

Getting to work amidst travel chaos and disruption

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There are several reasons why employees may have trouble getting to work because of major disruptions. The common cause recently is the [ASLEF and RMT strikes](#) affecting Southern and Gatwick Express train services, with the next bout of strikes planned for 24, 25 and 27 January. On Monday, tube strikes also affected commuters having a massive impact on businesses in London. And with today's weather both ice and snow are affecting the roads and public transport around the country. The question is what can employers do?

Develop a strategy

This is 'a must'. Employers should develop a strategy for dealing with major travel disruptions. The strategy should be twofold:

- how to ensure business continuity if a significant proportion of staff are absent; and
- how to deal with staff management issues including whether to pay staff who are absent, whether to allow staff to work at home and how to keep in contact with them.

Health and safety concerns

Employers should consider health and safety concerns of employees during difficult periods.

[Section 44 of the Employment Rights Act 1996 \(ERA 1996\)](#) states that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done because:

- 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
- 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.

Employers should be wary of ignoring employees' health and safety concerns in relation to any adverse weather conditions and should have a clear policy in place.

Should employees who cannot get to work be paid?

The answer depends on the following: the right not to suffer unlawful deductions from wages, and the employee's express and implied contractual rights.

Is docking pay an unlawful deduction from wages?

It is unlawful to make a deduction from a worker's wages unless the deduction is authorised by statute, a contractual term that has been notified to the worker in writing, or by the worker having given their prior written consent.

However, the absence of such authority is not always conclusive. The first step is to confirm whether there has been a "deduction" at all, and there will be no deduction unless the employee can establish some legal right to be paid.

The key issue is to decide if there is a contractual right to be paid if the employee cannot attend work. This will require a careful review of the employment contract and what takes place in practice.

Should employers pay employees anyway?

Aside from the legal uncertainty in not paying an employee, there are many business reasons to pay employees even if they are unable to come in to work.

Employee relations: [ACAS](#) encourages a "flexible" approach:

"The handling of bad weather and travel disruption can be an opportunity for an employer to enhance staff morale and productivity by the way it is handled."

Not paying employees may lead to bad feeling both towards the employer and those who could work from home and get paid.

Bad publicity: Larger employers should certainly consider the risk of adverse press coverage.

Abuse of sick leave: Some employees may be tempted to falsely call in sick, hoping to claim company sick pay. This may lead to a breakdown of trust, as well as resentment by more honest colleagues.

However, there is, as always, a flip side to the coin. Paying staff whether they work or not can cause difficulties. It may encourage some not to make the effort whilst others will try to get to work, and will feel hard done by if their colleagues are being paid to stay at home. It is important in those situations to ensure employees who turn up for work believe their efforts have been recognised.

What are the alternatives?

Homeworking and other workplaces: In many businesses, working from home may be possible for some employees. Managers and employees should plan and consider taking work home if disruption is forecast.

Where an employer operates at more than one office, it may consider sending employees to another closer to their home.

Workplace closure: In some cases, depending on weather conditions or the number of stranded employees, it may not be economical or even safe for a workplace to remain open. If an employer decides to close a workplace, it may be able to send employees to another workplace or ask them to work from home. Any employees with contractually guaranteed hours or salary will still have to be paid if they are ready and willing to work, unless the employer can rely on contractual terms.

Paid annual leave: The employer may want to offer employees the opportunity to take the absence as paid annual leave, assuming they have sufficient entitlement remaining.

Alternatively, an employer may decide it wants to force all absent employees to take annual leave. However, employers need to bear in mind [regulation 15 of the Working Time Regulations 1998 \(WTR\)](#); requiring notice to be given to employees in advance if the employer wants to force them to take holiday from their statutory holiday entitlement. As discussed in our recent [Christmas closure article](#), notice must be twice as long as the period of leave e.g. one day's holiday needs two full days' notice, and a week's holiday needs two weeks' notice.

Designating absence as holiday without giving the necessary notice under the WTR needs a specific power; usually found in the employment contract or the employee's explicit consent in writing.

Making up the hours: Employees who do not want to take annual leave or unpaid leave could be asked to make up the lost hours on other days.

Time off for dependants: Employees have a right to take a "reasonable" amount of time off because of the unexpected disruption or termination of a dependant's care arrangements (ERA 1996). Bad weather or other disruption might cause schools and nurseries to close with the result that an employee must take the day off to look after children.

In that instance, employers cannot force the employee to use paid annual leave entitlement, and must not subject the employee to any detriment because of exercising the right. However, the employee has no statutory right to be paid for the time off.

Time-limited paid leave: An alternative is to give limited paid leave, after which employees must either take unpaid leave, make up the lost hours, or agree to count it against their paid holiday entitlement.

Cover for absent staff: Many workplaces, particularly hospitals and other emergency services, must arrange to cover absent employees to maintain an adequate level of service. The strict rules on rest periods under the WTR are likely to be waived in those cases, but employers should ensure that employees are given compensatory rest, and that their working hours do not present a health and safety risk.

Practical steps to reduce business risk

- Develop a business continuity plan. Plan for worst-case scenarios and the plan should work for more minor disruptions.
- Consider including a clause in employment contracts to specifically authorise deductions from wages if this is the approach the employer wishes to take.
- Implement a policy setting out how the employer will deal with adverse weather and other major travel disruptions.
- Publicise the policy internally before any likely period of travel disruption, and ensure that all staff and managers are aware of their responsibilities.



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