

Employment matters to consider as we prepare to emerge from lockdown

The government has set out plans to take the UK out of lockdown and allow the economy to restart safely while continuing to minimise the spread of the coronavirus. It has issued and continues to issue guidance and mandate actions that businesses and individuals must take to support this effort. We have no reason to believe that restrictions on how businesses operate will be lifted in the near future, and employers should plan now to meet their obligations in this regard.

As the government winds down the coronavirus job retention scheme, it is anticipated that a significant proportion of employers will face difficult economic choices regarding their workforce in the absence of government assistance. Employers should urgently consider what working arrangements, including working hours, shift patterns and rates of pay they will provide to their staff when flexible furlough is introduced on July 1st, and as government assistance under the job retention scheme is withdrawn.

This note provides some valuable, practical steps for businesses in relation to their employees and working practices as we cautiously resume 'normal' working patterns.

HEALTH AND SAFETY ISSUES

As an employer, you have a duty of care to your employees. You should therefore continue to take all steps which are reasonably practicable to ensure the health, safety, and wellbeing of your employees, including those working from home. Particularly at a time of global distress and uncertainty, demonstrating concern for the physical, emotional, and psychological health of your staff is not just about complying with your legal requirements, but ultimately makes good business sense too.

The government has published detailed guidance – Working safely during coronavirus – which provides guidance specifically tailored for different work environments, including construction sites, factories, plants and warehouses, and offices. The guidance provides practical action employers should take to comply with the following mandated steps:

- Employers must carry out a coronavirus risk assessment.
- Employers must develop cleaning, handwashing, and hygiene procedures.

- Employers should take all reasonable steps to enable their workforce to work from home.
- Employers should maintain social distancing, wherever possible.
- Where social distancing is not possible, employers must manage transmission risk

In general, the guidance remains that those who can work from home continue to do so, but those who cannot, including for circumstantial reasons, can return to work. As we emerge from lockdown, more of your employees will begin to return to the workplace, however, although some of your employees might welcome the chance to return to the workplace, others might be fearful and not feel ready to return to work. Others might not be able to return to work until schools, nursery or other childcare provision fully resumes to enable them to return to work.

Some of the practical steps you should consider in anticipation of reopening your workplace in accordance with government guidance are set out below:

- Carry out a coronavirus risk assessment to ensure safety prior to resuming work in line with the Health and Safety Executive guidance.
- Consult with workers and with trade unions as part of any such risk assessment.
- Share the results of your risk assessment with your workforce and publish it on your website.
- Ensure that you have a reliable system for communicating with your staff about up to date guidance and advice.
- Develop hygiene procedures to increase the frequency of handwashing in compliance with guidance and provide adequate facilities to ensure staff can comply with guidance, including providing hand sanitiser all around the workplace.
- Plan for increased, enhanced cleaning and sanitising of all parts of your facilities, including equipment, machinery, and workspaces. Ensure in particular, that busy areas and toilets are cleaned appropriately and frequently.
- Determine which staff do not need to be on site and require those who can continue to perform their work at home to do so (see below).
- Consider what social distancing measures will be required in your workplace, and how you will implement and police these.
- Facilitate and maintain social distancing, where possible by putting up signs to remind workers and visitors of social distancing guidance, use floor markings, arrange one-way traffic, and limit access to the workplace if possible.
- Consider how you can stagger your employees' return to work or working hours so that you reduce maximum occupancy.
- Take steps to comply with any mandatory personal protective equipment requirements that might apply to your workforce.
- Where social distancing is not possible, manage transmission risk by considering whether a particular activity is necessary for the business to operate and take steps to limit the amount of time people are in close contact.
- Ensure you have a plan in place that you will follow if an employee develops symptoms of the virus, including what precautions you will take to minimise further infection.

- If an employee tests positive for coronavirus or informs you that they are displaying symptoms of the virus, you should notify other employees about the infection risk as soon as possible, however, you should not reveal the identity of the relevant individual. All Information about an employee's health is a "special category of personal data" under the Data Protection Act 2018, which means that it can only be processed by the employer in defined and restricted circumstances.
- Continue to be especially considerate of employees who are more vulnerable, such as those with pre-existing conditions that render them at risk, elderly, disabled and pregnant employees, and those who are required to self-isolate or who may wish to continue to shield.
- Consider whether you should monitor the temperature of people entering your premises and/or ask them to provide information about their health while remaining mindful of your duty to observe privacy rights and data protection and processing obligations.

MAINTAINING A FLEXIBLE, DISPERSED WORKFORCE

(See separate fact sheet on managing a dispersed workforce)

For the foreseeable future, the guidance remains that those who can, should continue to work from home. Some of the steps you should consider as you continue to embrace a flexible and/or remote workforce include the following:

- Consider whether employees can continue to perform their work from home for all or some of their working hours.
- Take all reasonable steps to enable your workforce to work from home, including ensuring staff have access to appropriate equipment.
- Handle all requests for flexible working reasonably, mindful of your duty to avoid refusing a request that could give rise to a claim of discrimination. In light of your employees' performance and productivity during lockdown, it might be harder to justify refusing such a request.
- Ensure you are mindful of employees' particular concerns and stresses of working from home, including childcare obligations and space constraints, particularly until schools and other childcare facilities reopen.
- Consider family obligations which might make returning to work difficult for some employees who cannot perform their work at home. For those employees, some alternatives to requiring them to return to work include taking:
 - > statutory parental leave or the right to time off to care for dependants
 - > furlough leave until the end of October under the government's job retention scheme
 - > temporary amended (reduced) terms of work and pay
 - > annual leave
- Ensure, however, that you do not use family obligations or other discriminatory factors in determining how you treat your staff at this time.
- Be mindful that some employees will be worried about returning to work and fearful for their health and determine how you will handle and address their concerns.
- Be mindful of your obligation to make reasonable adjustments for disabled and pregnant employees, which might mean being flexible with how and when they perform their duties.
- Communicate clear expectations to employees within flexible, dispersed working arrangements.

- Ensure that you retain flexibility to review and change your procedures and policies as the pandemic eases and as restrictions are lifted.
- Plan for open communication with homeworking staff and continue to monitor and look after their physical and mental wellbeing.

MANAGING REDUCED STAFFING NEEDS

As the economic toll of the pandemic emerges, it is expected that many employers will face difficult decisions to reduce their workforce costs, particularly as government assistance under the furlough scheme is reduced over the coming months. (See our fact sheet *Handling your workforce in the current economic downturn*.)

After 10 June 2020, no new employees may be placed on furlough other than parents returning from statutory maternity or paternity leave, and the job retention scheme will end without any further extensions on 31 October 2020. Further changes to the scheme designed to shift the burden of employee costs back to employers over the coming months include the following:

- From 1 July, employers can bring furloughed employees back to work part time for any part of their normal work hours and claim through the scheme for hours which are not worked.
- From 1 August, employers will have to pay employee's national insurance contributions and pension contributions and will no longer be able to reclaim those through the scheme.
- During September, the government will only reimburse 70% of salary (up to a maximum of £2,187.50) under the scheme. Employers will have to top-up employees' salary to 80% or more, depending on what has been agreed between the employer and the employee.
- During October, the government will only reimburse 60% of salary (up to a maximum of £1,875), and employers will have to top up to 80% (or more if so agreed).

The main choices for most employers facing the need to reduce their workforce costs will be:

- **Reducing hours and pay by amending employment contracts.** Although an employee must generally provide consent to amend his or her employment contract, there are ways in which employers can implement unilateral changes to terms and conditions of employment, subject to statutory employment protections for employees, including protection from unfair dismissal and unlawful discrimination, and of course subject to breach of contract issues.
- **Redundancies to reduce the workforce.** If you need to reduce your workforce by reason of redundancy, you will need to ensure that you do so in accordance with fair procedures to ensure you can avoid claims of unfair dismissal, which will include consulting with affected employees. If you are making collective redundancies – where you are contemplating making 20 or more individuals redundant at any one of your establishments within a period of 90 days - you must follow statutory collective redundancy consultation procedures, and you must comply in advance with statutory notification obligations or face criminal sanctions.

Any plan or action to reduce your workforce should be carefully and fairly implemented on the basis of legal advice in order to avoid unnecessary unfair dismissal and other claims. How you communicate with your teams and customers in anticipation of staff reductions is particularly important to avoid employment law claims and to preserve good relations with those you intend to retain.

EMPLOYEE RELATIONS CONSIDERATIONS

Beyond your legal obligations, there are things you might wish to consider as an employer to ensure that particularly at this time, your organisation is caring and inclusive, and mindful that the impact of the coronavirus has not been universal, meaning that some members of your team may need more support than others.

You might consider for instance:

- Re-orientation and re-induction processes to welcome staff back to work and allow for the supported re-integration of your workforce.
- What support you will offer those who have suffered bereavements or other traumas during the pandemic, and how you will support your staff if your business has lost a colleague to coronavirus.
- Regular, open communication between staff and management which allows staff to feel heard, recognised and validated regarding:
 - > the impact of the pandemic on them as individuals and employees
 - > the impact of the pandemic on the business
 - > any likely job losses or other changes being considered
 - > the process and challenges around returning to work
- Diversity and inclusion so that no action you take discriminates against certain groups of employees.
- What additional support you will make available to your staff during the coming months.
- How you will handle holiday leave requests, balancing the needs of your operations with the need for your staff to take holiday, which might include being more flexible around holiday leave.
- Any necessary adjustments for staff whose work involves travel, whether international or otherwise, while travel restrictions and quarantines remain in place.

HOW CAN CONEXUS LAW HELP?

Businesses and individuals will need legal advice to help them understand the risks they may face and the options that may be open to them.

We are available to assist in reviewing the laws in many jurisdictions across the world, and to review specific contracts. We are also available to provide practical, business-orientated advice on how to best protect yourself from the ongoing commercial effects of Covid-19.

Contact

For more information or an informal chat please contact us;

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ABOUT CONEXUS LAW

Conexus Law is an independent specialist law firm providing legal and commercial advice to clients who work in sectors where the built environment, technology, engineering and people converge. We work on projects across the globe.

Built environment: We work on complex or mission-critical projects, where the “normal rules” may not apply. These projects might present complex procurement challenges, might be one-of-a-kind, or might relate to the construction of mission critical facilities where the risks of project failure far outweigh the initial capital outlay.

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