



Employment Law Newsletter - April 2020

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Temporary changes

To make it easier for employers during the coronavirus pandemic, a number of rules have been relaxed. Some have required new legislation, others a loosened approach. Here are the key ones:

Carrying-over annual leave

On 26th March 2020, the Government amended the Working Time Regulations 1998 (WTR). The change means workers can carry up to four weeks of unused leave into the next two leave years 'where it is not reasonably practicable for a worker to take some, or all, of the holiday to which they are entitled due to the coronavirus', the Government said. It is aimed at allowing businesses under particular pressure from the impacts of COVID-19, the flexibility to manage their workforce better, while protecting workers' right to paid holiday.

The phrase 'due to the coronavirus' includes effects on the worker, the employer, or the wider economy or society. You can still require a worker not to take this carried-over annual leave on particular days where you have good reason to do so.

You remain under an obligation to ensure that workers have adequate opportunity to take their holiday, so it should not be replaced with pay in lieu unless the worker is leaving your business.

Right to work checks

These have been temporarily adjusted so that you can:

- ask the individual to submit a scanned copy or photo of their original document(s) by email or using a mobile app
- hold a video call with them and ask them to hold up their original document(s) to the camera so you can check them against your digital copies

- record the date you made the check and mark it as: 'adjusted check undertaken on (insert date) due to coronavirus'.

If they have a current Biometric Residence Permit or Biometric Residence Card or status under the EU Settlement Scheme, you can use the online right to work checking service during your video call.

You can still contact the Home Office Employer Checking Service to verify that someone has the right to work if they can't provide you with satisfactory documents.

What should you do when these temporary measures end?

Within eight weeks of these measures ending, you must carry out retrospective checks, in the usual way, on all those who started work or required a follow-up check whilst the measures were in place. Mark this check as: 'the individual's contract commenced on (insert date). The prescribed right to work check was undertaken on (insert date) due to coronavirus'. Retain copies of both checks on file.

Changes to family pay

For people taking family-related leave, it has been unclear how a reduction in pay due to furlough before beginning leave would affect their pay. The snappily titled Maternity Allowance, Statutory Maternity Pay, Statutory Paternity Pay, Statutory Adoption Pay, Statutory Shared Parental Pay and Statutory Parental Bereavement Pay (Normal Weekly Earnings etc.) (Coronavirus) (Amendment) Regulations 2020 came into force on 25th April 2020.

In the case of Statutory Maternity Pay (SMP), the regulations provide that where a woman is on furlough during part or all of the relevant period and her pay is reduced as a result, her normal weekly earnings for the purposes of eligibility and the rate payable for SMP will be calculated based on the pay she would have received if she were not furloughed.

The regulations make similar amendments in respect of maternity allowance, statutory paternity pay, statutory adoption pay, statutory shared parental pay and statutory parental bereavement pay, so that employees are not disadvantaged in relation to these statutory payments as a result of their being furloughed.

The regulations apply where the first day of the period in which the relevant payment or allowance is payable is on or after 25th April 2020.

Data Protection

On 15th April 2020, the Information Commissioner's Office (ICO) adjusted its regulatory approach to reflect the impact of COVID 19. While it will continue to recognise the rights and protections granted to people by the law around their personal information and their right to freedom of information, it will focus its efforts on the most serious challenges and greatest threats to the public. Specifically, it has promised to take firm action against those looking to exploit the public health emergency through nuisance calls or by misusing personal information.

What does this mean in practice?

- Although your business should report personal data breaches within 72 hours, the ICO will take a proportionate approach if this crisis affects your ability to do so.
- The ICO has stood down all audit work.
- Before issuing fines, the ICO considers the economic impact and affordability, which in these circumstances may mean the size of fines is reduced.
- The reduction in your organisations' resources could affect your ability to respond to subject access requests and the ICO will take this into account when considering formal enforcement action.

Remember to document your decision-making even if you cannot respond to freedom of information requests as quickly as you would like.

Are you ready for life after-lockdown?

Adjusting to returning to the workplace will present us with as many and varied challenges as

leaving it. What should you do now?

Managing the return

We're likely to emerge from lockdown gradually with government guiding our return with a dimmer switch rather than an on/off button. Those whose roles require them to be in the workplace will return first, while others who can work remotely continue to do so. Decide who you need in the workplace, when and why. Communicate your decision simply and clearly.

Health and safety

Social distancing and guidelines on using good hygiene to control infection will still be with us when we return. Consider official guidance for employers, and your specific sector. Decide whether you can or should test employees for COVID-19 before they return. Resources may be scarce with test kits being reserved for use by those in public services such as healthcare. Have more than one plan. Don't forget the privacy and data protection issues involved in processing employee's health data.

You will need to instruct your workers clearly on your hygiene requirements and provide appropriate soap, water, hand sanitiser and tissues. Decide how you will manage shared office space and any rules on eating and drinking at work along with the consequent requirement to regularly clean objects and surfaces that are touched regularly. You may wish to stagger break times to avoid congestion in communal areas.

We can learn lessons from supermarkets' use of directional barriers and floor markings to help employees, and customers, to keep their distance and from delivery businesses that leave packages on doorsteps and step back to wait for the customer to collect.

Mental Health

It will be natural for employees to worry about using public transport and working with colleagues. Decide now how you will allay those fears. Plan what you will say, how you will say it and your business's approach to, and support for, those who feel unsafe and are too scared to return when you need them.

Remember that some of your people will have lost loved ones. Grieving will be difficult as they will have been unable to spend their last days with them and attendance at the funeral will have been restricted. Promote your assistance programme, occupational health, using your mental health first aiders and any external sources of support.

Consider whether HR, or line managers should speak to people to find out how they are and what work they may be able to do on their return. If appropriate, arrange a group working space, e-mail chain or page on the intranet for employees to keep in touch and chat about non-work related things, from film recommendations to photos of pets.

Strike the right balance between supporting staff but not invading their privacy. Be careful about sharing confidential information about an employee's mental health with colleagues.

The role of mental health first-aiders should be unobtrusive and never stray into the realms of diagnosing or treating mental health issues. Be clear that, while the first-aiders can provide support, they are not mental health professionals.

Flexibility

The lockdown has helped us all improve how we work remotely. Returning to the workplace will provoke conflicting feelings. People will be pleased to see colleagues face-to-face but may resent the daily commute (and its cost) when they think they could work just as effectively at home. Some will have to balance work with their caring responsibilities or be worried that in the time they have been away the business has formed the view that they are no longer needed. Be flexible in how you allow employees to work and interact. The return will be gradual.

Money

Cutting hours, deferring pay and furlough leave will have left many of your people with less money while at the same time their costs will have increased as a result of families being based at home leading to greater food costs and higher utility bills.

Second job

Be clear about whether you will permit your employees to earn extra money elsewhere, and if so whether they require written authorisation.

Housing

Remind employees with a mortgage to check whether their lender is offering payment holidays and remind rental tenants about the additional protection in place for at least three months from 26th March 2020.

Transport

Most train and bus operators allow season ticket refunds for unused travel time, including tickets bought through workplace loan schemes. Company car drivers on furlough may be able to take advantage of relaxed rules around benefit-in-kind taxation if they "virtually" hand the car back to their employer (for example, by posting the keys back). Encourage workers to explore their options.

Childcare

Refunds and freezes of nursery fees depend on individual providers, so encourage employees to talk directly to their nursery. Employees who use the government's tax-free childcare system can withdraw funds from their account - but there may be downsides to doing so. HMRC's Childcare Service hotline can provide the latest guidance.

How can you manage ongoing disciplinary issues?

Even in lockdown your business will face issues of misconduct, and, where employees are still working, poor performance and absence. Typically, you would arrange a formal meeting to discuss and resolve the issue. But not now.

Capability

A fair process demands that you draw shortcomings to the employee's attention and give them a reasonable opportunity to improve. You can't do that if you have furloughed the employee. If they are working at home, it may be difficult for you to monitor them or provide sufficient support to help them improve. Formal performance management may need to be parked.

Conduct

Allegations of gross misconduct are different. The employee, and their conduct, may pose a risk to their colleagues, your customers or your business. The basic tenets of a fair disciplinary process warrant that the employee understands the accusation they face; that they have a reasonable opportunity to respond to that accusation; and that you consider their explanation with an open mind.

Hearing

You will be accustomed to communicating with your employees by e-mail but ensure that you have their current e-mail address and that they have the ability to open any attachments that you send them. Meet online using both audio and video features of whichever software your business uses. Ensure your employee understands its features so that they are not disadvantaged. Try to replicate a face-to-face meeting as far as possible.

Companion

Allow the employee to have a companion logging in remotely who can support them and make representations on their behalf.

Procedure

Your disciplinary procedures may not have anticipated these circumstances.

Reasonableness

But the overarching principle is reasonableness. If you act reasonably at each stage of the disciplinary process, an employment tribunal will understand why you have departed from your normal practices.

If you would like to discuss these or any other issues facing your organisation please speak to your usual contact at Watershed or Keith Morgan on +44 161 703 5611

watershedhr.com

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