Furlough update

- from **1 September 2020** employers can claim 70% of salary (up to a maximum of £2,190 or proportional to hours worked) and will be required, in addition to paying employer's NICs and pension contributions, to top-up at least the remaining 10% to 80% (capped at £2,500 or proportional to hours worked) but may need to top up more depending on what has been agreed with the employee
- from **1 October 2020** (and for the last month of CJRS) employers can claim 60% of salary (up to a maximum of £1,875 or proportional to hours worked) and will be required, in addition to paying employer's NICs and pension contributions, to top up at least the remaining 20% to 80% (capped at £2,500 or proportional to hours worked or more)
- **31 October 2020**: CJRS closes

- claim periods must start and end within the same calendar month
- claims must cover at least 7 days unless the claim includes either the first or last day of the calendar month and you have already claimed for the period ending immediately before it

Will furlough be extended?
This is anyone's guess.

Return to normal challenges

There are many challenges ahead for business. Listed below are just a few:
- a remote workforce
- remote recruitment
- returning to the workplace
- commute
- lockdown - local and second wave
- quarantine and changing restrictions
- restructures
- redundancies
- adjusted working
- flexible working requests
- wellbeing and managing absence
- performance management and re-engagement
- disciplinaries

We face these challenges in a more diverse working environment than we have ever known before with staff:
- working at the workplace
- working at home
- unwell
- shielding or socially distancing
- on full-time furlough
- on flexible furlough
- not able to be furloughed

- 'refusing' to return to the workplace
- reduced pay
- altered hours

Many, but not all, feel their situation is somehow worse than the next. Some might be right but not all are or can be. Whether they are or not, as this mix of individuals with different experiences and different views starts to mix with each other face to face again - or through remote means, this could be its own challenge and it will never be more important for employers and managers to listen - really listen.

Throughout the pandemic we have championed employers behaving both legally and morally and doing 'the right thing'. There are several factors to remember (beside the legal). For example:
- your staff are your most important asset
- a harmonious and happy workforce will be a key part of business recovery
- employees who feel devalued will be difficult to manage and are likely leave at the first opportunity - often these are the ones you least want to leave
- recruitment is expensive and more arguably more complicated in these socially distanced times

Refusing to return to the workplace

The world has been on its journey to a return to whatever normal now is for some time and this means a re-opening of workplaces to more and more people - providing it is 'covid-secure'.

Refusing to return to work

Employees who unreasonably refuse to return to the workplace to carry out work available could be subject to disciplinary action, not be paid and, ultimately, be dismissed. This is not a step to take lightly and there are several areas to be cautious about.

Top tips to think about

- Childcare

Schools have mostly re-opened so childcare should not be an issue surely? It is not necessarily business as usual. Schools may have adjusted or staggered hours and before and after school clubs may not be open. Workers continue to face this difficulty along with, potentially, children at home whilst they work from home. If you don't take this into account you risk of allegations of indirect (if not direct) discrimination on grounds of sex and possibly disability if there are concerns around the child's ill-health.

- Vulnerable

Shielding is no longer required but these individuals, along with others who live with individuals with underlying health conditions are concerned for their own health or that of those they live with and ignoring these concerns has potential to amount to discrimination based on disability or it could be related to age or pregnancy as well as concerns about health and safety more generally (see below).

- General concerns about health and safety

Employees might also believe themselves to be in serious and imminent danger and be entitled to protection against detrimental treatment or dismissal because they raise these concerns with their employer. They may also have 'whistleblown'.

It is all too easy to dismiss these concerns as an easy excuse to avoid returning to the workplace and plough headlong into a legal battle that could relatively easily be avoided. Its important not to forget the basic duty that employers have:

- to take reasonable care of the health and safety of their employees
- to provide a suitable working environment
- of trust and confidence

Breaches of these duties could lead to the employee raising a grievance and/or resigning and claiming constructive unfair dismissal.

Managing the process

For all these reasons, employers must be as flexible as possible. Consider alternatives to working in the workplace; for example:

- homeworking
- redeployment to allow for working from home
- furlough leave (if available)
- allowing unpaid (or paid) time off to deal with emergencies involving dependants
- unpaid parental leave
- compassionate leave
- career breaks
- holiday

Failing that, think about:

- reduced hours
- adjusted hours

which allows individuals to work around, for example, childcare commitments.

As part of the return to work process employers should:

- share risk assessments with their workforce
- discuss planned adjustments to the workplace generally
- communicate updates on guidance and approach regularly
- document everything
- talk as early as possible about returning to the workplace and take time to understand the circumstances.
- consult with staff and any trade union representatives, employee representatives and/or health and safety representatives and staff who might be concerned about degrees of risk for themselves or others.
- consider adjustments:
    - be flexible on return to work dates, hours, and times of work
    - travel plans and facilitate cycling or parking
    - new and expectant mothers
    - religious commitments
    - additional protections
- discussing any phased return of the workforce, with some staff returning before others
- minimise contact and organise attendance at work in groups
- talk to employees anxious about safety and returning to work and to try to resolve concerns together. Concerns can be:
    - fear of catching COVID-19 themselves
    - that they are vulnerable or living with someone who is vulnerable and therefore shielding

    - that they are caring for children
- be aware of perceptions of fairness and unfairness within the workforce and the potential for ill-feeling to develop

Restructures and downsizing: overview

Redundancies are becoming increasingly common with the end of furlough looming and an understandable desire for the furlough scheme to contribute to some of the costs of notice. This might be because efficiencies realised during lockdown or a downturn in work or a combination and it may be temporary or permanent.

It is important to remember that there are alternatives to redundancy. It is also important to remember how important your staff have been to your past success and will be to your future success and ability to bounce back swiftly. Our experience, in advising many clients through this difficult time, is that staff are far more willing to consider and agree, for example, reduced hours and/or reduced pay than they have ever been more. This will require a temporary (or permanent) change to contractual terms.

Changing terms and conditions of employment: overview

The starting point is what is the proposed change? Does the contract permit it? If it does, generally speaking, the business can make the change providing it acts reasonably.

The terms of the contract

The terms of a contract with an employee can be:

- **Express:** terms explicitly agreed whether verbally or in writing
- **Implied:** terms implied, for example, through custom and practice
- **Incorporated:** terms incorporated into the contract by law or collective agreement

Does the contract allow for the change?

- The terms of the contract might be broad enough that the proposed change is covered and no change is needed at all
- The term might expressly allow for the change
- The contract might include a general right for the employer to make changes

Even in the above circumstances, employers should be cautious and read any right to make changes restrictively, bearing in mind that they must always act in good faith and in a way which is not arbitrary, capricious nor irrational and also keep in mind statutory restrictions that might apply (for example minimum periods of notice and holiday).

In these circumstances, the contract can be varied by writing to the employee (and complying with any other terms in the contract). We recommend, however, discussing and explaining:

- the reasons for the change
- the change you wish to make
- encouraging agreement to the change by the employee which can then be confirmed in writing.

This far better than simply writing to notify the change.

Procedure where there is no right to change

To implement a change where there is no contractual right, the employer could:

- get the employee to expressly agree the change (by collective agreement (which would be unusual) or individually)
- terminate the existing employment contract and offer re-employment on the new terms
- unilaterally impose the change

Express agreement

This is, by far, the preferable approach with any agreement, ideally, documented in writing.

For any contractual change to be enforceable, the employee must receive some form of benefit (or 'consideration'), which is usually continued employment but this is something employers will need to think about.

Dismissing and offering re-engagement on new terms

In most instances, if the employee will not agree to the change, the employer's next best option is likely to be to terminate the existing contract and offering continued employment on terms including the change. This is not without risk as the employee may claim:

- wrongful dismissal which can be avoided by complying with any notice or payment in lieu of notice clause in the contract)
- unfair dismissal although this can be minimised if the employer has a potentially fair reason for dismissal (usually some other substantial reason based on a sound business reason) and acts reasonably.

Employers should remember an employee can claim unfair dismissal claim even if they accept re-employment on the new terms (although the claim may not be financially viable depending on the circumstances).

The reasons why the employee objects to the change will be important and, through a process of discussion, this can be flushed out and addressed.

Unilateral imposition

Unilateral imposition relies on the employee continuing to work as evidence of acceptance of the change, but this is riskier and a last resort as an employee could respond by:

- complying but working under protest whilst bringing a claim for breach of contract and/or unlawful deductions from wages
- resigning and claiming constructive dismissal - based on the change to the contract itself or a series of actions by the employer including the change
- refusing to work under the new terms which may force the employer to dismiss

Collective consultation

If 20 or more employees are involved in any change notification to the Secretary of State should be given and the collective consultation obligations complied with (see below).

An employer who does not comply with these collective consultation obligations may be ordered to pay a protective award of up to 90 days' actual pay to each affected employee.

Failure to notify the Secretary of State is a criminal offence.

Redundancies

If a reduction in staff is needed the procedure below (or a variation of it) should be followed.

1 Is there a redundancy situation?

There is a redundancy if there is a:

- closure of the entire business
- closure of the part of the business where an employee works
- reduced requirement for employees to carry out the work the employee is employed to do

2 Preparation

How many redundancies are proposed?

If there is likely to be, in a 90-day period:

- 20 or more redundancies **at one establishment** the requirement to collectively consult applies **and** the Secretary of State must be notified
- less than 20 redundancies a fair and reasonable procedure should be followed

Pools and selection criteria

If:

- the entire business is closing, the entire workforce is at risk and there is unlikely to be a need to carry out any selection process
- the entire business is closing at one location it is likely to be fair and reasonable to consider the entire workforce at that location (and that location alone) at risk and there will be no need to carry out any selection process. This should, however, be carefully considered taking into account, for example, whether other locations are close by.
- work of a particular type has reduced, carefully consider locations, who carries out that role, who could carry that role and if there is more than one individual in that role.

If selection is necessary, consider and identify a set of objective selection criteria that can be used. If you use different selection criteria for different types of work, document the reasons why.

Alternative employment

Consider and collate a list of vacancies (if any) across the business **and** any group businesses.

Pregnant employees and those on leave

Identify any employees who are pregnant or on maternity, adoption or shared parental leave as special rules apply to them. Also, don't forget on, for example, sick leave or sabbatical. They should be included in the process if they are affected.

Consider alternative approaches

Consider, for example, asking for volunteers and other potential alternatives to compulsory redundancy. Document why these may or may not be appropriate to explore and adopt in any case.

3 Collective consultation (20 or more employees)

Notify the Secretary of State

As noted above, collective consultation applies if, **at one establishment** within a **90-day period**:

- dismissals of between 20 and 99 employees are proposed or
- dismissals of 100 or more employees are proposed.

Dismissal has a wider meaning for the purposes of collective consultation than the definition of redundancy and would include, for example, introducing changes to terms and conditions of employment (where dismissal might have to be used to bring in the changes).

The notification must be:

- in writing (by letter or on a form HR1)

https://www.gov.uk/government/publications/redundancy-payments-form-hr1-advance-notification-of-redundancies

- given at least 30 (20 and 99 employees) or 45 days (100 or more employees) before the first dismissal
- provided to the employee representatives

Notice of dismissal must **not be given** until the Secretary of State has been notified. It is a **criminal offence** not to notify the Secretary of State.

Procedure

Information must be provided and consultation take place with 'appropriate representatives' where collective consultation is required. This might mean elections need to take place to identify appropriate representatives.

Consultation should take place with appropriate representatives with a view to reaching agreement about ways of:

- avoiding dismissals
- reducing the numbers of employees to be dismissed
- mitigating the consequences of the dismissals

Consultation should take place in good time but at least 30 days (20 and 99 employees) or 45 days (100 or more employees) before the first dismissal.

Information should be provided to appropriate representatives about:

- The reasons for the proposed dismissals.
- The numbers and descriptions of employees it is proposed to dismiss as redundant.
- The total number of employees of any such description employed at the establishment in question.
- The proposed method of selecting employees who may be dismissed.
- The proposed method of carrying out the dismissals, with due regard to any agreed procedure, including the period over which the dismissals are to take effect.
- The proposed method of calculating the amount of any redundancy payments to be made (if any) to employees who may be dismissed.
- 'Suitable information' about use of agency workers.

Special circumstances may apply which negate the need to comply with some of the requirements to collectively consult. If so, such steps towards compliance as are reasonably practicable should still be taken and the 'special circumstances' carefully documented. Relying on the special circumstances

defence at this advanced stage of the pandemic would be very risky indeed and every effort to comply with the requirements should be made.

4 Group meeting

Meet with all of employees (as a group or in groups if possible) who might be made redundant. Meetings may need to take place virtually in the current circumstances. During the 'meeting':

- Explain:
    - the reasons for the potential redundancies.
    - how many jobs are at risk (making it clear redundancies are a possibility at this stage).
    - ways of avoiding the redundancies are being explored.
    - the pools and proposed selection criteria (if relevant).
    - the right to take time off to seek alternative employment.
    - the procedure that will be followed, including for collective consultation and arrangements for election of appropriate representatives (if applicable).
- Ask the employees for suggestions of ways to avoid redundancies.

After the meeting make a note of what was said.

5 First letter

Confirm the information given during the meeting in writing and, if appropriate, set out arrangements for election of appropriate representatives and include a ballot form.

6 Carry out scoring

If necessary score each potentially redundant employee using the selection criteria.

Ideally, two managers should carry out the scoring so scores are as objective as possible.

Document and keep the scoring for each and every employee.

7 Second letter

Write to the employees provisionally selected for redundancy inviting them to a meeting to discuss their provisional selection. They will have the right to request to be accompanied and this should be included in the letter along with, for example, the reasons for the redundancy situation and their provisional selection. A copy of their individual scores should be included (if applicable).

The letter and information should be sent a period before the meeting to allow a reasonable opportunity to consider it before the meeting takes place.

8 First individual meeting

Meet with each employee individually about their scores, the proposal to select them for redundancy and the terms of the redundancy.

Listen to and consider any comments from the employee.

Discuss any alternative available roles or explain that there are none.

Take a detailed note of the meeting.

9 Follow up

After the meeting, consider and follow up any suggestions made to avoid the redundancies and any comments made about the individual scores.

An employee's score could change because of the consultation process and this must be compared to other scores and those provisionally selected reassessed. If there is a change, relevant parts of the procedure will need to be undertaken with those employees now provisionally at risk.

10 Second individual meeting

If a decision has been made to make an employee redundant, and it is possible, invite the employee to a further meeting to notify them. They may request to be accompanied by a trade union representative or work colleague to the meeting.

Advise the employee the decision has been made to proceed with their provisional selection and go through the redundancy package, including notice, holiday pay and any statutory (or other) redundancy payment.

Remind the employee of the right to time off to seek alternative employment.

Take a detailed note of meeting.

11 Dismissal letter

Confirm the decision to dismiss them as redundant in writing along with the termination date and payments they will receive (and how the redundancy payment is calculated). Confirm the employee's right of appeal, how to appeal and by what date they must appeal.

12 Appeal

If an employee appeals, they should be invited to an appeal meeting. If possible, the meeting should be held by someone who has not previously been involved and who is more senior to the person who made the decision to dismiss.

Following the meeting, write to the employee confirming the outcome of the appeal and that it is a final decision.

Fair and reasonable

The above is a summary of the steps to be followed in a fair and reasonable procedure; each step should ordinarily be followed to minimise the risk of a successful claim for unfair dismissal. However, what is fair and reasonable will be judged on the circumstances of each case and it may be fair and reasonable not to follow some of the above steps (or to take others) in these unprecedented times.

Employees with less than 2 years' service

Employees with less than 2 years' service will not, generally, have protection against unfair dismissal and it is unlikely they will be able to successfully challenge any lack of procedure.

Redundancy policies

Any contractual redundancy policy, including selection criteria, should be followed. Any non-contractual policy should be considered and the reason for any deviation should be documented.

Right to lay-off, short-time working and guarantee payments

Lay-off and short-time working has largely been off the agenda since the announcement of the furlough scheme. Some will be starting to dust off staff contracts and revisiting this as a potential solution to short-term reduction in work from 1 November onwards.

Lay-off is where the employer provides no work and no pay for a period. **Short-time working** is where employees are given less work and less than half normal pay for a period.

Lay-off

An employee is laid off in any week if:

- they are employed under a contract on terms and conditions such that their remuneration under the contract depends on being provided by the employer with work of the kind which they are employed to do, but
- they are not entitled to any remuneration under the contract in respect of the week because the employer does not provide such work for them.

An employee may have been provided with work and not laid off if they are offered work but refuse to do it. An employee who is not available for work, for example because of illness, is also not laid off. Any week of lay-off caused wholly or mainly because of a strike or lock-out will not count (even if the employee did not participate).

Short-time working

An employee is on short-time working in any week where:

- by reason of a diminution in the work provided for them by the employer (being work of a kind which under the contract of employment they are employed to do)
- the employee's remuneration for the week is less than half a week's pay

Required amount of time on lay-off or short-time working

There is no limit to how long employees can be laid off or put on short-time for.

An employee can, however, apply for redundancy and claim redundancy pay if the period is:

- 4 or more consecutive weeks; or
- a total of six weeks (of which no more than three are consecutive) in any period of 13 weeks.

The period can be all lay-off or all short-time working or a combination.

What is a week?

A week for the purposes of lay-off and short-time working is:

- (for weekly-paid employees) the seven days ending on the day to which their pay is normally calculated.
- (for all other employees) the seven days from Sunday to Saturday.

Notice

There is no statutory minimum period of notice required to lay-off or place an employee on short-time working.

If you have a contractual right to lay-off or short-time working you should observe the notice requirements of the contract.

The contractual position

The employer will breach the contract of employment if they lay-off or put employees on short-time working without pay or with reduced pay unless they have an express or implied contractual right to do so.

Contract permits lay-off or short-time working

An employer might have an express right within the contract to lay-off employees or to put them on short-time working, but it should be exercised reasonably and furlough will need to be considered.

The right might also be implied through custom and practice if:

- there is a custom of laying-off within that particular business.
- the custom is both:
    - 'reasonable, certain and notorious'; and
    - such that 'no workman could be supposed to have entered into service without looking to it as part of the contract'.

Contract does not permit lay-off or short-time working

If there is no express or implied right to lay-off or place on short-time working, the employer will be in fundamental breach of contract entitling the employee to resign and claim constructive dismissal if they impose lay-off or short-time working.

If the employer places an employee on lay-off or short-time working, the employee could:

- accept the breach of contract, treat the contract as continuing but claim a statutory guarantee payment.
- claim for damages for breach of contract in the civil courts or an employment tribunal.
- claim in the employment tribunal for unlawful deduction of wages.
- claim constructive unfair dismissal and/or redundancy pay.

For these reason a decision to lay-off or place on short-time working should not be taken lightly (especially if furlough is available) and you should discuss the situation with your employees and agree a temporary or permanent variation to their contract and, of course, any agreement reached should be documented in writing.

Holiday entitlement during periods of lay-off or short-time working

Provided the employment contract continues, which is the intention of lay-off and short-time working, statutory holiday entitlement will continue to accrue.

Holiday taken during lay-off or short-time working generally should be paid at the contractual or normal rate.

Entitlement to a statutory redundancy payment

An employee will be entitled to claim a statutory redundancy payment if they:

- have at least two years' service and have been laid off or kept on short-time working for the length of time set out above.
- follow the statutory scheme to claim redundancy pay (outlined below).

Lay-off: employee must not be entitled to pay during the lay-off period

As the statutory scheme applies only if the employee is entitled to no pay at all under their contract during the week in question where an employer provides a contractually guaranteed rate of pay or a fall-back rate of pay, an employee cannot be laid off. Entitlement to a statutory guarantee payment does not prevent a lay-off.

Guarantee payments (SGP) and workless days

An employee may be entitled to an SGP for up to 5 'workless days' in a three-month period.

A 'workless day' is a day during any part of which the employee would normally be required to work in accordance with their contract and the employee is not provided with work by their employer because:

- there is a reduction in the requirements of the employer's business for work of the kind which the employee is employed to do or
- there is any other occurrence which affects the normal working of the business in relation to this type of work.

A 'day' is the period of 24 hours from midnight to midnight. If an employee starts work before midnight and finishes after midnight, a day will be the day in which they completed most of their work. For example, if an employee starts work at 4 p.m. on a Tuesday and finishes at 4 a.m. on Wednesday, the relevant working day will be Tuesday.

There is no entitlement to SGP if:

- the employee does not have at least one month's continuous employment before the period for which they are claiming an SGP.
- the workless day is due to industrial action.
- the employee has unreasonably refused an offer of alternative work.
- the employee does not comply with reasonable requirements imposed by their employer with a view to ensuring that their services are available.

Calculating guarantee payments

An SGP is calculated by multiplying the number of normal working hours on the workless day by the 'guaranteed hourly rate'.

If there are no normal working hours on the workless day in question, no SGP is payable.

The guaranteed hourly rate is calculated as being one week's pay divided by the number of the employee's normal working hours in a week. If the number of normal working hours varies from week to week, the amount of one week's pay will be divided by either:

- The average number of normal working hours, which is calculated by dividing by 12 the total number of the employee's normal working hours during the preceding period of 12 weeks.
- Where the employee has been employed for less than 12 weeks, a number of hours which fairly represents the number of normal weekly working hours.

SGPs are subject to a maximum daily rate, which is £30 a day (subject to a maximum of five days or £150 in any three months) from 6 April 2020; previously £29 a day (subject to a maximum of five days or £145 in any three months). This should be calculated pro rata for an employee who works fewer than five days a week.

Guarantee payments and contractual payments

The right to an SGP does not affect any right to contractual pay for the same period. Any contractual pay can be set off against an employer's liability to pay an SGP and vice versa.

Claiming redundancy pay following lay-off or short-time working

To be entitled to claim a statutory redundancy payment the employee must:

- have two years' continuous service by the last day of the week of lay-off or short-time working they rely on.
- have spent the necessary length of time on lay-off or short-time working (or a combination).
- serve written notice of their intention to claim.

Employee notice of intention to claim

The employee must serve a written 'notice of intention to claim' on their employer:

- The notice must state that the employee is claiming a redundancy payment in respect of lay-off or short-time working.
- The notice must be served:
    - on the last day of the last week of lay-off or short-time working on which the employee relies; or
    - within four weeks of that last day.
- The notice must be:
    - posted or hand-delivered to the employer's address at which the employee works; or
    - given to a person nominated by the employer, left for them at a nominated place, or posted to a designated address.
- Once an employee has served their notice of intention to claim, they may apply to a tribunal to decide their claim without terminating their contract but they will not be entitled to the redundancy payment unless and until they have terminated their contract.

Counter-notice

The employer can only defend the claim if:

- the employee does not satisfy the requirements of the statutory scheme.
- it is reasonably expected that, within four weeks of the date of service of the employee's notice of intention to claim, the employee would start a period of employment with it of at least 13 continuous weeks during which they would not be laid off or kept on short-time working for any week.

The employer must, within seven days of service of the employee's notice of intention to claim, serve a written counter-notice stating that it contests liability to pay the employee a redundancy payment.

The employer must serve its counter-notice on the employee by hand-delivering it, leaving it for them at their usual or last known address, or posting it to that address.

The defence will fail if the employee remains employed by the same employer and remains laid off or on short-time working during each of the four weeks after service of their notice of intention to claim.

To withdraw a counter-notice, an employer should give written notice of withdrawal.

The effect of an offer of suitable alternative employment

It is not clear whether an employer can defend a claim under the statutory lay-off and short-time working scheme by making an offer of suitable alternative employment.

The employee applies to the tribunal

If the employer serves, and does not withdraw, a valid counter-notice, then the employee must lodge a claim with the tribunal to decide the matter. Details can be provided about this stage on request.

Calculation of a statutory redundancy payment

When calculating a statutory redundancy payment the following apply in these circumstances.

The relevant date

The relevant date is usually the effective date of termination. In these circumstances it will be the last day of the period of lay-off or short-time working.

The calculation date

For employees who have been laid off or placed on short-time working, the calculation date is the date on which, working backwards from the relevant date (above), the employer would have to have given notice in order to comply with the employee's minimum statutory notice entitlement.

A week's pay

An employee on lay-off or short-time working on the 'calculation date' should have the lay-off or short-time working disregarded.

Relationship with contractual redundancy schemes

If the employer operates a contractual redundancy payment scheme, it is likely it only applies if the employer dismisses the employee for redundancy.

If the employee claims a statutory redundancy payment under the statutory scheme, they are unlikely to have been dismissed to trigger payment under the contractual scheme.

Flexible working requests

Many of businesses are alive to a potential tidal wave of requests to work flexibly - under the statutory scheme, a business policy or otherwise. So what are the basics?

What are an employee's rights to make a flexible working request?

Employees with at least 26 weeks' continuous employment can make a request for flexible working under the statutory scheme for any reason:

- a request under the scheme must:
    - be in writing
    - be dated
    - say it is an application under the statutory procedure
    - state the change requested and when the change is to start
    - explain any effect the employee thinks the change would have and how it could be dealt with
    - say if any previous request has been made and when
- the employer has three months (which can be extended by agreement) to consider the request, discuss it with the employee (if appropriate) and notify the outcome including any appeal
- the employer must deal with the application in a reasonable manner
- the employer may refuse a request for one (or more) of eight reasons

    - burden of additional costs
    - detrimental effect on ability to meet customer demand
    - inability to reorganise work among existing staff
    - inability to recruit additional staff
    - detrimental impact on quality
    - detrimental impact on performance
    - insufficiency of work during the periods the employee proposes to work
    - planned structural changes
- the employer may treat the request as withdrawn in certain circumstances
- the employee can complain to a tribunal if the employer:
    - fails to deal with the application in a reasonable manner
    - fails to notify them of the decision within three months
    - fails to rely on one of the grounds to refuse
    - bases its decision on incorrect facts
    - treats the application as withdrawn when it should not have done so
- only one request can be made in any 12-month period

Acas Statutory Code of Practice and Guide

The statutory scheme is supported by various Acas documents:

- the Statutory Code of Practice, Handling in a reasonable manner requests to work flexibly: https://www.acas.org.uk/acas-code-of-practice-on-flexible-working-requests
- making a flexible working request: https://www.acas.org.uk/making-a-flexible-working-request
- responding to a flexible working request: https://www.acas.org.uk/responding-to-a-flexible-working-request

Employment tribunals must consider the Acas Code when considering claims relating to flexible working.

Other potential claims

A refused request made under the statutory scheme might not give the employee any other potential claims beyond those, if any, for breach of the statutory scheme. Other refused requests, however, whether made under the statutory scheme or not, may. It is important to consider these wider from the outset. Typically, additional protections arise where employees are seeking flexibility for childcare or religious reasons or they are disabled (or wish to look after someone who is) and in turn they have a protected characteristic and may have protections and claims under the Equality Act 2010.

There is also a risk that the employee will argue that the business had handled the request unreasonably or refused unreasonably and breached the implied term of trust and confidence. This could give rise to a grievance and/or claims for constructive unfair dismissal.

Wellbeing and absence management

We are in the same storm but we are not in the same boat

Every individual (and business) has been affected in some way by the Covid-19 pandemic; but not all in the same way and as we look forward it is important to remember this in the context of employees health and wellbeing and managing absences that might occur in the future.

Short-term intermittent absences

An employee, on return from furlough or to the workplace, might struggle to adapt and this might result in short-term intermittent absences, which pose challenges for business at the best of times. Practically, absences are disruptive; they are difficult to predict, cover and deal with and they can breed resentment and replicated behaviour within teams if left unchecked.

Early intervention

Employers should monitor absences regularly and begin conversations with employees early (usually with a return to work interview - which may be a challenge if working from home) to try and nip potential issues in the bud and minimise the risk of them developing into something more.

Opening the discussion with an employee, with a view to listening and understanding the situation, can lead to support and the issue being addressed quickly and with minimal fuss. Equally, it might (in due course) lead to dismissal and the procedure followed must have this in mind.

Unfair dismissal

An employer intending to dismiss for short-term intermittent absences must consider if they have a fair reason and follow a fair procedure to minimise the risk of a successful claim of unfair dismissal.

In the context of unfair dismissal, dismissals relating to sickness absence will generally be for an employee's '**capability**' (or incapability) to do the job. Other potentially fair reasons might be:

- **Some other substantial reason** (or 'SOSR') - whether for genuine reasons or not, if the absences have a significantly detrimental impact on the employer's business and/or the employee's performance, they can justify a decision to dismiss for SOSR.
- **Conduct** - if there is no genuine reason for the absence and/or absence reporting procedures are not followed, short-term intermittent absences may give rise to a dismissal for conduct.

Cases of persistent short-term intermittent absence can be difficult to deal with and the procedure should be tailored to the 'fair' reason (and adapted if the position changes as necessary). An employer should not be afraid to press pause and change approach. Carrying on regardless may mean the dismissal is unfair.

The Acas Code of Practice on Disciplinary and Grievance Procedures does not apply to ill-health or SOSR dismissals but they do apply to conduct dismissals. You can view the Code at:
https://www.acas.org.uk/acas-code-of-practice-on-disciplinary-and-grievance-procedures

A fair procedure, in cases of short-term intermittent absences, is likely to include:

- knowing your own procedures and follow them as appropriate
  Consistency of approach is important. Knowing the procedures and following them will help. Sharing them with the individual concerned at the start of the process will also help. It should minimise any suspicion as stages of the process are reached.
- a review of the pattern of absences
  This should include information relating to the individual as well as their team and the employer. Considering the big and small pictures side by side can help you consider if there is a wider issue or a specific individual whose absence needs to be considered in isolation.
  Remember to discount pregnancy-related absences and be cautious about absences which might be disability related. Also remember that sickness absence information is 'special category data' for GDPR and needs to be processed lawfully. This will generally be permitted as the processing is necessary for assessing the working capacity of the employee and/or the purposes of medical diagnosis.

- consideration of the reasons for them
  Even short-term, apparently unconnected, absences can be caused by an underlying reason/s – be it a physical condition/s or a mental one.
- obtaining up to date medical information (if appropriate)
  The employee should be encouraged to share any medical information which might be relevant.
  Obtaining a medical report will not always be appropriate in cases of short-term intermittent absences, but this is not to say it will not ever be.
- establishing the impact of the absences on the employer and colleagues
- discussing the situation with the individual
  This is very important. If there is no discussion with the employee, any dismissal is likely to be unfair. The employee may, for example, offer information the employer was not aware of or produce new medical information.
- notice of the improvements and risk of dismissal
  This should only be done after the above steps have been completed and the employee has had an opportunity to respond to the concerns. Any notice of improvement should include a realistic target and timescale and be reviewed.
  This step is often viewed as a punishment and means to an end – namely dismissal. It is important to reassure the employee this is not the case.
- considering if there has been the required improvement
- consideration of treatment of others
  Any treatment of one should be consistent with treatment of others. If this is not the case, any warning could result in a grievance, resignation or finding of discrimination and, if the decision is to dismiss, an individual might successfully argue the decision was unfair or discriminatory.
- consideration of alternatives to dismissal
- keep records at every stage
  Accurate and legible records should be kept of all communications and, in most instances, followed up in writing. Notes should be kept confidentially and only used and shared in accordance with GDPR.

There is a balance to be struck between the need for work to be done and the need for time to recover from ill-health (and this is never likely to be more important during and following the pandemic). This requires employers to look at the entire background to short-term intermittent absences, remembering an employee can still be dismissed fairly even when they are fit at the time the decision to dismiss is taken.

Discrimination

Employers must be cautious about apparently unconnected short-term absences and explore if there is (or maybe) a connection.

Employers can discriminate if they do not know about a disability but ought to have known (or investigated) given the information they had to hand at the time.

Personal injury

An employee whose absence was caused at work in the course of their duties could have a personal injury claim. In most cases, this will be dealt with by the employer's insurer.

It is worth bearing in mind that an employment tribunal will generally expect an employer responsible for the ill-health to make more of an effort to find alternative employment or tolerate a longer period of absence than it might otherwise have.

Breach of contract

If an employee is dismissed they may have claims for breach of contract if, for example, they are dismissed without notice or before they have exhausted their entitlements to sick pay.

We can help support you

The Birkett Long Employment and BLHR team would be delighted to hear from you. We can help with any queries you may have. We can provide support to business and individuals on a fixed fee basis.

We also have available packages to support you through individual and collective redundancy processes. Get in touch today with any member of the team on 01206 217300 and we can discuss the situation and the options that best suit you.

Giving you extra

Throughout this period we are hosting monthly online HR Forums which are a great opportunity for you to keep up to date with recent developments in HR & employment law. You can discuss any HR issues you are facing with other HR professionals and managers in business. Our experts are on hand to provide advice.

You can find the dates of our HR Forums at: https://www.birkettlong.co.uk/site/about/birkett_long_events

To book and find out more please email sarah.humphryes@birkettlong.co.uk

Birkett Long host a Wednesday Webinar every other week, these cover multiple topics. You can find out our Autumn schedule here - https://www.birkettlong.co.uk/site/about/birkett_long_events/

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