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Coronavirus (COVID-19) Employment Law Update

March 2020

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Introduction and what we will cover

- The current position and what next?
- Best practice and mandatory obligations for employers
- Sick pay (SSP and contractual sick pay)
- Working from home
- Survival pack – alternatives to redundancy

The current position and what next?

- The position is changing daily but it seems that as of 24 March 2020 the UK has just entered a period of, initially, three weeks in lock down which will affect every business and individual.
- The headline direction is “You must stay at home” which in practice has been explained by the PM as meaning people should leave home only to exercise once a day, travel to and from work where “absolutely necessary”, shop for essential items and to fulfil any medical or care needs.
- What work is “absolutely necessary” is not absolutely clear save in relation to “key workers” as a class of front line service providers, namely those people whose jobs are vital to public health and safety during the coronavirus lockdown.

Who are our key workers?

Key workers are:

- All NHS staff and staff in the health and social care sector;
- Producers and distributors of personal protection equipment and medicines;
- Nursery, teachers, teaching assistants, and social workers;
- Those involved in production, processing, distribution, sale and delivery of food and essential goods;
- Those keeping air, water, road, and rail passenger and freight transport modes operating;
- Utility workers - staff needed to keep oil, gas, electricity, water and sewerage operations running; staff in the civil nuclear, chemical and telecommunications sectors, and those in postal services and those working to provide essential financial services;
- Police and support staff, Ministry of Defence civilian staff and armed forces personnel, fire and rescue staff, and workers responsible for border security, prisons and probation;
- Local and national government workers in admin roles deemed essential to the effective delivery of the Covid-19 response or delivering essential public services, including payment of benefits.

Your business's duty of care

- For key workers and their employers the key advice is to do as much as you can to keep them safe whilst they carry on delivering essential services.
- Employers have both a statutory duty of care and an implied common law obligation to ensure the health and safety of their employees and workers.
- In pandemic conditions, specifically:
 - ✓ Reviewing systems of hygiene to ensure that they provide appropriate protection;
 - ✓ Carrying out a cost/benefit analysis for offering preventative measures to the workforce; and
 - ✓ Carrying out a risk assessment to identify any higher risk groups
 - ✓ Provision of PPE

Your business's duty of care continued...

- Employers of staff who are not categorised as key workers must follow government and Chief Medical Officers' advice and support staff in working from home if possible.
- Retailers on non-essential goods, pubs, theatres and cinemas must now close and gatherings of more than two people from the same household may be dispersed: working life just became very difficult.
- Employers should provide staff with information about the symptoms of COVID-19, current guidance on keeping good hygiene and information on when and how to seek medical assistance.
- Staff should be advised to use the phone, online services, or apps to contact their GP surgery or other NHS services if not an emergency.

What financial support may your business call on?

- Plans for a £330 billion package of support for businesses. More information on the various schemes can be accessed via <https://www.gov.uk/guidance/coronavirus-covid-19-information-for-individuals-and-businesses-in-scotland#businesses>
- A new Coronavirus Business Interruption Loan Scheme that will see banks offer loans of up to £5m to support SMEs. The Government will cover the costs of interest on these loans for the first six months. Scaling up HMRC Time to Pay service, allowing businesses and the self-employed to defer tax payments over an agreed period of time.
- Statutory Sick Pay (SSP) costs for businesses with fewer than 250 employees will be met by the Government in full for up to 14 days per employee.

Financial support from the government continued...

- Business Rate Relief for all businesses in the retail, hospitality or leisure sector for one year in 2020-21. Eligible pubs will also be entitled to a business rate discount of £5,000.
- Cash grants worth:
 - £25,000 to the smallest businesses in the retail, hospitality or leisure sector.
 - £10,000 for all business in receipt of Small Business Rates Relief (SBRR) and Rural Rates Relief.
- Launching the Bank of England Covid-19 Corporate Financing Facility (CCFF) for large businesses.
- The Bank of England has cut interest rates from 0.25% to 0.1% in an emergency move.

Financial support from the government continued...

- The government will provide additional Small Business Grant Scheme funding for local authorities to support small businesses that already pay little or no business rates because of small business rate relief (SBBR), rural rate relief (RRR) and tapered relief. This will provide a one-off grant of £10,000 to eligible businesses to help meet their ongoing business costs.
- The best place to find most up-to-date guidance and eligibility criteria for the different schemes is the gov.uk website. Follow the link below for more information:

<https://www.gov.uk/government/publications/guidance-to-employers-and-businesses-about-covid-19/covid-19-support-for-businesses#support-for-businesses-through-the-coronavirus-business-interruption-loan-scheme>

Financial support from the government – ‘furlough leave’

- Coronavirus Job Retention Scheme through ‘furlough leave’. The scheme will be in operation for at least 3 months from 1st March 2020.
- The government will pay 80% of employee’s monthly wages up to a maximum of £2,500.
- The employer can elect whether or not to supplement the additional 20% of salaries.
- Employees must not undertake any work while ‘furloughed’.
- Furlough leave can only be put in place unilaterally by either the employer or employee to prevent abuse of the system.
- If the business closes doors temporarily but the business is still running then it would be entitled to the grant to pay the staff who were still on the payroll.
- If only some employees are put on furlough leave but others are not, the business would still be eligible for the grant.
- A new online portal through which grants can be requested is expected to come into operation shortly.

Statutory Sick Pay (SSP)

- The new legislation will require employers to pay all employees, agency workers and workers who pay Class 1 NI contributions SSP from day one provided the individual self-isolates in line with the official guidance issued by the government.
- The mechanism through which smaller businesses, i.e. of less than 250 employees can claim the promised refund of SSP from the government for up to 2 weeks is not announced as of yet.

Statutory Sick Pay (SSP)

- Employers should maintain records of staff absences, but should not require employees to provide a GP fit note.
- There are plans to backdate any such claims for a refund to 13 March 2020. It is expected to have a clear framework by the end of March 2020.
- Eligible employees are the ones who earn over £118 a week or £120 a week from April 2020.
- The current level of SSP is £94.25 but will increase to £95.85 from April.

Statutory Sick Pay (SSP)

Agency Workers:

- If agency workers are employed by an umbrella company, it could be responsible for payment of SSP. If, however, workers are purely outsourced to other firms, those other firms are likely to be considered the relevant “employer” for the purposes of SSP.
- Under the Agency Workers Regulations (AWR), agency workers are entitled to the same treatment as the staff members of the client they are commissioned to but this does not extend to company sick pay. In the event that the employer’s client provides any or better contractual sick pay, agency workers will not be entitled to be paid the difference in pay under the AWR.

Contractual Sick Pay

Any amendments to contractual sick pay through:

- Consent
- Dismissal and re-engagement
 - Even if the affected employees accept the new terms, they will be entitled to claim unfair dismissal (if they have the requisite length of service) and wrongful dismissal, if the employer does not give them the required notice to terminate.
- Unilateral change
 - employees may “work under protest” and bring claims for breach of contract or unlawful deductions from wages (where they are only paid SSP during a period of absence). Alternatively, they may resign and claim constructive dismissal

Some common Q&As:

- Q:** Where an employee refuses to attend work due to fears about coronavirus, what action can the employer take and what pay are they entitled to?
- A:** If the employee is not a key worker then their following advice to stay at home on health and safety grounds / following government advice is likely to be a reasonable position. If you employ key workers who are asymptomatic/ not in quarantine or self-isolation the you would need to consider their reasons on a case by case basis, but an unreasonable refusal to attend may trigger disciplinary action.
- Q:** In what circumstances could holiday be used by workers to cover periods of absence?
- A:** Employers can require employee to take time off as annual leave subject to providing twice the requested amount of time in notice. The number of days may be subject to a contractual cap and the employment contract must always be checked.

Some common Q&As continued...

Q: Can employers lawfully conduct temperature checks on employees, workers or visitors?

A: This is something that should only be done with the employee's consent but it seems unlikely that employees will resist this simple request.

Q: Can an employer defer bonus in light of the economic effect of the outbreak?

A: Generally, not unless there are specific stipulations in the employment contract. There are different types of bonus arrangements and all can usually be varied by agreement with your employees. Communicate the need for the change clearly and many employees will recognise that these circumstances are unprecedented and businesses are doing what they can to keep going.

Some common Q&As continued...

Q: At what point should an employer close the workplace?

A: Since the Prime Minister's announcement on 23rd March, certain hospitality and retailers need to close their premises, save for food delivery and online deliveries.

Other employers do not need to close doors but are strongly encouraged to consider homeworking where possible.

There is published guidance depending on the type of business:

<https://www.gov.uk/government/collections/coronavirus-covid-19-list-of-guidance#guidance-for-non-clinical-settings>

<https://www.gov.uk/government/news/new-regulations-created-by-secretary-of-state-for-business-closure-covid-19>

Alternatives to redundancy

Lay-offs and short-time working are temporary solutions to the issue of no or less work.

- **Laying off employees** means that the employer provides employees with no work and no pay for a period while retaining them as employees.
- **Short-time working** means providing employees with less work and less pay for a period while retaining them as employees.

Alternatives to redundancy continued...

- The employer has no general duty to provide work but it has a duty to pay wages.
- This is only possible where there is an existing express contractual right to do so. There may exist an implied contractual provision but this would apply in exceptionally limited circumstances.
- Additionally during this period employers may need to make 'guarantee payments'. These are set by statute and are currently set to a maximum of £29 a day for 5 days in any 3-month period.

Alternatives to redundancy continued...

Statutory Guarantee Payments (SGP)

An employee may be entitled to a statutory guarantee payment (SGP) for 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:

- There is a reduction in the requirements of the employer’s business for work of the kind which the employee is employed to do.
- There is any other occurrence which affects the normal working of the business in relation to this type of work.

The employee does not need to be on “lay-off” or “short-time working” to receive a SGP.

Alternatives to redundancy continued...

Limit to how long an employee may be laid off for

This needs to be only for a reasonable time. Where employees have been laid off or kept on short-time working for an unreasonably long period without pay and there is no genuine prospect of an upturn in work, they could claim redundancy or constructive dismissal.

Holiday entitlement during periods of lay-off or short-time working

Provided the employment contract is not broken during a period of lay-off or short-time working (so that the employee remains “on the books” rather than being dismissed and reengaged), statutory holiday entitlement is unaffected.

Where an employee is temporarily laid off they can of course choose to take paid holiday instead, and must be paid at the appropriate rate.

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