

Adults

Q I am in the shield group and I have a letter. Can my employer sack me if I don't come into work? Can I get sick pay?

If your employer dismisses you as a result of being unable to work due to being in the shield group, you may have a claim for automatic unfair dismissal under s100(1)(d) or (e) of the Employment Rights Act 1996 ("ERA"). No minimum qualifying period of employment is required to bring this claim.

ss100(1)(d) and (e) ERA state

(d) in circumstances of danger which the employee reasonably believed to be serious and imminent and which he could not reasonably have been expected to avert, he left (or proposed to leave) or (while the danger persisted) refused to return to his place of work or any dangerous part of his place of work, or

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

If you have received a letter informing you that you are in the shield group, and that you should not leave your house, attend gatherings or go out for shopping or deliveries, it is likely that Covid-19 presents circumstances of immediate danger and you can reasonably refuse to attend your place of work. Refusing to attend is **not** the same as refusing to work, and you should explore, as a priority, whether you can undertake even some of your work from home.

If you are in the shield group, you can claim Statutory Sick Pay (SSP) at a rate of £94.25 per week even if you are not sick, but check to see if your contract entitles you to more generous terms.

If your job, or aspects of your job, could be done from home, you should ask your employer if they would consider making reasonable adjustments to enable you to work from home. Employers have a duty under s20 Equality Act 2010 to make reasonable adjustments for disabled people. Disabled people, under s6 Equality Act, are those who have a physical or mental impairment which has a substantial and adverse effect on their ability to carry out day to day activities. Certain health conditions, such as cancer, HIV and multiple sclerosis are automatically treated as disabilities.

Q I think I should be in the shield group, but I haven't had a letter. Can my employer sack me if I don't come into work? Can I get sick pay?

Once again, the provisions of s100(1)(d) or (e) ERA may give rise to a claim for automatic unfair dismissal. This would be if the reason for the dismissal is that you didn't come into work because:

- a. you felt that you were in circumstances of danger which you reasonably believed to be serious and imminent and which you could not reasonably have been expected to avert (s100(1)(d)) or

b. you felt that you were in circumstance of danger that you reasonably believed to be serious and imminent, and you took (or proposed to take) appropriate steps to protect yourself, or other persons, from the danger (s100(1)(e)).

In assessing what is reasonable in the circumstances under s100(1)(e), a tribunal will look at whether the steps you took (or proposed to take) were appropriate by reference to all the circumstances. These include, in particular, your knowledge and the facilities and advice available to you at the time. If you think you may be able to work part or all of your role from home, you should raise this **in writing** (if possible) with your employer at the earliest opportunity because this will be relevant to the steps you took.

If you haven't received a shielding letter you should contact your GP or hospital clinician promptly to address this. You will be entitled to SSP if you are unable to work as a result of COVID-19.

Q I am in a high risk group and I need to self-isolate. Can my employer sack me if I don't come into work? Can I get sick pay?

Once again, the provisions of s100(1)(d) or (e) ERA may apply to any dismissal (see above). It will be important that you

- explain to your employer (providing proof if required) why you consider yourself to be in a high risk group
- explain the need for you to self-isolate.

If your employer ignores this and dismisses you if you don't come into work then you may have a claim for automatic unfair dismissal. It is important to act reasonably, as a tribunal will scrutinise your actions under s100(1)(d) or (e) ERA as applicable. It would be prudent to get an 'isolation note' from the NHS 111 online website. If you are incapable of working due to COVID-19 you will be entitled to SSP.

Parents

Q: My child is in a high-risk group and I need to isolate with them to ensure I don't bring the virus into the house. Can my employer sack me if I don't come into work? Do they have to pay me, or can I be forced to take unpaid leave? Can I get sick pay?

If your employer dismisses you for self-isolating with your child, you may be able to bring a claim for unfair dismissal under s100(1)(e) or s57A Employment Rights Act 1996.

s100(1)(e) states:

(e) in circumstances of danger which the employee reasonably believed to be serious and imminent, he took (or proposed to take) appropriate steps to protect himself or other persons from the danger.

It seems reasonably likely that the Tribunal would interpret "other persons" as including children with whom you have to self-isolate, although this is not an argument which they have yet tested.

Under s7A Employment Rights Act 1996 (“ERA”), employees are entitled to reasonable time off to provide assistance for dependents who are ill. Many, although not all, children who fall into a high-risk group will be self-isolating due to illness.

Some people may also qualify for parental leave of up to eighteen weeks under the Maternal and Parental Leave Regulations. You qualify if

- you have been in employment for one year or more and
- have parental responsibility for the child.

Unless the child is in receipt of Disability Living Allowance, you must take the leave in blocks of one year or more. The eighteen weeks lasts until the child is eighteen. Unless different provisions apply in your workplace, you must give 21 days’ notice, but many employers may be willing to waive this in these circumstances.

If you think you think you may be able to do your work, or some of your work from home, you should ask your employer to allow you to do so. Under s13 Equality Act 2010, employers must not discriminate against people by virtue of their association with a disabled person; that is, their child. Under s20 Equality Act 2010, employers must also **not** have in place provisions, criteria or practice (such as a blanket refusal to consider working from home) which would disproportionately impact

- people who are associated with disabled people
- women, and are therefore more likely to be in the position of needing to self-isolate (because proportionately more women than men are primary/residential caregivers to children).

Usually, parental leave is unpaid, but you should check your contract of employment to see if it entitles you to more generous terms. You are entitled to statutory sick pay (SSP) if a member of your household has coronavirus symptoms or a doctor or NHS 111 has told you to self-isolate.

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Once again, the provisions of s100(1)(e), s7A ERA and ss13 and 20 Equality Act will apply to any dismissal or refusal to consider working from home.

In assessing what is reasonable in the circumstances under s100(1)(e), a tribunal will look at whether the steps you took (or proposed to take) were appropriate by reference to all the circumstances including, in particular, your knowledge and the facilities and advice available to you at the time. If you think you may be able to work part or all of your role from home, you should raise this **in writing** (if possible) with your employer at the earliest opportunity because this will be relevant to the steps you took.

Usually, parental leave is unpaid, but you should check your contract of employment to see if it entitles you to more generous terms. You are entitled to statutory sick pay (SSP) if a member of your household has coronavirus symptoms or a doctor or NHS 111 has told you to self-isolate, so it is a good idea to get an “isolation note” if possible.

Q: I think my child should be in the shield group but I haven't had a letter. Can my employer sack me if I don't come into work? Do they have to pay me or can I be forced to take unpaid leave? Can I get sick pay?

Once again, the provisions of the ERA and the Equality Act will apply (see above). It will be important to explain to your employer, and provide proof if required, why you consider that your child should be in the shield group. If your employer ignores this and dismisses you if you don't come into work then you may have a claim for automatic unfair dismissal or discrimination under the Equality Act. It is important to act reasonably as a tribunal will scrutinise your actions. It would be prudent to get an 'isolation note' from the NHS 111 online website.

You will be entitled to SSP if NHS 111 has told you to self-isolate, even if your child does not yet have a shield letter, and if they, or you, have coronavirus symptoms.

Disclaimer

This factsheet summarises the general position at law only, and the position may vary on the facts of each individual case. If you are sacked, you should seek advice on your individual situation urgently. Please note that you are normally expected to bring a claim to the Employment Tribunal within three months of dismissal.

**Paras Gorasia
Doughty Street Chambers**

**Beth Grossman
Ely Place Chambers**

1 April 2020