Bringing back competitive sport

Employment and Data Protection FAQs

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Employment considerations

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

This will depend on the terms of the relevant furlough agreement.

Assuming that your organisation's 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 work/training 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. 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?

The job retention scheme will continue to run until 31 October 2020 but it will operate differently from 1 July 2020 onwards. Employers will be required to contribute towards the furlough pay being received by their workers from August 2020 (with the amount such contributions increasing each month) but will be able get the relevant individuals to return to work on a part time basis from July 2020 without this breaking the furlough leave. 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 that organisations take further advice if they are considering utilising the job retention scheme from 1 July 2020 onwards.

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

Most staff contracts will have contractual provisions which deal with sick pay entitlements during periods of incapacity. Notwithstanding the contractual position, employers should ensure they are aware of their Statutory Sick Pay (SSP) obligations to staff and athletes particularly given the recent changes to these as a result of the COVID-19 pandemic.

SSP will only be payable to those who are paid via PAYE so this will certainly cover most staff but also some athlete contracts. However, any contractors who are paid a gross fee will not be entitled to SSP. These would 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 organisations 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 we need to implement any new policies?

The Stage One guidance issued by the DCMS recommended that each sport, club, Competition Delivery Partner and Elite Sport Organisation should name an existing member of staff as a COVID-19 officer (CO). The CO should be responsible for, amongst other things, oversight of the COVID-19 risk assessments for returning to training, Stage Two training and returning to domestic competition.

Once an organisation, club, rights holder or governing body 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 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 training times as well as specific training policies (e.g. policies in respect of preventing contact / tackling in team sports).

Given the likelihood of potential sickness absence over the coming weeks, it would also be advisable for organisations to review their specific sickness absence policy or introduce one if there isn't one already in place.

Organisations should ensure they refer to the relevant Government guidance when appointing their COVID-19 officer and 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 could potentially go to work/attend training if they cannot work/train from home.

8. What can we do if a vulnerable individual refuses to come back to work or return to training?

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

Assuming that the individual cannot work or train from home, organisations should seek to understand why they are unwilling to return and whether there is anything that could be done which would help to make them feel comfortable to do so. However, it would not be advisable to try and force an individual to attend work or training particularly as the government's guidance specifically suggests that individuals should be able to 'opt out' of training without any repercussions for doing so (which is different from some of the guidance aimed at other sectors). Therefore, if it is not possible to agree that someone will return, you will need to consider carefully what steps might be appropriate in the circumstances. Furloughing could potentially be an option if the Coronavirus Job Retention Scheme is still operating and the person is eligible for this.

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", additional care should also 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. We would therefore suggest that specific legal advice is taken in all circumstances where an individual is concerned about attending the workplace or training ground.

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/training.

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

You should advise the individual to follow Government guidance and remain at home. If you were to allow the individual to return to work/training, you would be going against Government guidance and exposing the individual to significant risk. It is therefore likely that your organisation would be found to be

in breach of health and safety legislation which could have significant financial and reputational implications as well as potentially lead to prosecution.

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 athletes or staff who have protected characteristics?

If athletes or staff 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/training 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/training, they should technically receive their full pay for the time they spend at home unless their contract permits otherwise.

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 athletes and staff, but an individual fails or refuses to comply with them, it is likely that you could legitimately terminate that individual's engagement or exercise any disciplinary measures that may be applicable in the individual's contract. 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 issuing temperature tests and COVID-19 questionnaires to athletes and staff before allowing them to train / attend matches?

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 run post-COVID-19 training and matches and to protect the athletes and staff from infection.

2. Will I need to get athlete and staff consent in order to take their temperature or to ask them about COVID-19 symptoms?

No. Data protection legislation requires that, 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 sports organisations should rely on is that the processing is in the legitimate interests of the organisation. 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 Sport, and the specific DCMS guidance about ensuring appropriate risk mitigation through screening of individuals prior to entry into any training or competition venue, it is likely that the legitimate interests of the sports organisation in collecting athlete and staff temperatures and issuing COVID-19 questionnaires and this 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 athlete and staff (and their families) are being protected from contracting COVID-19.

3. What if someone refuses to let us take their temperature or refuses to respond to any questionnaire?

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 (see above). 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 / complete a questionnaire 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 / responses 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, symptoms or a diagnosis indicating COVID-19 can I tell other athletes or staff about this?

Where possible you should refrain from naming individuals who have displayed a high temperature or disclosed COVID-19 symptoms, although you will be able to inform athletes and staff that there has been an athlete or member of staff that may be infected with COVID-19 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 possibly has displayed symptoms even without naming the person (i.e. where someone is suddenly absent from a small working group). You should still avoid naming the individual, but you can still notify other athletes and staff that an individual has shown symptoms.

7. Can I ask athletes or staff if anyone that they live with is suffering from COVID-19?

You may ask for family health data, but as this personal data will relate to an individual who is not directly involved in the organisation you will only be able to collect this with the person's consent. This means that athletes or staff will be able to refuse to disclose this information.

In practice, if an athlete or staff member lives with someone who is suffering from COVID-19, they should be isolating in accordance with Government guidance. The organisation should therefore make clear to athletes and staff 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 stay away.

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 discipline the athlete or staff member in such circumstances. In this regard, it is worth noting that the DCMS guidance specifically requires all individuals to abide by all government and PHE guidelines whilst away from training and competition venues.

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

You cannot retain personal data for longer than is necessary. In the case of an athlete or staff member who has shown COVID-19 symptoms the period of time that it will be necessary to retain this personal data will be short – i.e. 14 days.

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

You should have a privacy notice in place which informs athletes and staff 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 information collected in relation to COVID-19.

In addition, you should consider posting signs at the entrance to training facilities and the stadium informing people that 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 COVID-19 information from athletes and staff.

In addition, DCMS guidance requires that a risk assessment is undertaken by clubs/organisations with regard to returning to Stage One training and progressing to Stage Two training after lockdown. Further, competition organisers and venue operators (in collaboration with elite sport organisations such as

leagues and NGBs) should develop a COVID-19 competition venue operations plan, a COVID-19 risk assessment and mitigation plan. These risk assessments should take into account data protection.

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

It will be important to ensure that whoever is taking the person's temperature or asking about COVID-19 symptoms has been informed of the data protection considerations and the steps taken by the organisation. This person will most likely be required to field most questions that athletes and staff will have, including on data protection, and as such should be able to address these questions.

You should also seek legal advice before implementing temperature testing or collecting information in relation to COVID-19. These FAQs are a guide only and legal advice will be required to ensure that the steps taken 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 temperature?

If you wish to utilise thermal camera technology to obtain the temperature of athletes and staff 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 consider this technology in your risk assessments.

If you are appointing a contractor to implement this technology there will be additional data protection considerations regarding the appropriateness of the contactor, the contact in place with them, and restriction to access. You should obtain additional legal advice in this regard.

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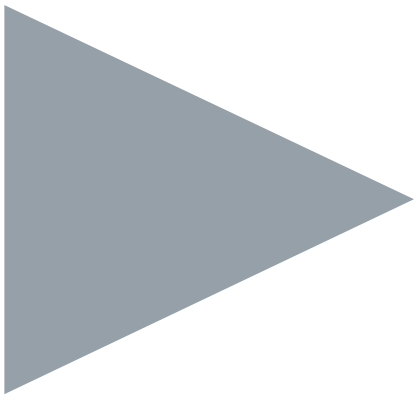


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