HR issues and the return to the workplace

Birkett Long HR & Employment
in conjunction with CIPD Essex and Ipswich Branch

Correct as at 14 May 2021

HR issues and the return to the workplace

Seek advice

What follows is general guidance. If you are unsure seek professional and specialist legal advice. The employment and BLHR team would be pleased to hear from you.

Keep official guidance under review

The information in this briefing is correct as at 14 May 2021 and is subject to any legislative changes which might be introduced by government.

Decisions in relation to staff based on outdated information could increase the risk of successful legal challenges and claims.

Employers should regularly check the public health and government guidance.

Birkett Long's BLHR and Employment Team

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How we can help?

Birkett Long's HR specialists and employment law solicitors provide advice, guidance and representation on HR and employment related issues to individuals and businesses. We know these can be challenging and time consuming for both and we understand the importance of getting the best out of the investment individuals put into their work and businesses put into their workforce.

Birkett Long Human Resources is a unique service consisting of HR experts and specialist employment lawyers and provides advice and guidance to senior managers in the absence of in-house HR knowledge or will work with and support your existing HR team. Our straight to the point, expert, commercial and pragmatic approach fulfils needs and budget. We understand commercial priorities and look beyond the obvious when seeking solutions. Our comprehensive service provides hands-on expertise as and when you require it.

However you choose to engage us, whether as an individual or business, we will use our extensive and specialist experience, including of the Employment Tribunal and High Court judicial systems, and will fight and protect your corner.

Our HR and employment specialist solicitors can assist and advise you on:

- IR35 and the off-payroll provisions
- Redundancies, Reorganisation and Restructuring (we have developed packages to support you through individual and collective redundancy processes accessible online and for a fixed fee)
- Transfer of Undertakings (TUPE)
- Industrial Relations and Action
- Discrimination and Equal Opportunities
- Grievance and Disciplinary Proceedings
- Discrimination including disability and age
- Recruitment
- Maternity and other family friendly rights, leave and pay
- Long term sickness and absence
- Appraisals
- Flexible working
- Employment tribunal claims
- Enforcement of restrictive covenants or other breach of contract disputes (from the point of suspicion of breach)
- Settlement agreements
- Directors, shareholders, shareholders' agreements and directors' service agreements
- Complex employment law issues, including complex discrimination, whistleblowing, TUPE, holiday pay, national minimum wage, equal pay and job evaluation schemes, GDPR and other data protection matters

Effective HR and employment law training for your business

We have adopted a facilitated approach to our HR and employment law training. There is no death by powerpoint or law lectures. Our approach incorporates life like situations played out on video (or in person) for attendees to discuss; what worked well? what would they change? are there any risks to the business in the approach? what should they change? The facilitator will also discuss legal and best practice aspects too before looking at a better approach scenario, making the training powerful, effective and memorable. If you don't believe us see what a recent business has said about their training:

Our recent 'Managing Misconduct' training session was a huge success, I have never had so much positive feedback from a training course! Being able to watch different scenarios being played out really helped our managers understand the topic and how it affects their roles and responsibilities.

To keep our training cost effective and flexible our training can be delivered virtually or face to face, with the training tailored to your business and its own policies and procedures. Attendees can be employees, managers, senior managers or individuals from within your own HR team or a mix.

Our training courses/topics are accompanied by a workbook for attendees to make their own notes, take away and refer to in the future making it even more likely they will remember and effectively deal with situations that might arise in the future.

Support for HR consultancies

We recognise that you are as much under pressure as anyone. Expected to keep up and deliver advice to your clients as the ground is moving beneath you, as well as deal with challenges within your own business. We can offer guidance and support - whether for you or indirectly for your clients.

HR Forum

Our HR Forums, held in Colchester, Chelmsford and Basildon, are a great opportunity to keep up to date with recent developments in HR & employment law. You can discuss any HR issues you're facing in a relaxed roundtable environment with other HR professionals and managers in business. Our experts are on hand to provide advice and ideas drawn from their extensive experience.

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 contact Katie Robertson on 01206 217334 or by email to katie.robertson@birkettlong.co.uk

Birkett Long HR Chat

Birkett Long host a group on LinkedIn where we post updates and points of interest from the news. It is a safe space, not dissimilar to the HR Forum, where you can discuss these, as well as HR issues you're facing, with other HR professionals and managers in business and we will be on hand to chip in with advice and ideas.

To keep the group as 'safe' as we can, the group is closed so please indicate on the feedback form (at the end of these notes) if you would like to become part of Birkett Long's HR Chat or 'LinkIn' with Julie Temple and we will send you an invite.

Keep in touch and up to date?

If you're interested in receiving future updates from the BLHR and Employment team at Birkett Long please email katie.robertson@birkettlong.co.uk and she will ensure you receive relevant updates and information.

Questions?

If you have any questions or would like to discuss any of the issues we speak about in this presentation or how the BLHR and Employment team at Birkett Long can help you or any of your clients do not hesitate to contact Julie Temple, Head of the team, on 01206 217318 or by email to julie.temple@birkettlong.co.uk, Helena Oxley, Employment Solicitor, on 01206 217624 or by email to helena.oxley@birkettlong.co.uk or Rianna Billington, Trainee Solicitor, on 01245 453812 or by email to rianna.billington@birkettlong.co.uk.

You can also contact any other team member who would be delighted to hear from you.

Testing Employees

Free asymptomatic testing is available under the government's workplace testing scheme and since 9 April 2021 individuals in England have been able to access twice weekly free rapid lateral flow testing.

The Government strongly urged employers to sign up to regularly test their employers but acknowledged its is a voluntary decision. The deadline to register passed on 12 April and tests can be ordered up to 30 June 2021.

Government also recommends private sector employers offer their on site workforce two lateral flow tests every week.

The guidance proposes three options for workforce testing:

- Option one: employer-led set-up ("DIY").
- Option two: third party providers.
- Option three: community testing through local authority testing sites.

Individuals can order rapid lateral flow tests themselves and are recommended to take the tests every 3 to 4 days. They should report the test results online.

https://www.gov.uk/order-coronavirus-rapid-lateral-flow-tests
https://www.gov.uk/report-covid19-result

The Legal Issues

Agreement and Consent

Employees may regard testing as an unnecessary invasion of their privacy. In addition, the testing process can be uncomfortable (involving a throat and nose swab) so employees may feel that it is unnecessarily invasive when they are not exhibiting symptoms and where there are other ways (such as social distancing) to ensure that any symptomless infection is not passed on to colleagues.

The employer may be in a stronger position where the workplace is, for example, one in which it is difficult to maintain social distancing, or in regular contact with the public, but consideration needs to be given to whether testing is a proportionate way to address that risk, taking into account the employer's health and safety risk assessment.

Data protection and confidentiality

The "Testing" section of the ICO's guidance states that, as long as there is a good reason for doing so, employers should be able to carry out health testing on employees as data protection law does not prevent them from taking the necessary steps to keep their employees and the public safe during the pandemic.

Testing | ICO

Employers must handle employees' personal data with care as testing records are medical data, which is special category data, and has more stringent processing conditions. In order to legally process this data, there must be a lawful basis (under Article 6 of the Data Protection Act 2018) and separate condition for processing (under Article 9 of the Data Protection Act 2018). Employers may be able to rely on legitimate interests and legal obligations under Article 6, and the employment condition and the public health condition under Article 9.

Regardless of the basis, the processing must be no more than is necessary so the information should be requested and recorded only for those employees for which it is appropriate to do so.
If the employer considers that it is entitled to process the data, and there is a health and safety need to administer the tests, and it is otherwise reasonable in the circumstances then it needs to consider how to implement the requirement.

Implementing a testing policy

A good way of implementing a requirement is by bringing in a policy.

The steps the employer takes before implementing any policy will be relevant when determining the reasonableness of any dismissal that may result from a breach of its policy.

ACAS Guidance

The ACAS guidance emphasises that there is no legal requirement for staff to be tested for COVID-19 and, in most situations, it is not necessary.

The guidance advises that if an employer does want to test staff for COVID-19, it should first talk with either staff, or the workplace's recognised trade union, or other employee representatives.

These discussions should focus on:

- How testing would be carried out and on who.
- How staff would get their test results.
- The consequences of refusing to be tested.
- The process to follow if someone tests positive.
- The level of pay if someone needs to self-isolate but cannot work from home.
- How someone's absence would be recorded if they need to take time off work.
- How testing data will be used, stored and deleted, in line with data protection legislation.

Any decision after the discussions should be put in writing and be in line with the employer's disciplinary and grievance policies. It should also be reviewed periodically as and when the position changes, including government guidance which should be kept under regular review.

Workplace testing for coronavirus (COVID-19) - Acas

Vaccinations

Over 34.9million people in the UK (as at 7 May 2021) have had a first dose of a Covid vaccine, which is really positive news – but it remains a complex area legally and a controversial topic for some.

A key question that arises when considering requiring employees to be vaccinated is whether it is ethical and legal for employers to request staff to be vaccinated before they return to the workplace, particularly when some do not want the vaccine for religious, philosophical or health care reasons. There are also Human Rights arguments.

Vavřička and others v Czech Republic [2021] ECHR 116

There has been a recent ruling from the European Court of Human Rights (which does still have some relevance in spite of Brexit) which held that a compulsory child vaccination programme with penalties for non-compliance is not a violation of human rights. *The case concerned the Czech Republic's statutory requirement for children to be vaccinated against nine diseases. Six applicants complained to the court about having been penalised for non-compliance.*

The court found that the compulsory vaccination policy interfered with the claimants' rights under Article 8 of the Human Rights. However, this interference was justified, and the policy had the legitimate aim of protecting against serious disease, as vaccination protects not only those being vaccinated, but also those who cannot be vaccinated for health reasons and are reliant on herd immunity. Additionally, the policy was proportionate and the fines for non-compliance were not excessive.

This ruling is interesting as it brings to light the human rights concerns over compulsory vaccination programmes, yet this case suggests human rights issues may not bar such policies. However, the outcome in this case was fact specific as it concerned childhood vaccination against long-standing diseases with well-known vaccines. A different outcome may therefore be possible on different facts.

Mandatory vaccination policies

It is not recommended to implement a mandatory policy, but if you consider it necessary, bear in mind the following:

- The vaccine is not suitable for everyone.
- Requiring employees to be vaccinated as a condition of providing work to them could amount to a repudiatory breach of contract, entitling them to resign and claim constructive dismissal. If you dismiss because they refuse, they may be successful in a claim for unfair dismissal.
- Individuals must wait their turn in order of priority to be offered vaccination. In allowing only vaccinated employees to return to the workplace could potentially lead to indirect or direct age discrimination claims by younger employees, with the employer having to rely on objective justification arguments to successfully defend any claims.
- Employers may find it difficult to justify a mandatory vaccination requirement on health and safety grounds, but this will be workplace and role specific.

- An employee who was compelled to receive the vaccine and who suffers an adverse reaction may attempt to bring personal injury proceedings against the employer. Whether it would be successful may remain to be seen.

Voluntary vaccination policies

A better approach is to be collaborative and encourage staff to be vaccinated with a voluntary policy.

Employers should inform staff of the available information on the potential advantages and disadvantages of vaccination to assist them in making an informed decision and the importance to health and safety in the workplace for all employees and visitors.

ACAS suggests supporting employees to get the vaccine by offering:

- paid time off for vaccination appointments.
- paying staff their usual rate of pay if they are off sick with vaccine side effects, instead of Statutory Sick Pay (SSP).
- not counting vaccine-related absences in absence records or towards any 'trigger' system the organisation may have.

Flexible Working

Government advice that individuals should work from home remains in place and could end on 21 June 2021, dependent on low infection rates. No matter the eventual end date, it is clear that the old 'normal' of working five days in the workplace will remain just that and moving forward this will take a new form for many (but not all) businesses.

It is advisable to plan for a return to the workplace and what that might look like for your business. Starting early allows time to manage concerns that may come up along the way and also shows a proactivity to employees and might allay fears that encourage them to seek opportunities elsewhere.

What is the new 'normal' for your business?

Return to work plan

Future working for your business could be all in the workplace, all working from home or something in between. This really will be business specific and deciding what the **business needs** are should be the initial first step in this process.

The next step will be to have open and honest communications with your **employees** about their thoughts and feelings on their future working preferences. These communications could take the form of a questionnaire, 121s, focus groups - whatever you believe to be most appropriate for your company. It could even be a mixture, however we would advise making it clear that although individual ideas will be considered no guarantees can be made at this point.

In parallel to communications with employees, business should engage with **managers** to ascertain their thoughts and feelings on the strengths and weaknesses of managing employees working from home. Strengths can be shared as best practice and weaknesses can be discussed to see how these can be overcome for a better experience for the business, for managers and employees.

Points to consider during the consultation process:

- How to avoid a divided workforce - there has been talk of fears of a two-tier society developing, consisting of those who work in the workplace and those who work remotely.
- Phased and gradual return - many employees have experienced working exclusively remotely during lockdown, fewer would have experienced a mixed model of remote and workplace working.
- A work in progress - new advantages and disadvantages of this flexible working may present themselves, the changes can be fine-tuned along the way and most likely will be - do not be afraid to assess and adjust.
- Objective approach - focus on a pragmatic and transparent assessment of the advantages/ disadvantages of different approaches.
- Discrimination - make sure your plans minimise discriminatory risks e.g. the complete removal of working from home may affect more women than men, potentially giving rise to sex discrimination claims as women, generally, have more childcare responsibilities.

Ongoing points of consideration:

- Give managers support in setting up new working arrangements with their teams to effectively manage team coordination and communication, as it is likely some employees will be in the workplace whilst some employees are working from home.
- Evolve the support given to all employees, especially those engaged remotely, and ensure they are fully equipped.
- Make sure to continue offering career development and allocating opportunities fairly. Avoid the creation of the two-tier workforce.

Policy/ Guidelines

If you have carried out initial consultation and have an understanding of 1. the needs of the business 2. managers thoughts and 3. the employee preferences, this information should form the basis of any policy or guidance you put in place and, of course, we recommend you put something in place. Whether you label the document a policy or guidelines the purpose of the document should be clearly set out along with the company expectations for everyone in writing.

Reluctant Returners

Despite best efforts to work with employees, employers may be met with employees who are reluctant to return to the workplace whether that be full time or at all.

What if an employee's preference of returning to the workplace or wanting their position to remain permanently remote does not match the employer's needs?

The starting point will be the government guidance at the time and the contractual arrangements that are in place, but we recommend you 'meet' with the employee and listen to their concerns and reasons for the reluctance. You should also explain the business needs to the employee and discuss both perspectives. It may be possible to reach agreement as a result, but employers need to be mindful of any potential discrimination risks. If an agreement cannot be reached the employee may be able to make a flexible working request.

Flexible working requests

A particular area of concern around returning to the workplace is likely to be flexible working requests. Many businesses are alive to a potential tidal wave of requests to work flexibly as the return to the workplace begins - under the statutory scheme, a business policy or otherwise. It's one of the reasons it could be sensible to get ahead and develop and announce any flexible policy around workplace working. 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
    - say if the request relates to something covered by the Equality Act 2010, for example to make a reasonable adjustment for a disability
- 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 implications 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.

Health & Safety

Employer duties

The current advice is people should continue to work from home where they can. Since 29 March 2021 it has not been a criminal offence to leave home to go the workplace, even if a job can be done from home.

With workplaces re-opening, steps must continue to be taken to make them covid-secure as employers have statutory duties to provide a safe place of work and general legal duties of care towards anyone who may be accessing or using their place of business.

To discharge these duties, employers should:

- Carry out suitable and sufficient risk assessments to identify the risks. Risk assessments should also look at different groups of workers (e.g. vulnerable workers), for whom there may be extra health and safety measures required.
- Implement measures to minimise those risks and take all reasonably practicable steps to minimise the risks, but this is not the same as having to eliminate the risks altogether.

If the workforce is still working from home, employers should still carry out a risk assessment and this should concentrate on any risks associated with working from home in the interim. This can be updated in due course to reflect any plans for re-opening.

Employee duties

Employees also have independent statutory duties to take reasonable care for their own health and safety, and that of other people, and to co-operate with employers to ensure that rules are complied with. It is therefore important that they know where to access the policies and understand them.

Protection from detriment and dismissal

Employees have the right not to be treated detrimentally where they raise health and safety concerns under Section 44 of the Employment Rights Act 1996 (ERA 1996), where an individual raises concerns, and they have a reasonable belief that they or others are at risk of serious or imminent danger. Employees also have the right, when raising the same issues, not to be dismissed under Section 100.

From 31 May 2021 workers are anticipated to be protected from detriment (not dismissal), as new legislation will come into effect. For workers, this protection will only apply to acts or failures to act taking place on or after 31 May 2021.

Employers should ensure that their health and safety policies and procedures are up to date and in line with government guidance as the workforce returns or continues to work from home and managers are also aware of this extension.

Employers should also be mindful that claims under Section 44 and Section 100 ERA 1996 have increased during the pandemic and now workers will be eligible to bring claims under Section 44 ERA 1994, the risk is even greater, so they must ensure compliance and issues are being dealt with appropriately.

Wellbeing

The COVID-19 pandemic has been an uncertain time for us all and has affected people in many ways with the risk to health being physical and psychological. Experiences include anxiety as well social isolation due to the lockdown. Many will have experienced challenging domestic situations, such as juggling childcare or caring for a vulnerable relative, and financial worries if their family has had a reduction in income. Some will also have experienced illness, or bereavement. It is important to remember this as we move forward out of lockdown, particularly in the context of employee health and wellbeing and that all staff - colleagues and managers are sensitive to this.

The bottom line is that fostering employee wellbeing is good for people and the organisation. Promoting wellbeing can help prevent stress and create positive working environments where individuals and organisations can thrive. Investing in employee wellbeing can lead to increased resilience, better employee engagement, reduced sickness absence and higher performance and productivity. However, as with anything, wellbeing initiatives will likely be ineffective if they stand alone, isolated from the everyday business, and without genuine commitment to its success. To gain real benefit, employee wellbeing priorities must be integrated throughout an organisation and embedded in its culture.

It is recommended that employers ensure they have a holistic framework in place to support employee's physical and mental health, and offer sources of help such as counselling, an employee assistance programme and occupational health services where possible. Employers also need to ensure that line managers, in particular, have the ongoing guidance needed to support their teams, so they can have sensitive conversations with individuals that are going to be beneficial and know when to signpost to expert help where needed.

Spotting the signs of potential mental health issues

Below are some possible signs to look out for, as indicators of potential mental health issues. It is important not to assume, as not everyone will show obvious signs, and of course these indicators could be attributable to other factors.

Possible signs of mental health issues may include:

- appearing tired, anxious or withdrawn
- increase in sickness absence or being late to work
- changes in the standard of their work or focus on tasks
- being less interested in tasks they previously enjoyed
- changes in usual behaviour, mood or how the person behaves with the people they work with

It will be harder to spot with employees working from home, so it is important to regularly check in with staff to see how they are doing. It can be difficult to talk about it, so employers should try and create an environment where the employee feels safe to discuss. Employers should also reassure the employee that they will not share anything that has been discussed with anyone else without their permission, unless there's a good reason to do so. If there is, they should be clear about who they will share it with.

The sooner an employer becomes aware that someone is experiencing an issue, the sooner they can provide help and support and the less likely it will develop into something more.

Changing terms and conditions of employment

The starting point is whether a business wants to implement a change at all? The follow on is whether the contract allows for the change? 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 (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 abide by any statutory restrictions that might apply.

If there is a right to change and it is reasonable to do so, 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 and hopefully encouraging agreement to the change by the employee which can then be confirmed in writing. This is just good employee relations and management.

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 most 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 offer 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 on the basis of a sound business reason) and acts reasonably.

Employers should remember an employee can claim unfair dismissal 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 with any luck addressed.

Tesco v USDAW, Court of Session, 2021

Tesco planned to fire and re-hire staff on less beneficial financial terms, said to potentially cost some workers a third of their wages. The workers' union, USDAW, successfully challenged this in the Court of Session in Scotland, legally prohibiting Tesco from unilaterally withdrawing entitlement to retained pay and/or terminating the contract in order to re-engage the workers on new terms.

> *'The judgement, which applies to the Livingston site only, means that Tesco are legally prohibited from unilaterally withdrawing entitlement to retained pay and/or terminating the contract in order to re-engage the worker on new terms which do not include retained pay.'*

There is some commentary that this case casts doubt over the practice of terminating a contract to re-hire on a new and varied contract (often referred to as fire and re-hire). This decision is an interim decision and this concern has certainly not come to pass - yet!

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 claiming 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 the Secretary of State should be notified and the collective consultation obligations complied with.

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 also a criminal offence.

Redundancy

To date, we have been reluctant to recommend proceeding with long term restructure or redundancy whilst the furlough scheme remains operational. Why? Any employee with more than two years' service could argue their dismissal was unfair - which is not to say they would be successful. The risk is that an employment tribunal would consider a redundancy unfair where furlough (a perceived no (or low) cost option to the employer) is an alternative. But, with restrictions being lifted and our sights on the new 'normal' working way of life, and the furlough scheme in place until the end of September with increasing costs to the employer, businesses may need to (and arguably should) make some tough decisions. We continue to recommend you carefully consider the position and take advice.

We appreciate not all businesses will be looking to restructure or downsize.

If, however, a reduction in staff is needed, the procedure below (or a variation of it) will need to 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 out that role and if there is more than one individual in that role. If not all are at risk, selection will be necessary.

If selection is necessary, consider and identify a set of objective selection criteria that can be used. If different selection criteria is to be used 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.

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 and includes, 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'. This might mean elections need to take place to identify appropriate representatives.

Consultation should take place, with appropriate representatives and with a view to reaching agreement, about ways of:
• avoiding dismissals;
• reducing the numbers of employees to be dismissed; and
• 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. It was more likely, in the early stages of the pandemic, COVID-19 constituted special circumstances, but far less likely now.

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 as a result 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 in scope.

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 the 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; they 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.

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. Employers should remember, however, claims for discrimination can be made regardless of length of service.

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 from it should be documented.

Furlough

A brief update

The Coronavirus Job Retention Scheme will remain in place until 30 September 2021, and currently, the UK Government pays 80% of employees' usual wages for the hours not worked, up to a cap of £2,500 per month. The employer must also pay employer national insurance and pension contributions.

From 1 July 2021, employers must contribute towards 10% of a furloughed employees wages, plus employer NIC and pension contributions and from 1 August 2021, employers must contribute 20% plus employer NIC and pension contributions.

For furlough to be claimed for from 1 May 2021, the employee must have been employed between 20 March 2020 on 2 March 2021 as long as you have made a PAYE Real Time Information (RTI) to HMRC between 20 March 2020 and 2 March 2021. Claims must be made monthly and within 14 days of the month end.

Employees can take holiday whilst on furlough, including flexible furlough, but should not be placed on furlough for the purposes of taking holiday or to coincide with taking holiday, with the time off for holiday topped up to 100%.

Since 1 December, furlough may not be claimed for any day that an employee is under contractual or statutory notice (whether notice was given by you, the employee or for retirement).

Check if you can claim for your employees' wages through the Coronavirus Job Retention Scheme - GOV.UK (www.gov.uk)

Right to work checks

Extension of amended right to work check measures

As of 12 May 2021, the Government has confirmed that the amended right to work check measures will remain in place until 20 June 2021. The amended measures allow checks to be carried out over video calls and scanned documents are acceptable as forms of identification.

The original timescale saw measures ending on 16 May 2021, which was concerning to employers given that much of the workforce are still working from home and interviews are taking place virtually to ensure compliance with social distancing.

When the original measures come back into play (which require face-to-face checks and original documents to be verified), the Government has confirmed that there is no need to carry our retrospective checks. This means that if an employer carried out checks using the amended measures between 30 March 2020 (when amendments were put into place) and 20 June 2021 (unless extended again), they will maintain a defence against civil penalty.

It is possible that virtual checks may become commonplace, as groups are actively lobbying for this. They are arguing that virtual checks are safer and more efficient, and given they have worked successfully during the pandemic, they should become the norm. Watch this space!

DBS checks

Verification arrangements

Under temporary arrangements for Covid-19, employers may check identity documents over video link and use scanned documents in urgent cases only, for Disclosure and Barring Service (DBS) purposes. Normal identity checks should be used (seeing original documents) in all other cases.

Where the temporary arrangements are used, original versions should be provided when the individual first attends the workplace.

We are not aware of any official end date to these temporary arrangements for DBS purposes.

We can help support you or your business

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.

We also have available packages to support you through individual and collective redundancy processes and provide any hr and employment related training you might need to protect your business.

Do not hesitate to contact:
Julie Temple, Head of the team, on 01206 217318 or by email to julie.temple@birkettlong.co.uk
Helena Oxley, Employment Solicitor, on 01206 217624 or by email to helena.oxley@birkettlong.co.uk
Rianna Billington, Trainee Solicitor, on 01245 453812 or by email to rianna.billington@birkettlong.co.uk.

You can also contact any other team member who would be delighted to hear from you.

Support for consultancies

We recognise that you are as much under pressure as anyone. Expected to keep up and deliver advice to your clients as the ground is moving beneath you, as well as deal with challenges within your own business. We can offer guidance and support - whether for you or indirectly for your clients.

Get in touch

Whatever your HR and employment law needs, 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

HR Forums

We are continuing to host our usual quarterly online HR Forums every month. These are a great opportunity for you to keep up to date with 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

Wednesday Webinars

We are also be hosting a Wednesday Webinar every two weeks covering a range of topics for businesses and individuals. You can find out more about our schedule here and sign up for free at https://www.birkettlong.co.uk/site/about/birkett_long_events/

Keep up to date

Follow Birkett Long and Julie Temple on social media: Birkett Long Julie Temple

You can also sign up to our newsletter by contacting sarah.humphryes@birkettlong.co.uk