

Workplace Newsletter

Keeping you up to date with all things Employment Law, HR & Work-Based

July 2020



Coronavirus business support update

It's been another roller-coaster month with plenty of changes (not just in the world of employment law and HR) with the easing of lockdown and further support announced for businesses struggling during Covid-19.

Most pubs, restaurants and cafés re-opened on Saturday 4 July, shortly followed by hairdressers and beauty salons with indoor leisure centres, gyms and pools set to reopen by the 25 July, right in time for the summer holidays which will no doubt bring further challenges for employers.

We've detailed a number of key changes and introductions of new schemes below.

Flexible furlough



1 July 2020 marked a major change to the Coronavirus Job Retention Scheme with the introduction of flexible furlough. This means that your employees are now able to work on some days, or parts of days and be furloughed for others. The government subsidy will only apply to the hours your employee is not working i.e. whilst they are on furlough.

If you're planning to use flexible furlough in the coming months, you must put a flexible furlough agreement in place with your employees and you will need to keep a record of the usual hours worked by each employee, your calculation to ascertain usual hours and the actual amount of hours worked.

[Read more p2>](#)

Welcome

With the current unsettled economic circumstances and large businesses such as BA and John Lewis announcing redundancies, this month we explore the alternatives to redundancy.

If redundancy has been the only option, our HR consultants have put together their top tips in re-engaging your employees who have 'survived' redundancy.

We've included an update on managing annual leave requests and exploring long-term home-working.

As always, please follow us on [LinkedIn](#) for our latest updates.

Wishing you all safety and good health from everyone at the Outset Group.



outset.

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Job retention bonus scheme



In Rishi Sunak's summer statement, a job retention bonus was also announced to encourage firms to retain furloughed staff. Employers will receive a one off £1000 payment per every furloughed employee earning over £520 per month that is kept on in work until the end of January 2021.

Payments will be paid in February 2021 with further details due to be announced at the end of this month. We will keep you updated on this development.

Support for hospitality and tourism sector



The government launched the 'Eat out to help out' scheme to help the struggling hospitality sector. Everyone will receive 50% off, up to £10 per head in pubs, cafes and restaurants throughout August, Monday to Wednesday in the hope of kickstarting the sector. Participating establishments will simply be able to register for the scheme [online](#) and reclaim the discounted amount through an online portal.

There has also been an immediate cut to VAT from 20% to 5% for the tourism and hospitality sector for the next 6 months.

Support for young workers



Kickstart scheme

A new scheme has been launched to support young workers called the 'Kickstart scheme'. The government will pay the wages of young employees for the first 6 months of employment. For each "kickstarter" job, the government will cover the cost of 25 hours' work a week at the National Minimum Wage - £4.55 for under 18s, £6.45 for 18 to 20-year-olds, and £8.20 for 21 to 24-year-olds.

Employers will be able to top up that payment if they wish. The government payments will also include national insurance and pension contributions. The scheme opens for applications in August.

Apprenticeship support

There's also additional apprenticeship support available from the government for taking on an apprentice. You'll receive a bonus of £2,500 for apprentices under 24 and £1,500 to take on apprentices over 25.

Traineeships

If you take on a trainee, firms will receive a £1,000 grant to support young people receiving work experience. A traineeship is a course that includes a work placement aimed at 16-24 year olds across England and unlike apprenticeships, employers don't have to pay trainees a wage but may choose to pay travel expenses or a food allowance.

A traineeship can last from 6 weeks to 6 months and employers should offer a minimum of 100 hours work experience. The scheme should be in place from September 2020.

Taking holidays abroad



Since our last newsletter, there has been an update to international travel with the introduction of 'travel corridors'. Passengers will no longer be required to self-isolate when they arrive in England from a number of countries including France and Spain. To view the full list click [here](#).

This means that employees wishing to take holiday to any of the exempt counties, will no longer have to quarantine upon return, hopefully causing employers less of an issue in the coming weeks.



Next month

From 1 August 2020, there will be another change to the Coronavirus Job Retention Scheme. The monthly cap will remain at 80% of employee wages capped at £2,500 but employers will now be required to meet the cost of employer NICs and pension contributions. Click [here](#) to view our furlough timeline document with key dates of changes.

How do you calculate wages for employees who are flexibly furloughed?
Click [here](#) to find out.

Where can I find examples to help me calculate my employees' wages?
Click [here](#) to find out.



Produced in Kent support your local campaign

We're proud to be supporting Produced in Kent and Visit Kent with the #supportyourlocal campaign.

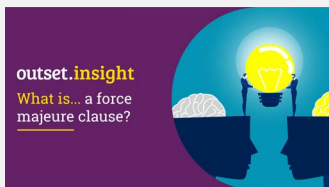
We're fortunate enough to have a large number of excellent independent businesses and producers in our county, who are working hard to reshape how they deliver their services to fit the new world we find ourselves in. Now, more than ever, it's important we all support the local businesses we know and love.

To sign the pledge, click [here](#). But most of all please support your local.



Meet the team - Darren Stevens

Our latest meet the team is [Darren Stevens](#), Head of our Employment team. Click [here](#) to read about Darren's career so far, his role at Outset and his passion for reading and personal development.



What is Force Majeure?

Our latest video in our 'What is...' series by our Managing Director and Corporate lawyer, [Sean Gorman](#), is what is Force Majeure? [Click here to watch the video.](#)



Alternatives to redundancy

No employer wants to run a redundancy procedure but sometimes it may be the only choice a business has to reduce its cost. Running a redundancy process isn't cheap and if the correct process isn't followed, employers can find themselves facing unfair dismissal claims and additional costs to resolve the problem.

Before starting a redundancy process, it's important to consider how you can reduce costs in other ways. This will help you retain skilled and experienced staff that you recruited and avoid the impact redundancies can have on staff morale.

Below are some suggestions to consider to reduce costs in alternative ways. In order to protect your business, care must be taken, the correct process must be followed and the arrangement should be carefully documented.

Reduce headcount

Restricting recruitment/withdrawing job offers/deferring new joiners

If you have employees who have handed their notice in and are exiting the business, you can save cost by not replacing them.

You could consider withdrawing employment offers. You may withdraw an offer of employment at any point before it is accepted, without having to give notice or make a payment in lieu of notice.

A softer alternative to withdrawals is to ask anyone about to join the business to defer their start date by a period of time.

Redeployment and retraining

If one area of the business has been harder hit than another, it may be possible to retrain an employee/s with transferable skills to take up a new role/s in the busier part of the business on a temporary or permanent basis. Any significant changes will need to be agreed in writing with each affected employee.

Any redeployed employees will also need to be given training to ensure that they are properly equipped to perform the new role.

Reduce non-permanent staff

Ending arrangements with casual workers, agency staff and self-employed consultants may be a relatively low-risk way to reduce employment costs without making 'permanent' staff redundant.

The employment status of such individuals should be carefully assessed in case they do, in fact, legally qualify as employees with statutory rights, such as the right not to be unfairly dismissed.

Employers should also be careful when terminating part-time or fixed-term staff. They are protected from less favourable treatment in comparison to (respectively) full-time and permanent colleagues, unless the employer can rely on objective justification.

Secondments

Internal or client secondments can work well to either train an employee in a certain area, or provide a specific service to a client. This may help to consolidate client relations and/or develop the employee's knowledge and skills, ultimately benefiting the employer's business when the employee returns to their original role. This will need to be done with the employee's consent in the absence of an express right to second in the contract of employment.

Voluntary career breaks/sabbaticals

Arranging unpaid sabbaticals/career breaks can be a great way to save on the costs of salary for a fixed period of time, whilst retaining valuable staff and giving them the opportunity to do something for themselves such as travel, study or voluntary work.

[Read more p2>](#)

Reduce remuneration – Reduce pay or benefits/pay freezes

Adjusting employees' contractual entitlements is perhaps the most obvious way to reduce business costs without resorting to compulsory redundancies. Any proposal affecting pay is going to be difficult to market to staff but a pay cut across-the-board for example, will be easier to digest if the alternative will result in dismissals.

Any significant change to working arrangements is likely to involve the variation of employees' contracts of employment. This can be a risky exercise itself and employers should proceed with caution and take legal advice.

Reduce hours - flexible working/job shares/overtime bans

Employees can be invited to make flexible working requests with a view to reducing their hours or days of work. The incentive of improved work-life balance may mean some employees welcome the opportunity to enter into such arrangements.

Employers could also request volunteers for job-shares. This arrangement enables two (or more) employees to split a full-time job between them, whilst entering into an agreement regarding hours and days of work and split of role and duties. This cuts costs for the business without letting anyone go.

Where there is no contractual entitlement to overtime, employers can stop offering it. Where a contractual right to overtime work is in place (for example, under a collective agreement), the business will need to obtain employees' consent to stop offering overtime.

Look to make savings elsewhere

Before turning to compulsory redundancies, employers should consider how budgets can be cut and costs can be saved in other areas of the business. For example, can contracts with suppliers of goods and services be reviewed with a view to reducing costs? Can other expenses and outgoings be reduced, for example.

If you decide redundancies can't be avoided then seeking volunteers at an early stage might reduce the need to make compulsory redundancies.

Although offering voluntary redundancy can take some control away from the employer in terms of selecting roles for redundancy, it is the employer's final decision as to whether or not to grant an application for voluntary redundancy.

A note of caution however - employees can be left feeling resentful if having taken the decision to opt for voluntary redundancy and it is turned down. This then has to be managed moving forwards.



Flexible furlough, payroll and claims



When the Coronavirus Job Retention scheme was launched, after the initial rush to understand how the scheme worked and what amounts could be reclaimed – a headache to understand in itself, the next challenge then presented itself in mid-March: applying it to payroll.

The complexities of the original scheme presented enough challenges; getting to grips with the legal position, and then making sure that the approach which had been taken with each employee was translated accurately to those responsible for payroll and making furlough claims.

Our advice at the time was: start preparing payroll early this month, it's going to be difficult and there are plenty of potential banana skins. That was particularly the case where people had spent part only of a payroll period on furlough, and of course further complicated by top-up beyond the Government contribution, taking holiday and earning variable pay. Spreadsheets across the country were no doubt being built, checked, double checked and triple checked – and had many scratching their heads. Including us, if we're honest.

As we head into July, with flexible furlough having started this month, it becomes even trickier to calculate and get right. So again we say, get started early, get the communications going between those responsible for managing furlough and those responsible for payroll and furlough claims, to make sure they have all the information they need.

Click [here](#) for our guidance on the rules for the new flexible furlough scheme.

Our top 5 tips of things to look out for (both for the old scheme and the new one):

- **Gross pay:** Make sure that the gross pay you are running through payroll reflects the actual gross pay you have agreed to pay anyone on furlough – this is particularly important if they earn over £37,500 and you are topping up.
- **The amount which can be claimed per day:** This capped amount changes depending on the number of days in the month, so this will be slightly lower in July than June.
- **Employers NIC:** Remember, you can only claim employers NIC on furlough pay – not any top up or amounts paid whilst working on flexible furlough. You'll need to break those elements down and claim accordingly.
- **Pension contributions:** Whilst a number of employers pay percentage contributions on earnings from zero, the statutory requirement is on earnings above the lower earnings limit, which for 2020 is £6240. You can only claim employer contributions on earnings above that amount. Also, beware salary sacrifice – this adds another layer of complexity.
- **Holiday pay:** Employees are able to take holiday whilst on furlough, if they do, those days should be paid at their normal rate of pay – but remember that you can still claim the furlough contribution to that day's pay.

Above all else - keep clear, understandable records of all of the detail of how you have calculated pay and relevant furlough claims. And good luck.



Managing annual leave during Coronavirus

On 26 March 2020, the Government introduced a temporary change to the Working Time Regulations 1998 (WTR). New guidance released on 13 May 2020 further details the changes and clarifies the position on carrying over annual leave.

What are the normal rules on holiday entitlement?

The WTR grant most workers 5.6 weeks' paid leave entitlement each year. This entitlement cannot be carried over into subsequent holiday years. There are exceptions to this, including where the employer and employee agree to carry-over up to 1.6 weeks (the maximum allowed) of statutory leave into the following year, and where an employee has not been able to take their statutory leave due to sickness or family leave.

The key change - clarification on carry-over

The guidance states that where it has not been "reasonably practicable" for the worker to take some or all of the 4 weeks' holiday due to the effects of coronavirus, the untaken amount may be carried forward into the following two leave years.

The "reasonably practicable" element means that coronavirus will need to have had an impact on the worker's ability to take their leave.

Various factors should be taken into account when considering whether it was not reasonably practicable for a worker to take leave. The government has issued [guidance and examples on their website](#) to help with this. The underlying theme in all of the examples is for the employer to consider practical alternatives to avoid an employee carrying over their leave.

The guidance suggests that employees on furlough are unlikely to need to carry forward annual leave, as they will be able to take it during the furlough period. Employers should remember however that a furloughed worker is entitled to holiday pay at their normal rate of pay (being their pre-furloughed pay). Therefore, where, due to the impact of coronavirus, the employer is financially unable to top up the employee's pay to full holiday pay the worker may be able to carry-over their leave entitlement.



How can employers manage extra annual leave?

1. Review and monitor individual holiday allowances over the coming months. Ask yourself when you may need staff most in light of current events.
2. Unless the employment contract says otherwise, an employer can require an employee to take statutory holiday on specified dates, whether or not the employee is on furlough leave, provided the required notice is given which is twice the period of holiday you require the employee to use eg a request to take 2 weeks' holiday requires 4 weeks' notice. So, in light of the answer to point 1 above you may wish to consider requiring employees to take their holiday at certain times.
3. Subject to the employment contract, an employer can require a worker not to take their carried-over leave on days requested by a worker by giving notice at least as many calendar days before the date on which the requested leave was due to start as the number of days being refused. So, for example, to refuse 4 days out of a 5 day holiday request you would have to give notice at least 4 calendar days before the date on which the leave was due to start.
4. Employers can require workers to take holiday while on furlough, provided the requisite notice requirements are met and employers are mindful of an employee's ability to 'rest, relax and enjoy leisure time' which is the fundamental purpose of a holiday.



Recent Case Decisions

Mr R O'Sullivan v DSM Demolition Ltd

Generally, employees have the right under the Employment Rights Act 1996 not to be unfairly dismissed, provided they have been continuously employed for at least two years by the date of dismissal. Calculating the relevant dates is seemingly straightforward.

The period of continuous employment begins "with the day on which the employee starts work" e.g. the start date on the individual's employment contract.

In this case, DSM argued that Mr O'Sullivan's start date was 2 November 2015. Mr O'Sullivan claimed it was 26 October 2015. The question for the

tribunal was therefore whether the unofficial work completed prior to a formal start date counted towards a period of continuous employment.

The tribunal found that Mr O'Sullivan had done work on site in the week of 26 October 2015. A statement of terms of employment however had been drawn up for Mr O'Sullivan with a 2 November 2015 start date. Moreover he was not put on DSM's payroll until 2 November 2015. It also appears he was paid cash in hand by a worker on site for earlier work which DSM's client was not charged.

Can "unofficial" work completed prior to a formal start date count towards continuous employment?

Both the tribunal and EAT held that Mr O'Sullivan had worked in the week of 26 October 2015 under an 'unofficial' arrangement, and not under a contract of employment. The result was that Mr O'Sullivan fell short of the necessary qualifying period for his claim. While the case provides guidance on continuous employment, it is important to recognise that each case will always hinge on its own facts.



Home-working – the new ‘norm’?

Covid-19 imposed home-working on employers and employees with little time to prepare. However, a number of organisations are now actively embracing home-working and the benefits it can bring – Fujitsu is the latest to follow in Twitter’s footsteps by informing staff they can work from home permanently.

Despite Boris Johnson’s announcement on 17 July, giving employers more discretion to make their own decisions about returning to the office safely from 1 August, undoubtedly many employers will want their workforce to continue working remotely for numerous reasons.

For some, it might not be possible for their full workforce to return to the workplace and follow social distancing guidelines, whilst there will be many employees who usually commute that may still be nervous about taking public transport.

Prepare for an increase in flexible working requests

- Ensure flexible working policies are up to date
- Document any revised working arrangements agreed

Any employee with at least 26-weeks continuous service has the right to make a written request for flexible working. Employers, by law, have to consider and respond to a flexible working request.

There are certain circumstances in which such a request could be refused, but these are limited to specific, albeit wide-ranging business reasons.

Make any reasonable adjustments for disabled employees

Where working arrangements place a disabled employee at a substantial disadvantage, employers must make any reasonable adjustments that would avoid that disadvantage

Check insurance policies to ensure these cover employees working from home and claims by third parties

Employers need to ensure they have the correct systems/policies and procedures in place to protect personal and confidential data and minimise the risk from cyber-attacks

Check insurance policies to ensure these cover employees working from home and claims by third parties.

Employees should also be advised to check there are no issues regarding them working from home, with their home insurer, mortgage provider or landlord

Review health and safety policies and procedures:

- Establish a system for carrying out risk assessments to ensure employees can work safely from home
- Ensure employees know how to raise any concerns they have about the suitability of their homeworking environment
- Ensure employees have the right equipment to work safely
- Consider appropriate support for mental health and managing the work/life balance

Employers have a legal duty to ensure the health and safety of all employees, including those working from home

Review the frequency/methods of communication

Managers and colleagues should keep in regular contact to maintain effective communication of business developments/manage workload/provide appropriate support/supervision and avoid issues of isolation/mental health concerns/grievances.



Reducing the impact of redundancy on remaining employees

Redundancies can be a tough and emotional process for everyone involved and that includes employees who remain working for your company.

'Redundancy survivor syndrome' can present significant challenges for employers. Employees may feel alienated from your business and struggle with low morale, motivation, commitment and a breakdown in trust.

This may result in immediate problems for your business such as:

- Difficulties retaining staff
- An increase in sickness absence
- Poor productivity and decision making
- Reduced focus and decreased performance

We explore options below to deal with change management, supporting remaining employees and helping you to move your business forwards.



Increased communication

Communication is key to improving your remaining employees' morale and commitment to your business. You should be open and honest with them about the future of the business and their roles in it, encouraging them to voice their concerns and addressing them where possible.

You should take time to revisit your business objectives and the obstacles you may face in the future. Find a way to communicate them to your employees, with a focus on the future rather than the past to help re-engage them with work and their role in helping to achieve those objectives.

Where possible, line managers should be encouraged to conduct one-to-one meetings with their team members to discuss the impact redundancies and changes to work has had on them and focus on agreeing targets for the future and reviewing progress going forwards.

Alternatively, you may choose to run a number of change-management workshops to help employees understand the change process, the emotional impact and support available to them such as counselling or access to an employee assistance programme.



Improving staff retention

Employees may worry that there won't be a position for them in the future and begin to look elsewhere, particularly if colleagues they worked with regularly are no longer in the business

- Consulting 'survivors' about the implications of the redundancy programme for themselves and the work they do;
- Provide them with practical support;
- Involve them in change programmes;
- Undertaking employee engagement exercises.



Improving sickness absence

Low morale and commitment along with a weakening of trust in management can contribute to changes of a more tangible nature, such as productivity and attendance at work.

Attendance problems can be addressed using return-to-work interviews or referrals to occupational health advisors. However, these issues should be monitored closely and not be endured over time.



Re-building trust with employees and the management team

Unsurprisingly, there may be a breakdown of trust between employees and the business following a redundancy process, particularly if it hasn't been managed well.

Sometimes employers are either unable or unwilling to take measures to protect the psychological contract of trust during downsizing exercises.

Communication should be "authentic" in tone and content and its messages should be consistent across all management levels and business functions. It should involve every employee, ensuring that each person receives the initial announcement of redundancies and continues to receive information during the redundancy process.

In addition, it is recommended:

- increased visibility of senior management; and
- providing training and coaching for managers in managing change effectively.



Improving decision making and productivity

Employees may be less inclined to take risks, possibly because they feel insecure in their jobs as a result of experiencing job losses among colleagues. They may see risk-taking and decision-making as actions that could increase an employee's profile and lead to unwanted attention.

Teamworking to encourage individuals to take risks and make decisions should be encouraged. Collective decision-making can reassure individuals because it spreads any blame and reduces the attention drawn to any one person.

Support you could offer redundancy survivors

- an employee assistance programme;
- consultation meetings with redundancy survivors;
- one-to-one discussions between employees and their line managers;
- briefing documents for managers, and Q&A documents for staff;
- access to HR;
- transition and change management for redundancy survivors; and
- monthly post-implementation reviews of progress