

THE DIFFICULT DECISIONS



In previous editions of these updates we have covered the crucial issues of managing employees during these challenging times. That started with working from home issues, reduced working hours, and the obvious welfare and protection issues.

Advice then moved to managing furlough options, such as the processes for selection and communication, rotation and extension of the scheme as it has evolved. Further changes to furlough are coming, and 9 June was the last day you can furlough someone for the first time and make a claim from HMRC.

The planned phasing out of furlough so that employers start to pay a share of the cost start on 1 August, and the part time/ 'flexible' furlough details are to be announced this week. A fast moving and complex issue!

This edition covers the more emotive issue of whether you can afford to return all employees to work or whether you need to consider some redundancies.

One frequent question, is whether notice can be served whilst an employee is on furlough leave. The simple answer is yes. The amount that needs to be paid to the employee (furlough pay, or normal pre furlough salary) depends on what their contract of employment says regarding notice period.

You should speak to your legal or HR adviser to understand this point. You must of course ensure you follow a full and fair process, and make fair and reasonable decisions in order to protect against unfair dismissal claims. Again, always take legal advice when considering redundancy dismissals.

Employment lawyers are already seeing an increase in Tribunal claims being issued by employees as a result of COVID-19 which is likely to rise further following the outcomes of redundancy exercises over the coming weeks and months. It is therefore vital that your processes are fair and consistent following the most recent guidance.

Under normal circumstances, the redundancy payment is calculated based on the employee's income in the previous 12 weeks where working hours vary. Employers need to be mindful not to use furlough pay for the calculation of a statutory redundancy payment. The CJRS Guidance is clear that normal employment laws apply – therefore a 'week's pay' for the purposes of redundancy calculations will be based on their normal contractual salary. Employers should also be mindful of the National Minimum Wage Increase which has taken effect since the introduction of furlough and the impact that this will have on the statutory redundancy payment calculation. If you are in anyway unclear around the normal redundancy calculation then we recommend that you seek legal advice.

The sad reality is that many employers may not need all of their employees in the near future or will have to make changes to reduce employment costs (salary reductions, freezes on bonus schemes). The focus must be on careful cost control

and perhaps some headcount reductions in order to protect those jobs that you will need in future. The sooner these decisions are made, the more likely that the notice period can be covered (in part at least) by the furlough scheme. Most employees hate uncertainty. If changes are needed, now is the time to begin consultation.

There is one other key issue to consider for furloughed staff. Furloughed staff have continued to accrue annual leave in the normal way, and many employers are starting to force employees to take some holiday now. Enforced annual leave is possible for those on furlough but the employer is required to top up so that any holiday is paid at 100% of normal pay (this includes for bank holidays). An employer must give double the notice period of the length of leave – so if you want an employee to take one week of annual leave during furlough, you need to provide two weeks' notice as an absolute minimum. You can also require that holiday is taken during notice periods subject to providing adequate notice and the terms of their contract of employment.

So don't forget the backlog of holiday entitlement and the impact on your people needs in the immediate future as people returning from furlough, and then taking significant periods of annual leave will stunt your recovery from the impact of COVID-19.

As with most people related issues, a good paper trail is key. You should record as a minimum:

- All communications with an employee regarding furlough – five years
- The furlough agreement with the employee – five years (if you are extending periods of furlough, this should be done following agreement, ideally in writing)
- Any claims for reimbursement made under the CJRS – six years – please refer to the Government CJRS guidance on this as HMRC requires you to keep specific records relating to the amount of payments.
- Records of any training undertaken by furloughed employees
- A record of why employees were placed on furlough – details of a downturn, forced closure, etc

Inevitably this note just scratches the surface of this important and emotive issue. You must ensure you take detailed advice from your lawyers or HR advisers. The detail of this note was produced with the help of Rory Wakeling of Kitsons who are working with many employers on these very issues. So if you are not getting the support you need, please don't hesitate to contact Rory or Jayme Nicholson, Rhodri Davey or Rosie Evans at employment@kitsons-solicitors.co.uk they would be happy to discuss any issues that you are facing, even if it is just as a sounding board to assist in decision making going forwards.



7 SANDY COURT, ASHLEIGH WAY, PLYMPTON, PLYMOUTH PL7 5JX

01752 220979

