Gaby Hardwicke SOLICITORS

Briefing Note: Ending Furlough Leave and Recalling Staff

An Introduction to the Briefing Note

This may be read in conjunction with our Briefing Note: Coronavirus Issues for Employers, which was last updated on 17 April 2020. That note will be reissued with an update at the end of May 2020, once the Government have announced the terms of the CJRS, which will continue in its present form until the end of July 2020 and will then revert to a shared cost model until the end of October 2020. In the meantime, the Government on 10 May 2020 announced a change of emphasis from the lockdown, under which employees who are unable to work from home, are now encouraged to return to work, with further workplaces being able to open from 1 June 2020.

Briefing Note
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The arrangements for bringing staff back from furlough, may prove to be as difficult for employers as the original decision to furlough was. This timely Briefing Note outlines the rights of employers to end a period of furlough leave and call their employees back to work. It is also intended to assist employers to deal with common scenarios or challenges by employees.

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1. What must I do before I can end furlough leave?

Before requiring employees to come back from work, it is necessary for employers to have particular regard to their health and safety obligations. These obligations include but are not limited to risks associated with contracting or passing on the Coronavirus. The Government have produced eight separate guides under the heading Working Safely during Coronavirus (COVID 19) (**COVID Secure Guidance**) for different types of workplace including construction and other outdoor work; factories, plants and warehouses; labs and research facilities; offices and contact centres; other peoples homes; restaurants offering take away and deliveries; shops and branches and vehicles https://www.gov.uk/guidance/working-safely-during-coronavirus-covid-19.

Under the Management of Health and Safety at Work Regulations, and now under the COVID Secure Guidance, employers are required to carry out a suitable and sufficient assessment of risks to health and safety. The assessment should cover risks to employees, but also to anybody else who might be affected by the business (e.g. suppliers, consultants, customers and other visitors). Existing risk assessments should be updated to expressly cover the risks presented by COVID 19 and should be kept under review to ensure that they comply with the COVID Secure Guidance, which will inevitably change as new workplaces open and new risks emerge. Risk assessment templates and completed workplace specific case studies can be obtained from the useful HSE website https://www.hse.gov.uk/simple-health-safety/risk/risk-assessment-template-and-examples.htm.

The COVID 19 risk assessment must be made available to all staff and where there are 50 or more employees must be published on the employers website. It is of course not sufficient just to have thought about the risks, employers are also required to take reasonable steps and care to avoid those risks.

The COVID Secure Guidance enables employers to download a poster designed to reassure staff and visitors that they are entering a COVID Secure workplace. In particular it confirms that the employer has:-

- carried out a COVID-19 risk assessment and shared it with the workforce
- cleaning, handwashing and hygiene procedures in line with guidance
- taken all reasonable steps to help people work from home
- taken all reasonable steps to maintain a 2m distance in the workplace
- done everything practical to manage transmission risk, where people cannot maintain a 2m distance

Given the guidance on social distancing, one of the most obvious areas that employers will need to focus upon is the issue of proximity. It is likely that employers will need to create a minimum distance between co-

workers and customers and, in some cases, this might involve limiting the number of people who can be present in the workplace at a time, bearing in mind that it is only those who cannot work from home who should be coming into the work place at all.. Employers will therefore need to give thought to matters such as:

- Hygiene measures – e.g. requiring handwashing at certain intervals, discouraging handshakes, requiring staff to clean computers and phones after use, regular deep-cleans.
- Supplying hand sanitiser, gloves and where appropriate face masks
- Installing screens where staff come into contact with members of the public
- Ensuring staff sit side by side rather than face to face
- Using floor tape to ensure separation around the workplace.
- Limiting use of shared equipment and facilities – e.g. staggering lunchtimes to limit the number of employees present in the kitchen area, asking staff to supply their own lunches to ensure canteens remain closed,
- Whether workstations need to be moved
- Whether it is feasible to have all staff return to work at the same time, or whether an alternative solution should be found – e.g. allowing or requiring some staff to work partially from home, or where this is not possible, a phasing of returns
- Whether it may be necessary to recall employees on shorter hours or adopt staggered shifts – whether simply to minimise the number of employees present in the workplace at any one time, or in order to avoid the need for employees to travel during peak times (see Changing Terms below)
- Requiring employees to undergo tests
- Dealing with employees and those they live with who display symptoms and ensuring they self-isolate
- How meetings, supervisions and other face-to-face contact should be managed
- How to manage contact between employees and customers, suppliers and other visitors.
- Whether it is safe to recall certain groups of employees at all (see 'Vulnerable Employees').

A full review of all of the pragmatic measures set out in the COVID Secure Guidance is beyond the scope of this briefing note and employers are strongly advised to refer to the particular guidance that applies to them bearing in mind that more than one could apply.

In addition to the risk assessment, employers will need to give clear health and safety guidance to employees ahead of any return, making clear that any failure to adhere to the guidance or exposing others to risk may attract disciplinary action up to and including dismissal.

Ideally before staff return from lockdown, the employer should consult with health and safety representatives of the workforce. Where the employer recognises a trade union, the union will appoint the safety representatives. If as in most workplaces, no trade union is recognised, the employer can choose whether to consult with the employees individually or via safety representatives appointed or elected by the workforce. Such representatives have statutory functions and enjoy protection under the Health and Safety (Consultation with Employees) Regulations 1996 (as amended). The larger the workforce the more manageable consultation becomes through the use of safety representatives, who are expected to consult not just management but the staff they represent as well.

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Employers may also wish to discuss their risk assessments and any intended guidance to staff with their insurers before re-opening their business.

2. Vulnerable Employees

In all cases employers will need to pay particular care to those employees who fall into vulnerable groups. In this respect the guidance has recently changed. There are now two categories of vulnerable employee.

Clinically extremely vulnerable individuals are strongly advised not to work outside their home. They may include the following people. Disease severity, history or treatment levels will also affect who is in the group:-
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1. Solid organ transplant recipients.
2. People with specific cancers:
    - people with cancer who are undergoing active chemotherapy
    - people with lung cancer who are undergoing radical radiotherapy
    - people with cancers of the blood or bone marrow such as leukaemia, lymphoma or myeloma who are at any stage of treatment
    - people having immunotherapy or other continuing antibody treatments for cancer
    - people having other targeted cancer treatments which can affect the immune system, such as protein kinase inhibitors or PARP inhibitors
    - people who have had bone marrow or stem cell transplants in the last 6 months, or who are still taking immunosuppression drugs
3. People with severe respiratory conditions including all cystic fibrosis, severe asthma and severe chronic obstructive pulmonary (COPD).
4. People with rare diseases that significantly increase the risk of infections (such as SCID, homozygous sickle cell).
5. People on immunosuppression therapies sufficient to significantly increase risk of infection.
6. Women who are pregnant with significant heart disease, congenital or acquired.

People who fall in this group should have been contacted to tell them they are clinically extremely vulnerable.

Clinically vulnerable individuals, who are at higher risk of severe illness, include those who are

1. aged 70 or older (regardless of medical conditions)
2. under 70 with an underlying health condition listed below (that is, anyone instructed to get a flu jab as an adult each year on medical grounds):
    - chronic (long-term) mild to moderate respiratory diseases, such as asthma, chronic obstructive pulmonary disease (COPD), emphysema or bronchitis
    - chronic heart disease, such as heart failure
    - chronic kidney disease
    - chronic liver disease, such as hepatitis
    - chronic neurological conditions, such as Parkinson's disease, motor neurone disease, multiple sclerosis (MS), or cerebral palsy
    - diabetes
    - a weakened immune system as the result of conditions such as HIV and AIDS, or medicines such as steroid tablets
    - being seriously overweight (a body mass index (BMI) of 40 or above)
    - pregnant women

If an employee is clinically vulnerable (but not extremely clinically vulnerable) and they cannot work from home, they should be offered the option of the safest available on-site roles, enabling them to stay 2m away from others. If they have to spend time within 2m of others, employers should carefully assess whether this involves an acceptable level of risk.

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As for any workplace risk the employer must take into account specific duties to those with protected characteristics, including, for example, expectant mothers and those with disabilities, which will include many who fall into the clinically vulnerable category. Disabled employees have additional protections under the Equality Act 2010 including:-

- the right not to be treated less favourably than an able bodied employee
- the right not to be subjected to unfavourable treatment for a reason related to their disability, which cannot be justified
- the right not to be subject to a provision, criterion or practice that subjects them and other disabled people in a similar situation , to a particular disadvantage, which cannot be justified
- the right to have their employer make reasonable adjustments to any provision, criterion or practice that subjects them to a substantial disadvantage
- the right not to be harassed because of their disability
- the right not to be subjected to a detriment because they have suggested that one of the above may have occurred.

Particular attention should also be paid to people who live with clinically extremely vulnerable individuals, who may also enjoy protection by being associated with a disabled person. A full consideration of the rights of disabled people is covered in other briefing notes available on our website but we strongly advise that you take expert legal advice should a potentially disabled employee raise any concerns about the arrangements for their return to work.. In some cases the employer may also be wise to seek specific occupational health guidance and consult with their insurers before recalling them to work.

Ultimately, if there is no safe means for a clinically vulnerable employee to return, their absence may be treated as sickness in the usual way.

Pregnant employees, however, attract specific protection:

- An employer must undertake a sufficient assessment of risk to the health and safety of an expectant mother and her baby
- Insofar as it is reasonable to do so, an employer must alter the employee's role or hours of work to avoid the risk
- If it is not reasonably possible to alter the employee's hours or work to avoid the risk, an employer must offer suitable alternative employment, if this avoids the risk
- If it is not reasonably possible to avoid risks by altering the role or hours, or by offering redeployment, an employer must suspend the employee on full pay.

3. How much notice must we give an employee to bring them back to work?

Whilst employers and employees are technically required to have agreed with each other that the employee will go onto furlough leave, in almost all cases the decision to end furlough will be that of the employer alone. Employers who have resorted to furlough leave should have a written agreement with the employee which outlines the terms of their furlough leave. Some furlough agreements may specify that the employer is entitled to bring an end to the furlough leave and require the employee to return to work immediately or on a set number of days notice..

If a furlough agreement does not specify how much notice an employer must give – or, even, if it makes no provision for ending furlough leave early at all -, it is likely to be an implied term of the agreement that the employer can end furlough leave and recall the employee to work on "reasonable" notice. What is reasonable will always depend upon the circumstances of the case, but in most cases we anticipate that 48 hours notice is likely to be sufficient.

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4. Varying Staff Hours

It may be necessary or desirable to ask staff to return on different hours than their contracts currently require – for example, as a means of controlling health and safety risks, or because the employer is currently unclear how many staff will be needed to meet the demands of the business.

Employers should first consider what the employees' contracts of employment state. For example, contracts may guarantee a minimum number of hours; they may give an employer total discretion over hours (i.e. zero-hours contracts); or they may give employers certain flexibility over when in the year the hours are worked (e.g. annualised hours contracts). Similarly, many contracts may allow employers to issue rotas dictating when the hours should be worked.

Employers may find – either in employee's contracts, in a Handbook that has already been accepted by the employee, or in a professionally drafted furlough agreement – that they have the right to 'lay off' the employee or place the employees on 'short-time working'. Short-time working clauses would, in most cases, provide employers with the flexibility they need to reduce hours and pay.

Whilst the first port of call should always be to check for flexibility within the contract or handbook, in the absence of any contractual right on the employer's part to determine or change an employee's hours, employers should seek to agree an appropriate variation with the employee in writing, particularly if it will carry a corresponding reduction in pay. This might sensibly be done at the same time as ending the furlough leave (see above).

Where the employee's agreement is required but they refuse to vary hours, employers may give consideration to dismissing and re-engaging the employee on notice but this should only ever take place after an exhaustive consultation process. Again, advice should be sought to avoid the risk of a constructive or unfair dismissal claim.

5. My employee is refusing to return to work due to continued school closures

In general, there is no reason why an employer cannot terminate furlough leave and ask an employee with children to return to work, even though nurseries or schools may remain closed.

If an employee is unable to return due to school closures, they may be entitled to take statutory dependants' leave. Provided the employee has informed the employer of their circumstances, they are entitled to take "reasonable time off". What is reasonable will depend upon factors such as the duration of the school closure and, importantly, any alternative childcare arrangements the employee can make. The Government have suggested that the current pandemic will be regarded as an emergency and consequently, whilst dependants' leave will, in most cases, be limited to 1-2 days at a time, or interspersed days, it is likely that in these unusual times (where alternative child care is unavailable) a longer period of leave will be deemed reasonable, potentially up until the schools reopen.

Dependants' leave is unpaid unless the contract of employment, an employer's policy, or an established practice entitles the employee to paid leave.

Employees have the right to request flexible working, including working from home. Such a request can only be declined on specific business related grounds and certain procedures must be followed. Failure to comply not only amounts to a breach of the Flexible Working Regulations but potentially also exposes the employer to a claim for indirect sex discrimination. An employment tribunal will expect an employer to allow an employee with child care responsibilities to work from home wherever possible or failing that to take holiday or unpaid dependant's leave. If the employer is considering imposing any disciplinary sanctions in such circumstances, they should take specific legal advice before doing so on a short-term basis.

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6. My employee is refusing to return to work because they are concerned about the risks to their health and safety

In very general terms, a simple refusal to return to work from furlough out of a generalised fear of risk that they or someone in their family might become unwell would amount to unauthorised absence and entitle the employer to take disciplinary action as well as refusing to pay the employee any longer. However before instigating such action, an employer should consult with the employee and attempt to alleviate any genuine concerns the employee might have.

In certain circumstances an employee who is dismissed or subjected to a detriment because they have raised health and safety concerns with their employer, will have protection akin to that of a whistleblower. However, if their concerns have been investigated and the employer is satisfied that reasonable steps to mitigate the risk of disease have been taken the employer can insist that the employee returns to work or faces the sanction of unpaid leave and/or disciplinary proceedings. In those circumstances, such sanction will not have been taken because the employee raised concerns..

Many employees who are unwilling to return to work will instead decide to self-isolate in order that their absence may be treated as sickness absence. In such circumstances, the employee should be asked to submit medical evidence. This may take the form of an isolation note (which can be obtained via 111nhs.uk) or a fit note from the employee's GP. Failure to do so, would usually render the employee ineligible for any form of sick pay. Similarly, from the point that an isolation note or fit note expires, and is not renewed, the employee's absence would normally be unauthorised and may justify disciplinary action.

If the employee is pregnant or likely to be disabled, specific advice should be sought in order to avoid the risk of discrimination claims. It might be necessary for the employer to eliminate options such as temporary home-working, a temporary alteration to hours, or a temporary re-deployment, in order to comply with the employer's duties under the Equality Act 2010.

If you would like to know more about this topic or our other legal services, please contact Paul Maynard paul.maynard@gabyhardwicke.co.uk

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