

# COVID-19 RELATED EMPLOYMENT LAW Q&A

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# Q&A

ISSUE	RESPONSE	RELEVANT LAW
<p>The information contained in this note does not constitute legal advice.</p> <p>The situation surrounding coronavirus is rapidly changing by the day so there is no guarantee that information contained in this document will continue to be accurate going forward. The information is up to date as at noon 24 March 2020. Please do get in touch with us if you have specific queries arising out of any of the issues mentioned in this note. We recommend that you access the links below for the latest government guidance.</p>		
<p><b>Update as at 24 March 2020 at Noon</b></p> <p>The Government's instructions of last night mean that everyone should be working from home except for cases where this absolutely cannot be done from home. Please refer to the <a href="#">New rules on staying at home and away from others</a> in the link below.</p> <p>We have also included the latest Government guidance on <a href="#">Further businesses and premises to close</a> which employers should carefully read, especially those in the retail sector.</p> <p>In other updates, the Government Equalities Office (GEO) and the Equality and Human Rights Commission (EHRC) have taken the decision to suspend the enforcement of the gender pay gap deadlines for this reporting year (2019/20).</p> <p>We have yet to receive further details about the Coronavirus Job Retention Scheme other than what was announced on Friday 20 March 2020. We provide you with what we know so far about this scheme and some of the tactical considerations below under "Absence and Pay" section.</p> <p>There are various support measures which the Government has put in place to support businesses so whilst we have set out the legal position of employers in this note, it should be read with these support measures in mind: please click on <a href="#">Government support for businesses</a> link below to find out what support is available for you.</p>		
<p>SOURCES OF INFORMATION</p>		
<ul style="list-style-type: none"><li>• <a href="#">New rules on staying at home and away from others</a></li><li>• <a href="#">Latest government instruction (23 March 2020)</a></li><li>• <a href="#">Guidance: Further businesses and premises to close</a></li><li>• <a href="#">Guidance on social distancing</a></li><li>• <a href="#">Government guidance</a></li><li>• <a href="#">Government travel advice</a></li><li>• <a href="#">Government guidance on school closures</a></li></ul>		

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<ul style="list-style-type: none"> <li>• <a href="#">NHS on COVID-19</a></li> <li>• <a href="#">ACAS advice on COVID-19</a></li> <li>• <a href="#">Government advice for employees, employers and businesses</a></li> <li>• <a href="#">Online isolation notes</a></li> <li>• <a href="#">Government support for businesses</a></li> <li>• <a href="#">ICO Guidance</a></li> <li>• <a href="#">NHS – get an online isolation note</a></li> <li>• <a href="#">Working from home guidance</a></li> </ul>		
<b>HEALTH AND SAFETY</b>		
<p><i>What are the health and safety obligations of employers in light of COVID-19?</i></p>	<p>Employers have a legal duty to ensure the health and safety of employees and customers so far as is reasonably practicable. Businesses should not expose those individuals to a material risk i.e. one that is more than minimal or trivial. This duty is likely to extend to ensuring that staff are not placed at undue risk from COVID-19.</p>	<p>Health and Safety at Work etc. Act 1974</p>
<b>WORKING STRATEGY</b>		
<p><i>How can we re-arrange our working strategy in light of COVID-19?</i></p>	<p>When this first started, employers started thinking about different arrangements as follows:</p> <ul style="list-style-type: none"> <li>• Workforce separation</li> <li>• Shift patterns to avoid rush hour</li> <li>• Flexible working</li> <li>• Avoiding crowd gathering</li> <li>• Office closure</li> </ul> <p>However, given the Government's announcement on 16 March 2020, most employers who can are now implementing home-working. Although there is no requirement that offices be shut, the Government's strong recommendation to work</p>	<p>NA</p>

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	from home means that practically most employers will be operating work-from-home policy for most employees where that is possible.	
<b>ONLINE ISOLATION NOTES</b>		
<p><i>What are online isolation notes?</i> (Relevant link is available above)</p>	<p>This has just been launched (20 March 2020) so that people unable to work for more than 7 days because of COVID-19 can obtain an isolation note through a new online service. Please click on the above link: the link is for employees to use.</p> <p>This will effectively replace GP fit notes which are often required once self-certification for the first 7 days expires, and will be used as evidence that they have been asked to self-isolate either because they have COVID-19 symptoms or live with someone who has symptoms.</p>	NA
<p><i>Do we have to keep these online notes if we are not going to claim these back through the forthcoming refund scheme?</i></p>	<p>No, although it would be good to keep them for record-keeping purposes.</p> <p>We would recommend that if HR is under strain to log all these notes, then the employer can ask the staff to retain the notes thus shifting the onus on to staff and away from HR.</p>	
<b>CORONAVIRUS BILL 2020</b>		
<p><i>What are the employment aspects of this Bill?</i></p>	<ul style="list-style-type: none"> <li>• Employees and workers will be able to take emergency volunteer leave in blocks of 2, 3 or 4 weeks' statutory unpaid leave. A UK-wide compensation fund will be established to compensate for loss of earnings and expenses incurred at a flat rate for those who volunteer through an appropriate authority.</li> <li>• SSP to be payable from day 1 rather than day 4, and this provision is to have retrospective effect from 13 March 2020.</li> <li>• Employers with fewer than 250 employees (as at 28 Feb 2020) will be able to reclaim SSP paid in respect of the first 14 days of sickness absence related to COVID-19. This covers SSP paid from 14 March 2020, the day after SSP was extended to self-isolation cases.</li> </ul>	Coronavirus Bill 2020
<b>SSP</b>		

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<i>What are the latest changes to SSP?</i>	<p><b>The Coronavirus Amendment No. 2 Regulations</b></p> <p>As of 17 March 2020 SSP has extended to a much wider group of people than ever before, to include those who self-isolate or are social distancing in accordance with Government guidelines. Reading the Government guidelines has now become more important, especially the <a href="#">social distancing guidelines of 16 March 2020</a>.</p> <p>The latest amendments extend SSP entitlement to individuals self-isolating because a member of their household has symptoms, and those falling within the vulnerable categories of individuals strongly advised in government guidance to work from home.</p>	SSP (General) (Coronavirus Amendment) (No.2) Regulations 2020 (SI/2020/304)
<i>If the employee is in self-isolation in accordance with Government guidelines (of 16 March 2020) but is not sick, is company sick pay (CSP) payable?</i>	<p>This very much depends on the drafting of the relevant company sick policy. If discretion to pay CSP is retained in the contract/policy, there is no obligation to pay as the employee is not sick. If, however, CSP is payable in the event that SSP is payable then CSP would be payable.</p> <p>Remember though that there could be discrimination issues to take into consideration, for example in relation to pregnancy.</p>	NA
<i>If the employee has fully exhausted their SSP entitlement, are they entitled to further SSP due to COVID-19?</i>	No. There hasn't been any amendment in this regard – the duration of entitlement to SSP remains at 28 weeks, subject to complying with other requirements under the legislation.	SSP (General) (Coronavirus Amendment) (No.2) Regulations 2020
<i>Is it worth starting to pay SSP from day 1 now even though the proposed legislation is not in force yet (given the likelihood that it will apply retroactively from 13 March 2020)?</i>	This is a judgment call for employers – given the law is not yet in force, it might be sensible to wait until the legislation comes into force before acting.	NA
<i>Employee is ill due to COVID-19, is SSP payable?</i>	Employee should be treated as sick therefore employer should pay employee in accordance with the applicable company sick policy.	SSP (General) Regulations 1982 ("SSP Regulations")
<i>Self-isolation: due to employer request or in line with Government guidance, is SSP payable?</i>	If employee is self-isolating to prevent infection or contamination with COVID-19 (the scope of this has become wider under No.2 Amendment Regulations) then the starting point will be that they are asked to work from home. In that scenario the employee ought to be paid in full.	SSP (General) (Coronavirus Amendment) (No.2) Regulations 2020

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	<p>If the employee cannot work from home SSP is payable at a weekly rate of £94.25. It will be at the employer's discretion whether they pay CSP since the employee is not technically sick. The only caveat to that might be if the CSP policy is drafted so that sick pay is due when SSP is due. In that scenario company sick pay might need to be paid.</p>	
<p><i>Self-isolation: without showing any COVID-19 symptoms and without any other good reason, is SSP payable?</i></p>	<p>If the employee is not able to show that they are self-isolating either under government guidance or due to employer request, and is not showing any symptoms of COVID-19, then SSP is not payable. Similarly CSP would not be payable.</p> <p>One big caveat – it has now become more difficult to check whether an employee is social distancing for the “right reasons” due to the 16 March social distancing guidelines. Obviously where the employer has implemented a blanket home-working policy and there is no problem with home-working, then this is not an issue.</p>	
<p><i>Is SSP payable to an employee who has to take time off work to look after children due to school closures?</i></p>	<p>No, although the March 16 social distancing guidelines should be read carefully as these employees might potentially be caught by other groups of people who are encouraged/advised to work from home.</p> <p>Other company policies related to family related absence would apply.</p> <p>There are also potential indirect discrimination angles in the event of a less favourable treatment.</p>	<p>SSP Regulations</p>
<p><i>Are any businesses able to recoup back SSP paid out to staff as a result of COVID-19?</i></p>	<p>The Government has announced new measures to refund SSP paid out by employers with fewer than 250 employees in an effort to help businesses suffering from the ramifications of COVID-19 – indeed this forms part of the Coronavirus Bill 2020. Eligibility criteria for this scheme are:</p> <ul style="list-style-type: none"> <li>• Refund is limited to two weeks per employee.</li> <li>• Scheme only applies to employers with fewer than 250 employees as at 28 February 2020.</li> <li>• Employers can reclaim expenditure for any employee who has claimed SSP as a result of COVID-19.</li> <li>• Employers should maintain records of staff absences although employees do not need provide a GP fit note.</li> </ul>	

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	<ul style="list-style-type: none"> <li>• Eligible period will start on the day on which the regulations extending SSP to self-isolators come into force.</li> <li>• Government will work with employers over the coming months to set up a repayment mechanism for employers as soon as possible.</li> </ul> <p>As noted above, this is now part of the Coronavirus Bill 2020 which has not yet come in.</p>	
<p><i>SSP refund scheme – if there are separate trading schemes within a group, does the small business definition apply to each trading entity or the group as a whole?</i></p>	<p>This is not yet in force and so we are not yet able to answer this until we have reviewed the legislation in detail.</p>	<p>NA</p>
<p><b>ABSENCE AND PAY</b></p>		
<p><i>What do we know about the Coronavirus Job Retention Scheme (“Retention Scheme”) so far?</i></p>	<p><b>What is it?</b></p> <p>A scheme set up to allow UK employers to access support to continue paying part of their employees’ salary for those that would otherwise have been laid off during the crisis (“laid off” has not yet been defined). All UK businesses are eligible to participate including small or large, charitable or non-profit. It will be backdated to 1 March 2020 and will run for 3 months i.e. until end May 2020, but it has been indicated that this might be extended if necessary.</p> <p><b>How does it work?</b></p> <ul style="list-style-type: none"> <li>• Employers will need to designate “furloughed workers” and notify them of this change – this ultimately comes down to changing Ts &amp;Cs of employment.</li> <li>• Employers will then submit information to HMRC about the furloughed workers and their earnings through a new online portal (which is currently being set up). It is limited to those on PAYE including those on zero-hour contracts.</li> <li>• HMRC will reimburse 80% of furloughed workers’ wages up to a cap of £2,500 per month (HMRC are setting up this reimbursement scheme).</li> </ul>	<p>NA</p>

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	<p><b>What happens to furloughed workers?</b></p> <ul style="list-style-type: none"> <li>• They remain on payroll but must not undertake any work for the employer. It is not clear whether furloughed workers would be able to work for another employer while being furloughed; we will have to wait until details emerge.</li> <li>• Employers have no obligation to make up the shortfall in wages.</li> </ul> <p><b>Considerations</b></p> <ul style="list-style-type: none"> <li>• Choosing who will be will be furloughed and how employers go about this process will require careful thinking and planning as it involves changing the Ts&amp;Cs of the proposed furloughed workers.</li> <li>• Obtaining consent and documenting this process will be crucial: consultation with employees is recommended (claims could potentially follow if workers claim they should not have been furloughed or were furloughed w/o procedure).</li> <li>• Redundancy can be offered as an alternative so that consent may be more forthcoming from employees.</li> <li>• Collective consultation obligation may also be triggered under s.188 TULRCA if the employer intends to furlough more than 20 employees and it intends to dismiss them if they do not obtain consent from those employees.</li> <li>• Although employers do not have to make up the shortfall in payment, employers may consider doing this..</li> <li>• Priorities for furloughing may include: <ul style="list-style-type: none"> <li>○ Those who are unable to effectively carry out their roles due to the current situation.</li> <li>○ Those not in business critical roles.</li> <li>○ Those with less than 2 years' service.</li> </ul> </li> <li>• As always, employers need to consider discrimination angles (both direct and indirect).</li> </ul>	
<p><i>If we are having to send staff home due to Government guidelines and the staff cannot work from home even though they are willing and able, do we have to pay them?</i></p>	<p>The starting point is that you are required to pay staff in this scenario. However, we are advising about/being asked about the following potential options:</p> <ul style="list-style-type: none"> <li>• Lay-offs or short time working (subject to express contractual right) (see further below)</li> </ul>	<p>NA</p>

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	<ul style="list-style-type: none"> <li>• Asking employees to agree to reduction in pay/ reduction in hours, for example 10% reduction for 6 months (change of T&amp;Cs)</li> <li>• Exercising contractual clauses to reduce employee hours</li> <li>• Requiring employees to take holidays</li> <li>• Asking employees to take unpaid leave</li> <li>• Deferring discretionary bonuses</li> <li>• Dismissing staff who have less than 2 years' service and/or those in the probationary period</li> <li>• Redundancy – if collective, then adds time and cost. (In addition, note that if it is being considered that employees would be required to change their terms then the collective redundancy obligations would also be triggered)</li> </ul>	
<p><i>Due to reduction in demand, is it possible for our staff to be redeployed to another company?</i></p>	<p>This is something that employers are considering given the reduced demand for their staff. For example, some of the high street retail and hospitality chains are in discussions with supermarket employers about putting in place secondment arrangements whereby the retail staff are seconded to a supermarket to cover the latter's high demand for staff.</p>	
<p><i>If we shut down the business, can we put our employees on unpaid leave?</i></p>	<p><b>What are lay-offs and short-time working?</b></p> <p>You can consider lay-offs or short time working if there is an express provision in the employment contract. There will be a breach of contract where the employer lays off employees or puts them on short-time working without the contractual right to do so.</p> <p>Laying off employees means the employer provides employees with no work (and no pay) for a period whilst retaining them as employees; short-time working means providing employees with less work (and less pay) for a period while retaining them as employees.</p> <p><b>If you don't have an express clause permitting lay-offs and short-time working</b></p> <p>The right to lay-off must be permitted in the employment contract otherwise it will amount to a fundamental breach of contract allowing the employee to resign and claim constructive dismissal.</p>	<p>s.147 ERA 1996</p>

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A term can be implied into the contract if there is a custom of laying off that is 'reasonable, certain and notorious' and is such that 'no workman could be supposed to have entered into service without looking to it as part of the contract': *Bond v Cav Ltd* 1983 IRLR 360, QBD.

ACAS advice on 'Lay-offs and short-time working' states if the employee has been laid off in breach of their employment contract, the employee may:

- choose to accept the breach of contract and treat the contract as continuing, while claiming a statutory guarantee payment;
- sue for damages for breach of contract either in civil court or at ET;
- claim for unlawful deduction of wages; or
- claim that the employer's action amounted to dismissal, constructive or otherwise.

**Definition of lay-off**

A week of lay-off occurs when an employee, whose contractual remuneration depends on his or her being provided by the employer with work of the kind which he or she is employed to do, is not provided with such work, with the result that he or she is not entitled to any remuneration for that week: s.147(1).

If the employee's remuneration does not depend on his or her being provided with work, the lay-off provisions do not apply.

**Definition of short-time working**

A week of short-time working occurs if there is a diminution in the work provided by the employer, and as a result, the remuneration for any week is less than half a 'week's pay': s.147(2).

Short-time working is often described as a form of partial lay-off and can occur where the employer maintains its operation on a reduced scale e.g. on two out of five days, in order to eke out what little work is available.

**Holiday entitlement**

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	<p>Statutory holiday entitlement is unaffected by any period of lay-off or short time working, and an employee can therefore take holiday during this time and be paid his or her normal rate of pay.</p> <p><b>Statutory redundancy payment</b></p> <p>If an employer exercises an express or implied right to lay off an employee or put them on short-time working, in certain circumstances, the employee becomes entitled to claim a statutory redundancy payment: s135(1)(b). Those circumstances are where the employee:</p> <ul style="list-style-type: none"> <li>• Satisfies the qualifying conditions to bring a claim by having the required length of service and having been laid off or kept on short-time working for the required length of time.</li> <li>• Follows the statutory scheme set out in ss.147 to 154.</li> </ul> <p>Under certain circumstances, the employee may be entitled to holiday pay and notice pay.</p> <p><b>Statutory guarantee payment</b></p> <p>An employee may be entitled to a statutory guarantee payment on up to 5 "workless days" in a three-month period. A "workless day" is a day during any part of which the employee would normally be required to work in accordance with their contract, when the employee is not provided with work by their employer because of either of the following:</p> <ul style="list-style-type: none"> <li>• There is a reduction in the requirements of the employer's business for work of the kind which the employee is employed to do.</li> <li>• There is any other occurrence which affects the normal working of the business in relation to this type of work.</li> </ul>	
<p><i>Can we require employees to take holidays due to the sudden downturn in business or due to government guidelines/advice or otherwise?</i></p>	<p>An employer may give notice ordering a worker to take statutory holiday on specified dates: reg 15(2). Such notice must be at least twice the length of the period of leave the worker is being order to take: reg 15(4).</p> <p>This default notice provisions above can be amended or dis-applied, but only by a "relevant agreement", which means a written contract (including an employment contract), a collective agreement that is incorporated into the worker's contract, or a workforce agreement: reg.15(5) and reg 2.</p>	<p>Regulations 2 and 15 WTR 1998</p>

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<i>What process do we have to follow if we want to invoke a temporary salary reduction for staff?</i>	<p>This is about changing Ts &amp; Cs which means you would ideally consult with employees and obtain their agreement to the change.</p> <p>If the change is positioned appropriately, there is reasonable likelihood of obtaining consent from employees as they would rather take a pay cut than face redundancies. For those who object, there is the option of “dismiss and re-engage”: Another consideration is National Living Wage (NLW) and whether there is scope to cut by a certain % without breaching the NLW.</p>	NA
<i>If we close our shops due to lockdown, are we obliged to continue paying staff?</i>	This is ultimately a question of lay-offs or short-time working for which please see above advice on that issue.	NA
<i>Where we have made employment offers, are we able to withdraw or delay start date?</i>	<p>Two scenarios are envisaged:</p> <ul style="list-style-type: none"> <li>i) offer was made and accepted by the employee(s);</li> <li>ii) offer was made but not yet accepted by the employee(s).</li> </ul> <ul style="list-style-type: none"> <li>i) The contract is binding on the parties but the employer can simply give notice to terminate the contract. Alternatively, the employer can agree to defer the start date with the employee.</li> <li>ii) The employer can withdraw the offer given that it has not yet been accepted.</li> </ul>	NA
<i>Can we cancel or delay bonus payments that are due if there is discretion to do so?</i>	<p>This very much depends on the provision of the contract that deals with bonus payments. Assuming the clause is absolute discretion, then this is subject to the requirement that the exercise of such discretion is rational and not perverse or capricious.</p> <p>It is important to show that the company has considered exercising the discretion in a reasonable and proportionate manner. It may be better if the measure is part of package of steps such as removing vacancies, requiring holidays, salary cuts etc. so that one group is not singled out. You may also wish to consider deferral rather than outright cancellation, depending on your commercial needs.</p>	
<i>If we have already communicated our intention to increase annual salary, can we delay or cancel this?</i>	If the salary increase has been communicated as being from a specified date and without any conditions attached to it, then it will be binding. Please see above advice regarding salary reduction.	

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<p><i>If the employee has travelled outside the UK on holiday, can we require him to self-isolate upon return and what happens to his pay?</i></p>	<p>This group of people is not included as being advised to self-isolate under the latest government guidelines, which means that if the employer does require this person to self-isolate for a period then the employee arguably needs to be paid as normal regardless of whether they are able to work from home or not.</p> <p>If the employee cannot return to work due to travel restrictions and therefore their holiday period is “extended” beyond what was approved, then the employer can either agree to extend their annual leave or treat the period as unpaid leave as the employee is not able to work.</p>	
<p><b>EMPLOYMENT TRIBUNAL HEARINGS</b></p>		
<p><i>What happens to tribunal hearings?</i></p>	<p>From Monday 23 March 2020 all in-person employment tribunal hearings (hearings where the parties are expected to be in attendance at a tribunal hearing centre) listed to commence on or before Friday 26 June 2020 are to be converted to telephone case management hearings or other electronic means which will take place (unless parties are advised otherwise) on the first day allocated for the hearing. If the case is set down for more than one day then parties should proceed on the basis that the remainder of the days fixed have been cancelled.</p> <p>This direction also applies to any hearing that is already in progress on Monday 23 March 2020 and, if not already addressed before then, the parties may assume that the hearing on that day is converted to a case management hearing of the kind referred to above. In-person hearings listed to commence on or after 29 June 2020 will remain listed, in the meantime, and will be subject to further direction in due course.</p> <p>Rule 46 ET Rules allows any hearing to be conducted by electronic communication (including telephone), provided the tribunal considers it just and equitable to do so, and where a hearing is to be in public, members of the public can hear what the tribunal can hear and see any witness as seen by the tribunal. The Presidents strongly encourage tribunals and parties to use electronic methods where this is feasible and compatible with the overriding objective.</p> <p>s.4 ET Act allows claims that would ordinarily be heard by a panel of three to be heard by an employment judge sitting alone or with one lay member, if the parties consent. Judges are encouraged to explore with parties whether such consent may be forthcoming.</p>	<p>Rule 46 of the Employment Tribunal Rules 2013 (“ET Rules”)</p> <p>s.4 Employment Tribunals Act 1996 (“ET Act”)</p>

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<i>What about EAT hearings?</i>	<p>The President of the EAT has announced that all full hearings currently listed to be heard in person in the Rolls Building between 23 March 2020 and 9 April 2020 shall now be converted to an Appointment for Directions and be heard by telephone, unless directed otherwise by the President or another judge of the EAT.</p> <p>All Rule 3(10) hearings and preliminary hearings between these dates shall be heard by telephone unless otherwise directed by the President or another judge of the EAT.</p> <p>Any hearings listed from 14 April 2020 will be the subject of a further announcement before that date.</p> <p>The parties remain free to make any application to the EAT at any time.</p>	
<b>DATA PROTECTION</b>		
<i>To what extent can we share information about an employee who has contracted COVID-19 to others within/without the organisation?</i>	<p>Proportionality is key. Don't name the individual unless you need to name the individual as you shouldn't provide more information than is necessary. According to the ICO, "you have an obligation to ensure the health and safety of your employees, as well as a duty of care. Data protection doesn't prevent you from doing this."</p>	<p>Data Protection Act 2018</p> <p>ICO guidance</p>
<i>Can you collect health data in relation to COVID-19 about employees or from visitors to our organisation, including health information ahead of a conference or event?</i>	<p>Remember it's a balancing exercise between protecting employees' welfare and not gathering lots of sensitive information.</p> <p>It would be reasonable to ask people if they have visited a particular country or are experiencing COVID-19 symptoms.</p> <p>You can ask visitors to consider Government advice before coming to the event which should help you minimise the information you need to collect. If you need to collect specific health data, don't collect more than you need and ensure that any such information is treated with appropriate safeguards.</p>	<p>ICO guidance</p>

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