefore recommend that you talk to the individual to understand why they are not willing to have their temperature taken and to see if you are able to address their concerns. Further advice may then be required at that stage depending on their response.

4. **Will their temperature be considered health data?**

Personal data relating to someone's health is considered "health data" under the GDPR and this means that it is deemed to be a 'special category' of personal data.

5. **Are there any specific rules regarding health data?**

Special categories of personal data should be processed with extra consideration and protection as there could be a heightened risk of harm to individuals if this information is not handled fairly and lawfully. It is vital that this information is kept secure and only those who require access to this information are able to access it.

Special categories of personal data also require an additional lawful basis in order to be processed. As discussed, the lawful basis for processing personal data will be legitimate interests, but the lawful basis for processing health data will be that it is necessary to comply with legal obligations in the field of employment, specifically the Health and Safety at Work Act 1974.



6. **If someone has a high temperature indicating COVID-19 can I tell other cast/crew about this?**

Where possible you should refrain from naming individuals who have tested positive, although you will be able to inform cast/crew that there has been an incident of a high temperature being recorded which will allow them to more closely monitor their own health and take any necessary steps to prevent infecting others. In some cases it will be apparent who has recorded a high temperature even without naming the person (i.e. where someone is suddenly absent from a small working group). You should still avoid naming the individuals but you can still notify other cast/crew that an individual has recorded a high temperature.

7. **Can I ask cast/crew if anyone that they live with is suffering from COVID-19?**

You may ask for cast/crew's family's health data, but as this personal data will relate to an individual who is not a part of the production you will only be able to collect this with the person's consent. In practice, this means that cast/crew will be able to refuse disclosing this information.

In practice, if a cast or crew member lives with someone who is suffering from COVID-19, they should be isolating in accordance with Government guidance. The production should therefore make clear to cast and crew that, even if they choose not to specifically disclose it to you, you expect them to follow Government guidance which means that if an individual in their household is suffering from COVID-19 they should self-isolate and not attend the production. If you were to find out that an individual had attended work against Government guidance you should at the very least send them home and order them to stay at home for the requisite period of time (14 days). However, you may also wish to consider whether it is appropriate to terminate the individual's engagement in such circumstances.

8. **How long should I retain information about someone's temperature?**

You cannot retain personal data for longer than is necessary. In the case of a cast/crew member with a high temperature the period of time that it will be necessary to retain this personal data will be short – i.e. 14 days – but it will be up to the production companies to make this determination.

9. **What do I need to tell people about collecting and processing their personal data?**

You should have in place a cast/crew privacy notice which informs cast/crew about what personal data is collected, the purposes for using this personal data, the lawful bases for processing this personal data, how long data will be retained, as well as other information required under GDPR. This will need to be updated to address temperature testing. In addition, you should consider posting signs at the entrance to set informing people that temperature testing will be taking place.

10. **Do I need to put in place a risk assessment for data protection?**

Where you rely on legitimate interest to process personal data you will need to carry out a documented assessment as to whether or not your interests prejudice the individual's interests. In addition, where processing personal data is likely to result in a high risk to individuals you will need to carry out a data protection risk assessment. Finally, GDPR requires that those who process personal data are able to demonstrate their compliance with GDPR. For these reasons you should carry out a risk assessment around the collecting of cast/crew temperature with regard to data protection.

11. **What other steps do I need to take in respect of data protection?**

It will also be very important to ensure that whoever is taking the person's temperature has been informed of the data protection considerations and the steps taken by the production company. This person will most likely be required to field most questions that cast/crew will have, including on data protection, and as such should be able to address these questions.

Two decorative triangles, one dark grey and one light grey, pointing towards each other.

You should also seek legal advice before implementing temperature testing. These FAQs are a guide only and legal advice will be required to ensure that the steps taken with regard to temperature testing do comply with data protection.

12. What if I want to implement contact tracing?

If you wish to implement contact tracing then you should seek specific legal advice.

13. What if I want to utilise thermal cameras to take cast/crew temperature?

If you wish to utilise thermal camera technology to test cast/crew temperatures then the rules set out in this guidance will generally still apply, however it will be vital that additional consideration is given to notifying individuals about the use of this technology before they are subject to it. You will also need to give additional consideration to this technology in your risk assessment. If you are appointing a contractor to implement this technology there will be additional data protection considerations regarding the appropriateness of the contractor, the contact in place with them, and restriction to access. You should also obtain additional legal advice.

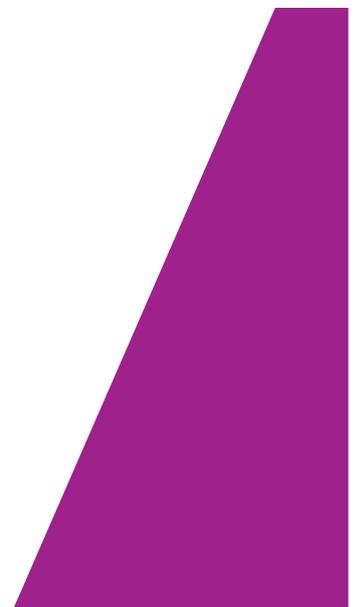
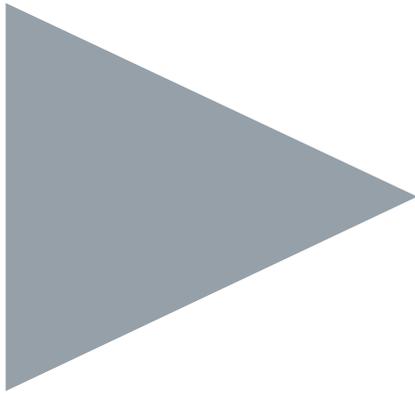
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