

COVID-19 Employment Law update

The coronavirus pandemic has brought about tremendous change to our working lives, and with it have come multiple changes to employment law and new challenges for employers.

Over recent weeks we have prepared numerous articles on the key issues which are affecting employers.

These issues and rules are subject to change by the government, please [contact us](#) for specific and up-to-date advice.

RECENT NEWS

It's hard to keep up: barely a day goes by without another change to government guidance or policy being made. This article summarises the recent key changes which employers should be aware of.



CORONAVIRUS JOB RETENTION SCHEME

It has been announced that the Coronavirus Job Retention Scheme (the Scheme) shall be extended to the end of October 2020. This will be welcome news for the many employers who have furloughed staff over the recent weeks.

For further background about the Scheme, please see our earlier article [here](#).

Whilst we are awaiting further guidance about the Scheme's extension, we understand:

- The extension will be available to all employers, regardless of industry or sector.
- There will be no changes to the Scheme until the end of July 2020.
- From August 2020, the Scheme will be more flexible, allowing employees to return to work on a part-time basis (which is not currently permissible).

- Employees will continue to receive at least 80% of their salary (up to the maximum of £2,500 per month), although it is expected that employers will need to share this cost from August 2020. It has been reported that employers will need to cover 20-30% of salaries, as well as employer national insurance contributions.

Further, the government has now collated the various guidance notes and factsheets about the Scheme, including how employers can calculate payments and make a claim. The consolidated guidance can be accessed [here](#).

COVID-19 RECOVERY STRATEGY

The government has published its strategy to get the country back to normal. A copy of this guidance can be accessed [here](#).

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The key points for employers to be aware of are:

- The government says it will work with businesses and unions to enable individuals to return to workplaces safely.
- For the foreseeable future, workers should continue to work from home wherever possible.
- Workers in England who cannot work from home should travel to work if their workplace is open (in fact, they are “actively encouraged”), and employers should follow any guidance on workplace safety.

The guidance also sets out a number of ‘general principles’ which individuals should have regard to. These include reducing the number of people they spend



time with at work, following advice given to them by employers, walking or cycling to work wherever possible and avoiding peak travel times.

STEPS EMPLOYERS SHOULD TAKE: COVID-19 SECURE GUIDELINES

With workers now being actively encouraged to return to work if they cannot work from home, employers should think about the steps they need to take to allow staff back safely. To assist with this, the government has produced COVID-19 Secure guidelines for workplaces.

This guidance includes general guidelines which apply to all employers and which should be implemented as soon as possible. For example:

- Keep staff working from home wherever possible.
- Carry out COVID-19 risk assessments in consultation with staff or trade unions (where applicable). These are aimed at identifying and minimising risk. If possible, employers should publish the results of their risk assessment on their website: the government “expects” all businesses with over 50 employees to do so.
- Social distancing of two metres should be maintained and workplaces should be re-designed to accommodate this (such as having staggered start times and creating one way walk-throughs). If a two metre distance cannot be maintained, the guidance suggests that

employers could erect barriers, ensure staff face away from each other and/or create workplace shift patterns or fixed teams designed to minimise staff interaction.

- Ensure proper cleaning process are adopted and that adequate handwashing facilities and/or sanitation are provided.

In addition, the government has published eight workplace-specific guidance documents for employers to consider. These cover:

- construction and other outdoor work
- factories, plants and warehouses
- laboratories and research facilities
- offices and contact centres
- other people’s homes
- restaurants offering takeaway or delivery
- shops and branches
- vehicles.

The guidance notes can be accessed [here](#).

EMPLOYERS SHOULD ALSO CONTINUE TO PROTECT CLINICALLY VULNERABLE STAFF AND THOSE CATEGORISED AS “EXTREMELY VULNERABLE” (BEING THOSE WHO HAVE BEEN ADVISED NOT TO WORK OUTSIDE THEIR HOME). EXTREMELY VULNERABLE STAFF ARE NOT ALLOWED BACK TO THE WORKPLACE.

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The guidance is helpful and gives employers lots to think about. Obviously, every workplace and workforce is different, so it will be important for employers to consider the guidance in light of their actual circumstances. It seems to us that carrying out a robust risk assessment and maintaining open communication with staff will be crucial.

For further information about issues which employers should consider when bringing staff back to work, please see our earlier article [here](#).



DATA PROTECTION

In one of our recent articles (accessible [here](#)), we looked at the data protection issues which employers should consider. The UK's data regulator, the Information Commission, has now issued specific guidance around testing and processing employee health data during the pandemic.

The guidance can be found [here](#).

It confirms that employers should be able to process such health data, but reminds employers that such processing needs to be in accordance with usual data protection principles (such as keeping the data collected to a minimum and keeping it safe) and that they need to carry out a data protection impact assessment. The guidance also reminds employers about the need to be open and transparent with staff.



ANNUAL LEAVE: A RELAXATION OF THE RULES DUE TO CORONAVIRUS

The Working Time Regulations 1998 (the "WTR") have been amended so that workers can carry over four weeks' holiday entitlement for up to two years if they have been prevented from taking it due to the effects of the current coronavirus epidemic.

Under the WTR, workers are entitled to 5.6 weeks' annual leave (i.e. 28 days) or a pro-rated amount for part-time workers. This entitlement is made up of:

- Four weeks' core leave, which must normally be taken in the holiday year in which it accrues and
- 1.6 weeks' additional leave, which can, if the parties agree, be carried over to the next holiday year.

The recent changes to the WTR mean that where a worker is unable to take their core leave in the current holiday year due to the effects of coronavirus, they can

carry that leave forward and take it in the following holiday year or even the year after that.

In the current situation, with restrictions on travel, office closures and guidance on self-isolation and shielding, it is clear that many workers' holiday plans this year will be adversely affected and the relaxation of the rules will allow them some flexibility as to when they can take that holiday time. It will also make it easier for employers to ensure operational continuity when business returns to normal (i.e. they will not be forced to ensure that all staff take their four weeks' leave later this year).

PLEASE NOTE, IT IS POSSIBLE FOR EMPLOYERS TO DENY WORKERS THE RIGHT TO ROLL OVER THEIR LEAVE, BUT THEY WILL NEED A 'GOOD REASON' FOR DOING SO. THIS HAS NOT YET BEEN DEFINED AND WE AWAIT FURTHER GUIDANCE.

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MAKING REDUNDANCIES DURING THE PANDEMIC

It is a sad reality that some employers will need to make redundancies as a result of the pandemic. It is clear that the 'lock-down' will only be lifted gradually and that the Coronavirus Job Retention Scheme will not last indefinitely, and the combination of these is forcing some employers to take action to protect their balance sheets. This article provides a useful summary of the key considerations for employers who are contemplating a headcount reduction.

Is there another way?

As a general rule, employers should only make redundancies as a last resort. They should therefore first consider whether there are any alternatives. For example:

- Exercising any contractual right to "lay-off" staff on a temporary basis or reduce their hours.
- Where appropriate, terminating the contracts of agency staff and contractors first.
- Where there is no contractual right, asking employees to consent to reduce their hours and/or pay on a temporary basis, or considering ways to unilaterally make such changes.
- Seeing whether any employees want to take unpaid leave or go on a sabbatical.

Employers should also consider, to the extent they have not already done so, whether furloughing staff under the Coronavirus Job Retention Scheme is an option. It is very likely that tribunals, when

assessing unfair dismissal claims, will expect employers to have at least considered using the scheme to avoid a redundancy situation during the pandemic. For more details about the scheme, please see our separate Q&A which can be accessed [here](#).

What is a "redundancy"?

"Redundancy" is one of the potentially 'fair' reasons which an employer can rely upon to dismiss an employee. It is important for an employer to demonstrate that there was a genuine redundancy situation (e.g. the dismissal was due to a workplace closure or a reduced requirement for employees to carry out a certain type of work), and that they follow a fair process, involving meaningful consultation with the affected employees.

The process involved will depend on how many employees are affected and over what time period. Generally speaking, if an employer is proposing to make 20 or more redundancies at one time, they will need to carry out collective consultation with employee representatives or a trade union.

Making fewer than 20 redundancies

If an employer is proposing to make fewer than 20 redundancies, there is no definitive timescale for conducting the process. Although fact dependant (depending on the reason for the redundancies, how many employees are involved, size of the employer, etc.), the process can often be completed within two weeks and will normally involve:

- Considering whether to ask for volunteers.
- Considering the pool of affected employees.
- Putting affected employees "at risk" of redundancy (i.e. warning them that their role might be made redundant).
- Scoring employees (using fair and non-discriminatory selection criteria).
- Consulting with employees on an individual basis about their score.
- Considering whether there are any alternatives to the redundancy (including whether the employer has any vacant jobs which are suitable).



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In the age of “lock-down”, consultation will be harder due to social distancing and people working from home and employers will need to think creatively about how they can meaningfully consult with staff remotely (e.g. via zoom, web-chat, telephone etc.). Getting the communications right will be key.

Making more than 20 redundancies

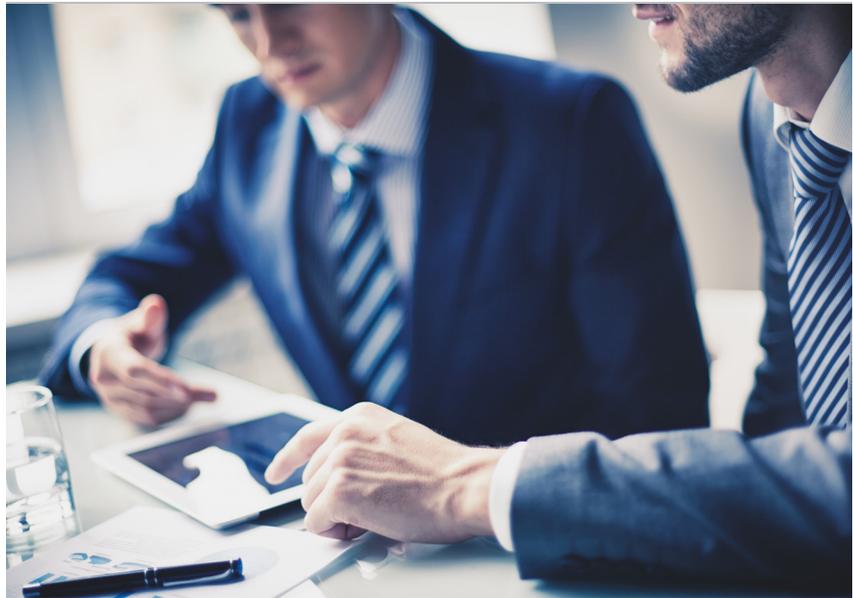
If an employer is proposing to make more than 20 redundancies within a 90-day period, they will need to comply with collective consultation obligations. This process will last between 30 – 45 days, depending on the number of redundancies proposed.

Under collective consultation rules, employers must first consult about the proposed redundancies with any recognised trade union or, if none exist, with a newly elected employee representative body. Again, communication is critical and employers will need to carefully consider how to deal with this whilst complying with social distancing rules.

There is also a requirement to notify the Government's Business, Energy and Industrial Strategy Department about the proposals.

It is possible, in very limited circumstances, for employers to deviate from their collective consultation obligations. However, it is important to seek advice on this point.

If you have any queries regarding these updates, please contact **Joe Beeston, Senior Employment Associate** in our corporate team for more information.



Payments on a redundancy

An employee who is made redundant will be entitled to:

- Their notice (whether that is worked or paid in lieu). Employees are entitled to the greater of: (i) the notice period in their employment contract; or (ii) that required under statute (being one week's notice per year of service (up to a maximum of 12 weeks)).
- Salary and benefits which accrue up to their last day.
- A payment in lieu of any accrued but untaken annual leave.
- A statutory redundancy payment (“SRP”) based on their age, length of service and gross weekly pay (if they have been employed for more than two years). SRP can be calculated using this [online calculator](#). If an employer operates a contractual enhanced redundancy pay policy, employees will be entitled to that instead.

General Points

- In practice, only employees with more than two years' service benefit from unfair dismissal rights. Therefore, where affected employees do not have sufficient service, employers might elect to effect redundancies more expeditiously
- It is important that redundancy processes are fully considered, properly documented and carried out correctly to avoid lengthy and potentially expensive employment claims down the line. We often advise clients on these processes, and can assist with drafting scripts for use at consultation meetings, letters to employees and associated termination documents.

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The current global crisis is evolving rapidly, and the rules and guidance for individuals, companies and other entities to manage its implications are similarly fast moving. Notes such as this may be out of date almost as soon as they are published. If you have any questions prompted by this article or on any other matter relevant to you, please get in touch with your usual contact at Forsters.

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