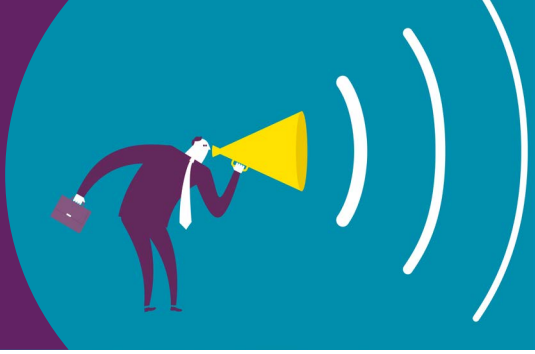
Workplace Newsletter

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

June 2020



Furlough – the latest

Since our last newsletter the government has published updated guidance on the Coronavirus Job Retention Scheme, in particular how businesses can use 'flexible furlough'.

From 1 July 2020 it will be possible for employees to work on some days (or parts of days) and be furloughed for others. For example, an employee who previously worked 9 - 5, Mondays - Fridays, could work on Mondays, Tuesdays and Wednesdays but be furloughed on Thursdays and Fridays.

Q: How will flexible furlough work?

A: Employees will be able to work part-time for their employer while on furlough. Any flexible furlough arrangement will need to be agreed between the employee and employer in writing; however, any working pattern is permitted under the scheme and there is no restriction on the length of time it must last.

Q: How will the government subsidy change?

A: The subsidy will only apply to the hours the employee is **not** working during furlough. Employers will be required to pay the employee's normal wages while the employee is working.

Read more p2>

Welcome

This edition of our monthly newsletter covers some big changes to the furlough scheme, in particular how to use flexible furlough. We've also put together a handy timeline for a one stop shop reference to the new government guidance and when the changes will happen.

As always, please follow us on LinkedIn for our latest updates. We've launched our new 'How to...' 'What is...' video series where we explain commonly used 'jargon' quickly and simply, so you know exactly what it is we're talking about or learn how to do something for yourself.

If you'd like us to cover any topics, please get in touch enquiries@outsetuk.com.

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

outset.

Q: Who can be placed on the new flexible furlough scheme?

A: Only employees furloughed for three weeks or more before 30 June 2020 can continue to be part of the scheme after 1 July 2020. Employers can no longer add new employees onto the flexible furlough scheme, with the exception of employees returning from maternity or other family leave. Employees who are back at work at the end of June can be re-furloughed provided they have been furloughed for three weeks or more.

Q: Are there changes to the way we need to make a claim?

A: Yes. Any claim for the period before 30 June 2020 must be made by 31 July 2020. After 1 July 2020, a claim must start and end within the same calendar month.

To claim the grant, employers will need to report to HMRC the hours an employee works and the usual hours an employee would be expected to work in a claim period. Employers can make more than one claim in each month, but each claim must be for a period of at least seven days.

The one exception to the seven-day claim rule is if you are making a claim for a few days at the beginning or end of a month.

Q: Are there additional record keeping duties?

A: Yes. For employees on flexible furlough, you must retain the usual hours worked by each employee, your calculation used to ascertain usual hours and the actual hours worked. These records must be kept for 6 years.

The written agreement you have with employees that agree to be flexibly furloughed must be kept for at least 5 years.

Q: How will we calculate the government subsidy if we use the flexible furlough scheme?

A: The guidance contains complex rules for calculating the amount of grant which may be claimed. Your calculation will vary according to whether you previously calculated the grant based on a fixed salary or variable pay, how many hours worked and your 'baseline' number of 'usual hours'. The government has therefore made a number of examples available. We have included the links to these pages opposite.

Your next steps

Flexible furlough is optional and you can continue to use the original furlough scheme until 31 October 2020, although it will be at a rising cost to the employer. For further information on costs, please see our Furlough timeline opposite.

These developments will naturally affect the decisions that employers are facing. We've put together a list of key reference materials to accessing the Government guidance information.

Can you claim?
Click here to find out.

Which employees can you put on furlough?
Click here to find out.

What steps do you need to take before calculating your claim?
Click here to find out.

How do you calculate how much you should you be claiming?
Click here to find out.

How do you claim your employees' wages online?
Click here to find out.

How do you report a payment in PAYE RTI?
Click here to find out.

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.

Celebrating 10 years

Last week Amanda Brown in our employment team celebrated 10 years with Outset / Nicholas Moore Specialist Employment Lawyers having joined in 2010. Congratulations Amanda!

Meet the team - Daniel Smith

Our latest meet the team is Daniel Smith in our Employment team. Read what Daniel says about himself and his career here.

What is a change of control clause?

Our latest video in our 'What is...' series by our Managing Director and Corporate lawyer, Sean Gorman, is what is a change of control clause? Click here to watch the video.

Furlough timeline: Key dates

Changes to the Coronavirus Job Retention Scheme

June 2020

The monthly cap on the furlough grant will remain at 80% of employee wages capped at £2,500.

10 June

Last chance to furlough employees and for them to be eligible under the flexible furlough scheme from 1 July 2020.

30 June

The furlough scheme closes to new entrants (with the exception of employees returning from maternity or other family leave after 10 June 2020).

July 2020

Employers can make their first claim under the new flexible furlough scheme.

1 July

- Only employers currently using the scheme for previously furloughed employees may claim.
- Start of the flexible furlough scheme.
- Employers may bring furloughed employees back to work part-time.

31 July

Employers have until this date to make any claims under the Coronavirus Job Retention Scheme in respect of furlough periods ending on or before 30 June 2020.

August 2020

From 1 August 2020, the monthly cap on the furlough grant will remain at 80% of employee wages capped at £2,500 but employers will be required to meet the cost of employer NICs and pension contributions.

September 2020

From 1 September 2020, employers will also have to pay 10% towards an employee's wages (resulting in the monthly cap on the furlough grant reducing to £2,187.50).

October 2020

- From 1 October 2020, an employer's contribution towards an employee's wages will increase to 20% (resulting in the monthly cap on the furlough grant reducing to £1,875).
- The furlough scheme will end on 31 October 2020.

International travel:

Can an employer restrict employees' travel during non-working time?

From 8 June 2020, any new passengers arriving in England must undertake a 14-day period of self-isolation. With very few exceptions, this will affect most people travelling to England.

Self-isolation will involve not going to public areas such as work, school, taking public transport or taxis. As lockdown restrictions are lifted and people are able to move between countries, coupled with the onset of summer holidays, the 14-day quarantine period will become a bigger issue for employers in the coming weeks. It therefore begs the question: can an employer restrict employees' travel during non-working time?

A review of the current quarantine measures will happen after 28 June 2020.

In the meantime, employers should consider their stance on international travel and begin communicating this to their workforce.

For example, where an employee is unable to work from home during the self-isolation period, employers may consider:

- refusing holiday requests
- designating the self-isolation period as a period of unpaid leave (although depending on timings you may need employee agreement for this)
- requiring the self-isolation period to be taken as a further period of paid annual leave

We are waiting for guidance from the government on whether it will extend entitlement to Statutory Sick Pay to employees in the above scenario. We will update you further when we receive more information.

If you are affected by the 14-day quarantine rule or believe you will be and are not quite sure what to do, please get in touch.

Believe it or not?

This month we return to our usual Believe it or not feature with some interesting facts about the workplace.

63% of employees would delegate workplace tasks to robots. The most common job suggested to delegate was manual data entry.

According to Appliances Direct, we spend 109 hours taking tea breaks at work over a year. Some excuses for not doing a tea round at work though included an allergy to tea spoons, electricity costs too much and that they had freshly painted nails.

A company in Japan recently introduced 6 extra annual leave days for non-smokers, to make up for the time off taken by smokers on cigarette breaks.

85% of GenerationZ consider an extra day's annual leave to be the most important workplace perk with flexible working at 83% and free tea & coffee at 85%.

The rise of collective redundancy consultation

As employers look to the long-term viability of their businesses, we are seeing more employers implement collective redundancy consultation processes. With the rising cost to employers of the furlough scheme on the horizon, it is unfortunately inevitable that many more employers may be forced to make large scale redundancies as one of their next steps.

Our March edition brought you an overview of collective redundancy consultation. As a quick recap however, collective consultation will be relevant to you if you propose to make 20 or more employees redundant at one 'establishment' within a period of 90 days or less.

The significant loss some businesses are suffering, coupled with the predicted slow recovery of the economy, is more than many can sustain without significant restructuring.

The precise practical issues to be considered before conducting collective consultation will vary. **We have put together some key legal and practical tips:**

General tips

1. 'Establishment' usually, but not always, refers to the geographical business location. The meaning of 'establishment' is something that needs to be checked particularly carefully if you have mobile workforces or people who habitually work from home.
2. Separate employing group companies will be considered separate employers for the purpose of the collective redundancy consultation.

Individual consultation meetings

- Individual consultation meetings can, subject to collective consultation, happen during the statutory 30/45 day period.
- Individual meetings can be 'by appointment' rather than forcing people who don't want to come to individual meetings to come to individual meetings.

Representatives

- Collective consultation processes may be unfamiliar to those that are elected as representatives. Consider if the representatives need 'orientation training' to understand their roles and responsibilities. We can help with that.
- Where the numbers of representatives exceeds the number that you were initially seeking, you may be able to avoid a ballot if you are prepared to have more representatives than you initially thought you would need.
- Where you require a ballot for the election of employee representatives, there is nothing inherently objectionable in a secret ballot being run online provided that adequate safeguards are in place to respect the secrecy of the ballot.
- The statutory minimum 30/45 day consultation period runs from the date that the statutory information is sent to the employee representatives - not the date that individuals are first put at risk.

Practicalities for facilitating communication

- Consider having virtual meeting etiquette for running collective consultation meetings. One example of this is to ask everyone to be on mute and only one person speak at a time.
- The first collective consultation meeting should usually be used as a planning meeting to determine how the rest of the collective consultation process will be run, particularly given the challenges of doing it all virtually.
- Agree that agendas will be circulated ahead of time, so that meetings can be run efficiently. This will facilitate discussions amongst the representatives themselves to agree a common position.
- Remember that there are four channels of communication going on during the collective consultation:
    - **representative to representative** - no monitoring of communication is allowed by the employer here
    - **representative to workforce** - no monitoring of communication is allowed by the employer here
    - **company to representatives** - keep an open dialogue
    - **company to workforce** - keep an open dialogue

Recent Case Decisions

TUPE and unscrupulous pre-transfer behaviour

Ferguson and ors v Astrea Asset Management

Four directors of Lancer Property Asset Management were to transfer to a company called Astrea Asset Management Ltd under TUPE. Prior to their transfer, the directors amended their own employment contracts to include substantially more favourable terms.

Following the transfer, the directors were dismissed for gross misconduct by the 'new employer' for (amongst other things) making some of the changes to their own contracts prior to the transfer.

The EAT held that, although these changes were beneficial to the directors, they were void because they had been made by reason of the TUPE transfer.

This is a welcome judgment, particularly for employers who inherit employees under TUPE. There has long been concern that unscrupulous 'outgoing employers' might be tempted to 'poison the well' by, prior to the TUPE transfer, changing the contracts of the employees transferring just to make things more expensive for the incoming employer. This case provides some support for 'incoming employers' who may need to legally challenge the outcomes of that type of pre-transfer behaviour.

Redundancy and using competitive interview processes

Gwynedd Council v Barratt

Redundancies were required following a reorganisation of the school services structure. The Council, rather than using a selection and scoring process, required teachers to apply for their former jobs in the new school. There was no consultation over the proposals, nor was there an opportunity to appeal against the dismissals permitted by the employer. The teachers who were dismissed claimed unfair dismissal and their claims were upheld by the ET and EAT.

The EAT contrasted redundancy selection processes in which employees were being considered for new posts by competitive interview with those situations where employees were being selected from a pool to decide which of them could continue doing the same role. Here, the employer effectively asked the Claimants to apply for the same/substantially the same job, rather than a new post – and by using a competitive interview process rather than a pooling process (without consultation or appeal), and that was found to be unfair.

Whilst all situations will depend on their facts, there is a dividing line. If the true position is that employees are effectively being asked to apply for their old jobs, using a recruitment process (rather than a selection pool process) that is at higher risk of being found to be unfair. If the 'new role' is genuinely different, employment tribunals will permit more latitude for 'recruitment style' subjective judgement in the selection process for that new role.

The Barrett case also reminds us that, in redundancy cases, there is no absolute rule that an appeal against dismissal must always be permitted. Whether it is appropriate to permit an appeal against dismissal and redundancy cases will usually depend upon how thorough the earlier consultation and selection process has been.

Employment Tribunal Hearings: Road Map

What has happened?

The pandemic has had a serious impact on the running of employment tribunals. While some cases have still been heard, the majority listed for hearing in April, May and most of June have been postponed. The Presidents of the Employment Tribunals in England and Wales and in Scotland have therefore published a 'road map' setting out what we can expect in terms of the listing and hearing of employment tribunal cases.

In summary, the road map sets out a four-phase process, each phase showing an anticipated increase in hearings through the use of video conferencing. The road map stresses that different regions will progress at different paces.

Even if you haven't received an employment tribunal claim, as more employers restructure in the coming months, there will likely be more tribunal claims coming through, but as the growing backlog continues to increase in size, the knock-on effect will likely continue into 2021 and 2022.

What can I do now to prepare for any potential tribunal claims and likely delays before tribunal hearings?

Just keep in mind that if you do later receive employment tribunal claims from employees who have departed, the business will need witnesses to defend those claims.

Given the current uncertainty and likely restructuring of businesses, you will need to be aware that that the individual employee witnesses who would normally do this job may have left by the time the hearing comes around. The key ways to mitigate risk associated with this are a) to ensure that the paper trail of emails and meeting notes from the redundancy consultation process clearly demonstrates what happened and what was discussed; and b) if 'likely key witnesses' do themselves leave, discuss with them prior to their leaving whether they would be willing to give evidence in any future employment tribunal hearing.

We recognise that this is not an easy area - but it is an unfortunate practicality that is worth keeping in mind.