Bargaining Support Group

Covid-19 Pandemic
Bargaining for staff unable to work

UNISON
the public service union
UNISON will seek to update this guidance as developments relating to the Covid-19 pandemic unfold across the UK. If negotiators have any comments on this guidance or any experience of the scheme that could be usefully incorporated in the guidance, please contact Bargaining Support at bsg@unison.co.uk

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Introduction

This short guide is intended to assist negotiators over the course of the Covid-19 pandemic to bargain on behalf of those staff who are not suffering symptoms of the virus or in a household where someone is displaying symptoms, but nonetheless they are unable to fulfil their usual contracted hours because of their circumstances. Staff in such a situation are most likely to be those whose health makes them particularly vulnerable to the virus or staff who have caring responsibilities for dependants particularly affected by the pandemic.

UNISON has produced a variety of guides for bargaining on behalf of members during the Covid-19 pandemic. The full range of guides are available online by accessing the UNISON bargaining guide page at https://www.unison.org.uk/bargaining-guides/

Other topics include bargaining in support of staff suffering symptoms of the virus or in a household where someone is displaying symptoms, staff who continue to fulfil their full contracted hours either at home or in the workplace, and staff who are placed on furlough leave.

However, this guidance is structured as follows:

Background ..................................................................................................................................................3
  Government advice on vulnerable workers ..............................................................................................4
  Government measures on school closures ..............................................................................................6
Seeking right to work from home ...........................................................................................................7
Protecting pay, terms and conditions ......................................................................................................9
Adjusting staff absence procedures .........................................................................................................11
Checklist of bargaining steps ..................................................................................................................12
Background

On 23 March, the government issued advice that all workers should work from home and only attend their normal workplace where it is “absolutely necessary.”

Certain groups of “vulnerable” staff were given particularly strong advice from the government to stay away from the workplace, including those with underlying health conditions and pregnant workers.

And the NHS identified some people as “extremely vulnerable” to Covid-19, which resulted in the issuing of a letter telling anyone within that category to stay at home for a 12-week shielding period (though in some cases people with a condition that renders them extremely vulnerable did not receive the NHS letter).

Government also ordered school closures which took effect from 20 March and reductions in transport services in some parts of the country began to affect the ability of some staff to undertake their contracted work.

These developments therefore affected the following broad groups most acutely:

- Staff who are more vulnerable to Covid-19 (including pregnant workers and those with underlying health conditions);
- Staff who are extremely vulnerable to serious consequences if they contract Covid-19 and have been advised to “shield”;
- Staff who have vulnerable dependants;
- Staff with dependants who have contracted Covid-19;
- Staff who have children at home due to school closure;
- Staff who are unable to reach their workplace due to transport restrictions.

Subsequently, there has been some relaxation of these restrictions and these are set out below.
Government advice on vulnerable workers

The government has classified vulnerable people as those who are:

- Aged 70 or older (regardless of medical conditions);
- Under 70 with an underlying health condition listed below (i.e. anyone instructed to get a flu jab as an adult each year on medical grounds):
  - chronic (long-term) respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis;
  - chronic heart disease, such as heart failure;
  - chronic kidney disease;
  - chronic liver disease, such as hepatitis;
  - chronic neurological conditions, such as Parkinson’s disease, motor neurone disease, multiple sclerosis (MS), a learning disability or cerebral palsy;
  - diabetes;
  - problems with the spleen – for example, sickle cell disease or if had spleen removed;
  - a weakened immune system as the result of conditions such as HIV and AIDS, or medicines such as steroid tablets or chemotherapy;
  - being seriously overweight (a body mass index (BMI) of 40 or above);
- Those who are pregnant

The latest government advice for this group is set out in section nine of this link - Vulnerable Workers

People in this category “are advised to stay at home as much as possible and” if they do go out, to “take particular care to minimise contact with others outside” the household.
Within this group, the following further category of people are classified as extremely vulnerable and advised to “shield”:

- Solid organ transplant recipients;
- People with specific cancers:
  - people with cancer who are undergoing active chemotherapy;
  - people with lung cancer who are undergoing radical radiotherapy;
  - people with cancers of the blood or bone marrow such as leukaemia, lymphoma or myeloma who are at any stage of treatment;
  - people having immunotherapy or other continuing antibody treatments for cancer;
  - people having other targeted cancer treatments which can affect the immune system, such as protein kinase inhibitors or PARP inhibitors;
  - people who have had bone marrow or stem cell transplants in the last 6 months, or who are still taking immunosuppression drugs;
  - people with severe respiratory conditions including all cystic fibrosis, severe asthma and severe COPD.
- People with rare diseases and inborn errors of metabolism that significantly increase the risk of infections (such as SCID, homozygous sickle cell);
- People on immunosuppression therapies sufficient to significantly increase risk of infection;
- Women who are pregnant with significant heart disease, congenital or acquired.

Anyone in this category was strongly advised to stay at home at all times and avoid any face-to-face contact for a period of at least 12 weeks from the day they received their shielding letter. Currently, the only relaxation of this advice is to permit such people to leave the house to meet one other person from another household, preferably the same person, while respecting social distancing rules.

However, the rules for England are set to be relaxed in two further stages.

From 6 July, the government is advising that anyone who has been advised to shield can meet in a group of up to six people outdoors, including people from different households, while maintaining strict social distancing.

From 1 August, shielding is set to be “paused,” which means from that date, the only advice is to adopt strict social distancing measures. Therefore, a return to work is permitted if, as per the rest of the working population, work cannot be conducted at home and if workplace to which they are returning is “Covid-safe.” However, the government adds that those who have been shielding “should remain cautious as you are still at risk of severe illness if you catch coronavirus.”
In Scotland, shielding advice applies until 31 July, while in Wales it applies until 16 August, though there has been no indication of whether it will end at that point. In Northern Ireland, the same timetable of relaxation in rules on 6 July and 1 August as in England has been announced.

The latest government advice for this group in England is set out on this link - [Extremely Vulnerable Workers](#).

**Government measures on school closures**

School closures took effect from 20 March across the UK. However, educational provision was preserved for the following categories of schoolchildren.

- Vulnerable children, including children who are supported by social care, those with safeguarding and welfare needs, including child in need plans, on child protection plans, ‘looked after’ children, young carers, disabled children and those with education, health and care (EHC) plans.
- Children whose parents’ work is critical to the Covid-19 response and are unable to provide a safe environment at home while at work.

The key workers who are defined as critical to the Covid-19 response are almost entirely in the sectors where UNISON represents members - health, social care, childcare and early years, areas of local government, emergency services, transport and utilities.

The government definition of these sectors and the critical roles within them is as follows:

### Health and social care

This includes but is not limited to doctors, nurses, midwives, paramedics, social workers, care workers, and other frontline health and social care staff including volunteers; the support and specialist staff required to maintain the UK’s health and social care sector; those working as part of the health and social care supply chain, including producers and distributors of medicines and medical and personal protective equipment.

### Education and childcare

This includes childcare, support and teaching staff, social workers and those specialist education professionals who must remain active during the COVID-19 response to deliver this approach.

### Key public services

This includes those essential to the running of the justice system, religious staff, charities and workers delivering key frontline services, those responsible for the management of the deceased, and journalists and broadcasters who are providing public service broadcasting.
Local and national government
This only includes those administrative occupations essential to the effective delivery of the COVID-19 response, or delivering essential public services, such as the payment of benefits, including in government agencies and arms length bodies.

Food and other necessary goods
This includes those involved in food production, processing, distribution, sale and delivery, as well as those essential to the provision of other key goods (for example hygienic and veterinary medicines).

Public safety and national security
This includes police and support staff, Ministry of Defence civilians, contractor and armed forces personnel (those critical to the delivery of key defence and national security outputs and essential to the response to the COVID-19 pandemic), fire and rescue service employees (including support staff), National Crime Agency staff, those maintaining border security, prison and probation staff and other national security roles, including those overseas.

Transport
This includes those who will keep the air, water, road and rail passenger and freight transport modes operating during the COVID-19 response, including those working on transport systems through which supply chains pass.

Utilities, communication and financial services
This includes staff needed for essential financial services provision (including but not limited to workers in banks, building societies and financial market infrastructure), the oil, gas, electricity and water sectors (including sewerage), information technology and data infrastructure sector and primary industry supplies to continue during the COVID-19 response, as well as key staff working in the civil nuclear, chemicals, telecommunications (including but not limited to network operations, field engineering, call centre staff, IT and data infrastructure, 999 and 111 critical services), postal services and delivery, payments providers and waste disposal sectors.

In England, the blanket ban on school opening has now been lifted for early years (aged 0-5), Reception, Year 1 and Year 6 groups. Secondary schools are also allowed to offer face-to-face support for a quarter of the Year 10 and 12 cohorts at any one time.

Scotland has announced school reopening from 11 August. In Wales, a phased approach commences on 29 June, with a maximum of one-third of pupils present at any one time. Northern Ireland is set to keep schools closed for the remainder of the summer term, but is targeting an early return of 24 August for Primary 7, Year 12 and Year 14 pupils.
Seeking right to work from home

Despite the general presumption issued by the government in favour of working from home, the government’s listing of critical sectors in the economy during the Covid-19 pandemic shows that making the case to work from home is not straightforward for many roles.

However, for the categories of staff listed on page three, gaining the right to work from home takes on a particular importance to either protect their health or enable them to balance intensified caring demands with their working life. The strongest grounds for making a case for these staff is on the basis of protecting health and safety.

For those staff classified as vulnerable or extremely vulnerable workers, the case can be made that for the employer to insist on attendance at work is a dereliction of the duties enshrined in the Health and Safety Act and puts lives in considerable danger. It can further be argued that refusal to allow working from home may be a breach of the Equality Act 2010 duty to provide reasonable adjustments to disabled workers.

Government guidance revised on 5 June has explicitly stated that for staff classified as extremely vulnerable the “employer is expected to help” such employees to work from home.

For pregnant employees (and breastfeeding mothers), the Management and Safety at Work Regulations provide an extra safeguard. Under these rules, the employer must assess the workplace risks specifically posed to such staff. UNISON believes that in the context of the Covid-19 pandemic attendance at the workplace represents a significant risk to pregnant women and breastfeeding mothers.

Where staff are carrying out roles that are very difficult to fulfil by working from home, an option can be to consider temporary re-deployment that allows home working for the duration of the pandemic.

Where staff are disabled it will be important to ensure that any reasonable adjustments required are assessed and provided, as failure to provide reasonable adjustments may constitute a breach of the Equality Act 2010.

Any redeployment is likely to mean a variation in the employment contract unless there is a ‘flexibility clause’ that allows a change to the job and duties or work location. This would need to be specified and is different to “any other duties commensurate with the grade/role.”

It would be essential for the employer to get the individual agreement of the affected worker to any redeployment following a full discussion on the implications. The employer should confirm any changes made to the contract in writing, including the temporary nature of the redeployment during the Covid-19 pandemic. There is always an expectation for the employer to act “reasonably,” including the consideration of appropriate alternative work within the particular circumstances of the worker. An employee can “agree” to the change in contract by performing the changed duties. The branch should discuss with their regional organiser and seek legal advice if appropriate. (UNISON’s full guidance on redeployment is available at https://www.unison.org.uk/bargaining-guides/)

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1 Health and Safety at Work Order 1978 in Northern Ireland
If, despite all efforts, the employer cannot be persuaded to allow staff in the categories addressed by this guide to work from home, a range of workplace modifications should be considered to reduce risks and make it easier for staff to fulfil caring duties, such as changes to working hours or improved social distancing. Possible measures are set out more fully in UNISON’s bargaining guidance for staff still attending the workplace and model agreement on this link - https://www.unison.org.uk/bargaining-guides/

From 1 August, government advice in England and Northern Ireland makes extremely vulnerable workers eligible to return to the workplace. However, negotiators should refer to that element of the advice which states that previously shielded workers are being told by the government that they must “remain cautious as” they are “still at risk of severe illness” if they “catch coronavirus” to prioritise their protection by continued working from home.

Protecting pay, terms and conditions

In many cases, staff will be able to work from home in fulfilling their contracted hours and therefore continue to receive their usual full pay.

However, the case should be made to employers that under the extreme circumstances of the Covid-19 pandemic, staff that cannot fulfil their contracted hours working from home but must remain at home because they are classified as vulnerable or they have substantial caring responsibilities, should continue on full pay.

This has been the position agreed for local government NJC workers and set out in staff circulars - https://www.local.gov.uk/our-support/workforce-and-hr-support/local-government-services. A similar position has been agreed for Scottish local government workers. In the NHS, many of the same protections have been extended to self-isolating vulnerable workers, including those on bank and agency contracts https://www.nhsemployers.org/covid19/staff-terms-and-conditions

In the case of pregnant workers and breastfeeding mothers the right to full pay is backed up by Management of Health Safety at Work Regulations, which demand medical suspension from the workplace where risks can’t be mitigated and alternative work is not viable.

It may need to be highlighted to employers that some workers who have been advised by telephone by their GP to shield have not yet received formal letters confirming this from the NHS due to problems in the system. These staff should still be shielding, pending receipt of the official letter, and should retain full pay for this period. Staff should not be required to disclose details of their medical condition.

Branches should seek to get agreement that staff in the vulnerable (but not shielding) category should also retain full pay whilst unable to work due to government guidance.

In some cases, employers have chosen to deal with affected staff by allowing unlimited special leave. This has been the case for staff within the remit of the Ministry of Justice.
For staff with caring responsibilities, if the employer is not prepared to allow unlimited special leave, it may be possible to obtain an agreement for normal paid time off for dependants to be extended beyond the usual level (five days is a commonplace entitlement). For instance, an agreement with EDF Energy extended entitlement to 14 days. Such a solution may be particularly valuable if it can be used up in half-day segments and taken in combination with working from home arrangements.

The last resort for staff who are carers is to seek unpaid leave, given the requirement on employers to allow “reasonable” time off to deal with emergencies and parental leave rights to four weeks in a year for each child and adopted child under the age of 18.

If the employer is utilising the Job Retention Scheme to furlough employees, it can be highlighted to the employer that staff who are subject to the 12-week shielding guidance as they are classified as “extremely vulnerable” and staff who are unable to work due to caring responsibilities, can be designated as a suitable group for furlough, even though they are categorised as key / critical workers delivering public services. UNISON’s full guidance on furloughing staff and the Job Retention Scheme is available at https://www.unison.org.uk/bargaining-guides/

If an employer seeks to fall back on Statutory Sick Pay for shielded staff, negotiators should highlight that the government specifically states in its explanatory memorandum to the Statutory Sick Pay (General) (Coronavirus Amendment (No. 3) Regulations 2020 that the provision for SSP “is intended as a safety net in cases where the employer chooses not to furlough them.” UNISON sees no reasonable basis for an employer making such a choice.

In some cases, staff may be unable to attend work because the scale of travel restrictions makes their journey to work impossible within any reasonable expectations of travel time. This scenario is similar to that covered by many employers within “adverse weather” policies. These policies normally set out a range of options, including making up lost time subsequently, taking paid or unpaid leave, and working from home. However, given the likely length of time that travel restrictions will be in place, making up lost time ceases to be a viable option.

For staff who are facing 12 weeks of shielding, it may be useful to bring to their attention the government’s services for supplying food and other essentials - https://www.gov.uk/coronavirus-extremely-vulnerable

For staff who are facing an extended period of unpaid leave, attention can be drawn to the advice and assistance that UNISON members can obtain through the There For You service.

Since, the impact of the pandemic is liable to raise anxiety and mental health issues among some staff, it may be useful to press the employer on raising awareness of any support available through the Employee Assistance Programme. If the employer does not have such a programme, greater efforts may be necessary to direct staff to the support available through mental health advice lines (a listing can be extracted from the UNISON Mental Health Bargaining Guide).
The argument set out in this section will become progressively more difficult to make as schools reach the end of their summer term toward the end of July and as government advice making extremely vulnerable workers eligible to return to the workplace takes effect from 1 August in England and Northern Ireland (previously shielded workers will cease to qualify for Statutory Sick Pay at this point).

However, negotiators should continue to assert that where staff cannot work from home the government advice that previously shielded workers must “remain cautious as” they are “still at risk of severe illness” if they “catch coronavirus” should be a factor in staging any return to workplace and until measures from a Covid-19 secure risk assessment are in place to protect previously shielded workers they should be receive full pay.

Adjusting staff absence procedures

In order to maintain appropriate contact with staff during any period of absence in the circumstances addressed by this guide, it is important that an employer is pressed to update emergency contact numbers, provide clarity to staff about who they should be notifying about any changes to their circumstances and offer an alternative if their specified contact (usually the line manager) falls ill or is unavailable for any other reason.

A further adjustment of established procedure in recognition of the unprecedented scale of the Covid-19 pandemic should be made by discounting any absence from triggers for action specified in any attendance management, disciplinary, redundancy or capability policy.

To assist in making this case to the employer, it can be highlighted that a precedent for waiving such absence for trigger purposes has been set by agreement for local government NJC and NHS Agenda for Change staff. In the case of the NHS, disciplinary and grievance procedures as a whole have been paused unless there is a compelling reason to continue.
Checklist of bargaining steps

The previous pages have set out the background to the following key steps in achieving agreements that support our members who are unable to work during the Covid-19 pandemic:

➢ Seek preference for working from home where an employee has greater vulnerability to severe health consequences from contracting Covid-19;

➢ Target continued full pay for any staff who are unable to work due to the vulnerability of their health, intensified caring responsibilities or major transport restrictions.

➢ If this cannot be achieved, seek a significant extension of paid special leave for such staff (including 12 weeks special leave for shielded staff).

➢ Where an employer is looking to furlough staff under the Job Retention Scheme, highlight that government guidance specifically allows furloughing of staff classified as vulnerable workers and staff with major caring responsibilities;

➢ Ensure staff are made aware of the staff categories that are designated as not being able to work and therefore entitled to the terms achieved through negotiation;

➢ Review procedures to ensure that absence does not contribute to triggers for management action in disciplinary, capability, attendance management or redundancy policies.

All these bargaining targets are included as clauses in UNISON’s model workforce policy during the Covid-19 pandemic on this link https://www.unison.org.uk/bargaining-guides/

The link also carries bargaining guidance on other key issues during the pandemic.

Bargaining guidance specific to service groups can be accessed through the Coronavirus Rights at Work page on this link

https://www.unison.org.uk/coronavirus-rights-work/