

Welcome to today's seminar:

Employment law Covid - 19

15th April 2020

What we will cover today

- The new Covid-19 regime
- Working From Home (WFH)
- Shielding vulnerable staff
- Discrimination
- Self-isolation and sick pay
- Furlough – job retention scheme
- How to claim financial support
- Short-term working and Lay-off
- Redundancy, compulsory redundancy & fair selection
- Annual leave and holiday entitlement
- Questions and Answers

Lawson West Solicitors Employment Law and Covid-19



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Introduction

Experienced employment solicitor Vaishali Thakerar sheds light on the employment law implications of Covid-19 and outlines the main areas for human resource teams and directors.

At the end of this webinar you will have gained greater insight into how to manage several employee Covid-19 situations, questions and scenarios.

The Lockdown

On 23rd March 2020, Boris Johnson announced a package of measures that constitute the greatest restriction of liberty this country has ever seen in peace time:

“Travelling to and from work but only where this is absolutely necessary and cannot be done from home.”

The Lockdown

Current government advice is for everyone to stay at home, except in specific situations. This includes:

- **only going outside for food, health reasons or work** (where this absolutely cannot be done from home)
- **staying 2 metres (6 feet) away from other people** ('social distancing')
- **avoiding busy commuting times on public transport where travel is essential**
- **washing your hands as soon as you get home**

Employers should support their workforce to take these steps. This might include agreeing more flexible ways of working.

Working from home

For any employee who can work from home should do so. If the employee is working from home, the employer should:

- pay the employee as usual
- keep in regular contact
- check on the employee's health and wellbeing

What if an employee does not want to go into work?

If the employee cannot do their job from home should continue to work with the social distancing measures and hygiene measures in place.

If the employee does not want to go into work an employer should consider:

- Unpaid leave
- Holidays
- Disciplinary action

Vulnerable staff and shielding

- **Government advises anyone who's at high risk of getting a severe illness if they catch coronavirus ('vulnerable people') to take particularly strict social distancing measures.**

Employers must be especially careful and take extra steps for anyone in their workforce who is in a vulnerable group. They include, but are not limited to, those who:

- have a long-term health condition, e.g. asthma, diabetes or heart disease, or a weakened immune system as the result of medicines such as steroid tablets or chemotherapy
- are pregnant
- are aged 70 or over
- care for someone with a health condition
- that might put them at a greater risk

Shielding extremely vulnerable staff

If you have staff that have received a letter from the NHS to say they should take extra steps to protect (or 'shield') themselves because of an underlying health condition. This is because they are at higher risk of severe illness from coronavirus.

Employees should talk to their employer as soon as they can if they:

- have been told to start shielding
- think they might get a letter telling them to start shielding
- If an employee receives a letter telling them to start shielding, they should stay at home for at least 12 weeks.

Discrimination and unfair treatment

An employee is protected by law against unfair treatment and dismissal, if it's because of:

- pregnancy
- age
- a health condition that's considered a disability under the Equality Act

It does not matter how long they've worked for the employer.

It could be unlawful discrimination on the grounds of pregnancy, disability or age if an employer either:

unreasonably tries to pressure someone to go to work

unreasonably disciplines someone for not going to work

Self isolation and Sick Pay

An employee is entitled to be paid statutory sick pay if:

- they have coronavirus
- they have coronavirus symptoms, e.g. a high temperature or new continuous cough
- someone in their household has coronavirus symptoms
- they've been told to self-isolate by a doctor or NHS 111

If someone has symptoms and lives alone, they must self-isolate for 7 days.

If someone lives in a household and is the first to have symptoms, they must self-isolate for 7 days. Everyone else in their household must self-isolate for 14 days.

If anyone else in the household starts displaying symptoms, the person with the new symptoms must self-isolate for 7 days. This is regardless of where they are in the 14-day isolation period.

Coronavirus job retention scheme (Furlough)

This scheme is available to employers who use PAYE payroll from 28 February 2020. This may include:

- employees
- workers
- those who do casual work
- those who have zero-hours contracts
- **Eligibility**
 - select and tell ('designate') the employees affected that they're furloughed
 - keep employees on the employer's payroll
 - make sure furloughs last at least 3 weeks
- **Keep a written agreement to the furlough**

What if a staff member has left after the 28th February 2020

- The employer can use their discretion and rehire the member of staff but this is not compulsory.
- They could only furlough re-engaged employees if they have no work for them to do.

How to I select between staff who will be furloughed?

If an employee's job cannot be done from home, you can furlough them

You can also furlough a member of staff if they want to due to their childcare commitments due to school closures

Employers must select who they want to furlough on a fair way in order to avoid any form of discrimination.

You need to get agreement from the employee that they are happy to be furloughed in writing unless there is a lay off clause in your contract of employment – this letter should also detail what the employee will get paid in total.

If an employee disagrees with the decision about being selected for furlough or how much they'll get paid, they'll need to talk to their employer and try to come to an agreement.

Furlough and rotation

- The minimum period to be furloughed is 3 weeks
- Many employers have considered this as a fair means of introducing furlough. This is permissible provided that each individual is furloughed for at least three weeks on each occasion.

Can the 'furloughed employee' work elsewhere?

Yes

If their existing employment contracts permit them to, employees can take on new work for other employers during furlough. Employers who are furloughing employees should make their position on this point clear in their communications with employees.

What will a furloughed employee be paid?

- The government will pay employers 80% of wages, up to a maximum of £2,500 a month for each furloughed employee.
- The employer has a discretion if they want to top up the wages to 100%, but they do not have to. If the employer decides not to top up the wages, they should tell the employee and explain why not.
- If furloughed employees are paid 80% of their wage, this might mean they get less than the minimum wage. This is allowed as long as they're not working.
- But if employees do training for their job during furlough, they must get the current minimum wage for these hours. For example, if an apprentice continues with their apprenticeship course while furloughed.

What counts as pay?

- For salaried employees, pay is their normal salary as of 28 February 2020, but can also include regular payments which employers are obliged to pay their employees, such as past overtime and compulsory commission payments.
- For employees whose pay varies, their pay is the higher of the pay from the equivalent pay period last year or the average pay of the past 12 months.
- Discretionary commissions and bonuses are excluded, as are benefits in kind.
- Where employers operate salary sacrifice, only the post-sacrifice pay may be claimed. However, HMRC has confirmed their view that the COVID-19 outbreak is a life event which may warrant changes to the salary sacrifice scheme.

How to claim financial support

- **Once the government's new system is available through HMRC (HM Revenue & Customs), employers will be able to make a claim for financial support. Claims can be backdated to 1 March 2020.**
- **The portal will be open from the 20th April 2020 with the first payments being made on the 30th April 2020.**
- **Payments will be made every 3 weeks. This is because 3 weeks is the shortest period a furlough can last.**
- **If employers need short-term cash flow support, they may be eligible for a 'Coronavirus Business Interruption Loan'.**

What other options do you have?

Short term working?

- If you need to need to close down your business for a short period of time you can ask staff to reduce their contracted hours.
- If this is an option you need to talk to your staff as early as possible and throughout the closure.
- Unless it says in the contract or is agreed otherwise, they still need to pay their employees for this time.

Lay-off

Employees who are laid off and are not entitled to their usual pay might be entitled to a 'statutory guarantee payment' of up to £30 a day from their employer.

Lay-off ...continued

This is limited to a maximum of 5 days in any period of 3 months. On days when a guarantee payment is not payable, employees might be able to claim Jobseeker's Allowance from Job Centre Plus.

Your existing contracts of employment must have a lay off clause

Using annual leave

- Employers have the right to tell employees and workers when to take holiday if they need to.
- An employer could, for example, shut for a week and tell everyone to use their holiday entitlement.

Other cost savings with staff

- Seek to agree a postponed start date for new recruits, or consider withdrawing job offers
- Take care that any recruitment freeze does not place employees in an intolerable position regarding increased workload.
- Review whether or not any new vacancy can be filled by redeploying staff with appropriate retraining where necessary.
- Review overtime to see if it can be reduced or stopped altogether.
- Invite staff to volunteer for reduced hours or flexible working
- Consider inviting employees to apply for sabbaticals on part or no pay.
- Seek to agree a temporary reduction in pay e.g. 10% reduction in salary

Redundancy

Redundancy is when you dismiss an employee because you no longer need anyone to do their job. This might be because your business is:

- changing what it does
- doing things in a different way, for example using new machinery
- changing location or closing down

For a redundancy to be genuine, you must demonstrate that the employee's job will no longer exist.

Compulsory redundancy

If you decide you need to make compulsory redundancies, you must:

- **identify which employees will be made redundant**
- **make sure you select people fairly - do not discriminate**

Fair selection

Fair reasons for selecting employees for redundancy include:

- **skills, qualifications and aptitude**
- **standard of work and/or performance**
- **attendance**
- **disciplinary record**
- **You can select employees based on their length of service ('last in, first out') but only if you can justify it. It could be indirect discrimination if it affects one group of people more than another.**

What could be unfair selection?

You must not select an employee for redundancy based on any of the following reasons:

- pregnancy, including all reasons relating to maternity
- family, including parental leave, paternity leave (birth and adoption), adoption leave or time off for dependents
- acting as an employee representative
- acting as a trade union representative
- joining or not joining a trade union
- being a part-time or fixed-term employee
- age, disability, gender reassignment, marriage and civil partnership, religion or belief, sex and sexual orientation
- pay and working hours, including the Working Time Regulations, annual leave and the National Minimum Wage

Redundancy consultation

- If you do not consult employees in a redundancy situation, any redundancies you make will almost certainly be unfair and you could be taken to an employment tribunal.
- You must follow 'collective consultation' rules if you're making 20 or more employees redundant within any 90-day period at a single establishment.
- There are no set rules to follow if there are fewer than 20 redundancies planned, but it's good practice to fully consult employees and their representatives. An employment tribunal could decide that you've dismissed your staff unfairly if you do not.
- Consultation does not have to end in agreement, but it must be carried out with a view to reaching it, including ways of avoiding or reducing the redundancies.

Suitable alternative employment

- If you do decide to make redundancies you must consider any suitable alternative roles/vacancies which are available

Holidays

ACAS has guided that employers should be flexible as they can about holiday during the coronavirus pandemic.

It's a good idea to:

- talk about any plans to use or cancel holiday during coronavirus as soon as possible
- discuss why holiday might need to be taken or cancelled
- listen to any concerns, either from staff or the employer
- welcome and suggest ideas for other options
- consider everyone's physical and mental wellbeing
- be aware that it's a difficult time for both employers and staff

Furloughed staff and holidays

- Furloughed staff can request and take their holiday in the usual way, if their employer agrees. This includes bank holidays.
- Furloughed workers must get their usual pay in full, for any holiday they take.

Carrying over annual leave due to the virus

- During the coronavirus outbreak, it may not be possible for staff to take all their holiday entitlement during the current holiday year.
- Employers should still be encouraging employees to take their paid holiday.
- The government has introduced a temporary new law allowing employees and workers to carry over up to 4 weeks' paid holiday into their next 2 holiday leave years. This law applies for any holiday the employee or worker does not take because of coronavirus, for example if:
 - they're self-isolating or too sick to take holiday before the end of their leave year
 - they've had to continue working and could not take paid holiday

Cont ...

- They may also be able to carry over holiday if they've been 'furloughed' and cannot reasonably use it in their holiday year.
- Some employers will already have an agreement to carry over paid holiday. This law does not affect any agreements already in place.
- If an employee or worker leaves their job or is dismissed and has carried over paid holiday because of coronavirus, any untaken paid holiday must be added to their final pay ('paid in lieu').

What about bank holidays?

- Employers can still require employees to take paid holiday on a bank holiday, unless they're off sick.
- Employees can also ask to take a day's paid holiday. If the employer agrees, they must get their usual pay in full for bank holidays.
- If bank holidays cannot be taken off due to coronavirus, employees should use the holiday at a later date in their leave year.
- If this is not possible, bank holidays can be included in the 4 weeks' paid holiday that can be carried over. This holiday can be taken at any time over the next 2 holiday leave years.

What if an employee needs to look after a vulnerable person?

- Employees are entitled to time off work to help someone who depends on them (a 'dependant') in an unexpected event or emergency.
- A dependant does not necessarily live with the person, for example they could be an elderly neighbour or relative who relies on the person for help.
- There's no statutory right to pay for this time off.
- The amount of time off an employee takes to look after someone must be reasonable for the situation.
- If a dependant such as a partner, child or relative in the same household gets coronavirus symptoms, they should receive Statutory Sick Pay (SSP) as a minimum for this time.
- They'll also need to follow self-isolation guidance.

Discrimination Issues

Question:

What if an employee refuses to attend work because they have a disability which they believe puts them at high risk of serious illness if they catch COVID-19, can an employer dismiss them, or if not, what pay are they entitled to?

Answer:

A requirement imposed by an employer to continue travelling to and attending work, or to not pay or to dismiss them due to their absence in this scenario, could amount to discrimination. In addition, if the reason the employee self-isolates is because of a disability that puts them into a high-risk category such as an auto-immune disease or a respiratory condition, disability discrimination issues may arise.

Question:

What if an employee has severe anxiety and is afraid to attend work?

Answer:

An employer should be sympathetic to any concerns staff may have and try to resolve them to protect the health and safety of the employee. For example, if possible, the employer could offer flexible working, or allow the employee to take holiday or unpaid leave.

If the employee has severe anxiety this can amount to a disability and reasonable adjustments should be considered

Question:

What if an employee is aged 60 and wants to self isolate, does an employer have to let them?

Answer:

Even if the employee does not have health issues there could be age discriminatory issues which employers should consider. i.e. consider unpaid leave or permit them to use annual leave

Question:

A member of staff is pregnant and classed as vulnerable what should I do?

Answer:

You must make the workplace safe for the employee. This may include altering the working conditions or hours in order to reduce the risk. They should demonstrate how they will do this through a risk assessment.

If you cannot make the job safe (such as letting the employee work from home) or find an alternative work the you must suspend the employee on full pay – failure to do so could amount to pregnancy discrimination.

Questions



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Employment Law and Covid-19



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