



Navigating the challenges ahead

Supporting employers beyond lockdown

As employers, trade unions, public health authorities and the Government work together to safeguard communities, ease the lockdown and reopen workplaces, it is clear that leadership, trust and careful planning will play a vital role in this critical next phase of COVID-19.

The Government is working to its published “road map” for a gradual easing of lockdown, together with a series of workplace guidance. But any approach to a return to work will be incremental, not immediate, and will be conditional upon a continued decline of the pandemic. As we transition to new ways of living and working, positive and creative thinking will be required by businesses to assess whether they can provide safe working conditions for their staff, should they seek to reopen.

In line with government requirements and their own staffing and business needs, many employers will need to introduce short term changes to the workplace and/or to working arrangements to facilitate a restart which accommodates social-distancing. Many such changes are likely to involve changing employees’ existing contracts of employment. Guidance states that workplaces should make every reasonable effort to enable working from home as a first option.

For other employers, longer term or more profound adaptations to the business may prove necessary, including reducing staff numbers through redundancies.

Overleaf, we set out some issues for employers to consider regarding:

- reopening workplaces: returning to work safely
- preserving organisations: redundancies in a virtual world
- new ways of working: adapting the workplace and changing terms and conditions

Please contact the following partners if you require advice and assistance:

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Returning to work safely

Checklist issues

- ✓ Assess COVID-19 return to work risks
- ✓ Consult with workers/representatives
- ✓ Consider publishing the risk assessment
- ✓ Devise measures to mitigate the risks
- ✓ Inform employees of the measures taken
- ✓ Address the needs of employees who are vulnerable, pregnant, caring, shielding, living with shielders, disabled
- ✓ Train employees in COVID-19 safety measures and amend disciplinary rules to deal with non-compliance
- ✓ Ensure that managers are fully briefed
- ✓ Publicise anonymous channels for workers to report unsafe practices
- ✓ Don't forget to assess the needs of staff who are continuing to work at home

Legal issues to consider

- Employers have a legal duty to ensure, so far as is reasonably practicable, employee health and safety (H&S)
- Employees also have H&S legal responsibilities and an obligation to report H&S concerns
- Employers should conduct risk assessments in consultation with workers/their representatives and take appropriate measures to control risks
- Check if measures involve employee contractual change (see 'new ways of working' below)
- The latest government, HSE, ECHR and other guidance should inform return to work planning
- Employers instituting COVID-19 workplace testing must observe employee privacy protections
- Beware discrimination risks in return to work arrangements
- Employees are protected against suffering a detriment or being dismissed for H&S reasons or for raising a H&S concern ('whistleblowing'), depending on the circumstances
- Concerns raised by employees about returning to work or safe working arrangements should be investigated and handled consistently, fairly and reasonably
- H&S employer and employee obligations apply also to home-working arrangements

Useful links

- [Our alert](#)
- [Our webinar](#)
- [Government guidance](#)
- [HSE guidance](#)
- [ECHR guidance](#)
- [ICO guidance](#)
- [Home-working](#)

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Redundancy in a virtual world

Checklist issues

- ✓ Is this a genuine redundancy situation?
- ✓ Ensure you have effective "remote" communications channels to support consultation
- ✓ Have a contingency plan for managing potential delays to usual timescales
- ✓ Will employee representatives need to be elected?
- ✓ Check that privacy/confidentiality is protected during remote consultation
- ✓ Additional guidance, training and support needed for managers or representatives?
- ✓ Understand the interaction of the furlough scheme with redundancy proposals
- ✓ Any additional steps required to mitigate impact in current circumstances?

Legal issues to consider

- Employers must take all reasonably practicable steps to ensure a fair redundancy procedure is followed, within the context of COVID-19
- Collective redundancy obligations are triggered where the employer proposes to dismiss 20 or more employees at one establishment within a 90 day period; consultation timescales vary depending upon the total number of redundancies proposed
- Collective consultation will be with a recognised trade union, directly elected representatives or an appropriate, pre-existing body of elected or appointed representatives
- Prescribed information must be provided to union or employee representatives in writing
- Employers must notify the Department for Business, Energy and Industrial Strategy (BEIS) of proposed dismissals
- Failure to collectively consult raises risk of claims for protective awards
- Individual consultation with affected employees will also be required
- Employees must not be selected for redundancy based on certain protected grounds
- The notice and statutory redundancy pay for affected employees can be calculated using statutory rates, adding in outstanding holiday pay and any enhanced redundancy pay

Useful links

- Our alert
- Our webinar
- Acas Guidance: Manage Staff Redundancies
- Gov.UK: Calculate your employee's statutory redundancy pay
- Gov.UK: Redundancy payments - Form HR1

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New ways of working

Checklist issues

- ✓ Have a clear business case for any proposed changes to contractual terms or working arrangements
- ✓ What are the current contract terms of employees and where are they set out? Is there flexibility to make changes?
- ✓ Consider the potential exposure to claims from those affected (eg inadvertent discrimination, breach of contract)
- ✓ Is collective consultation necessary?
- ✓ Who can agree a contract variation? (eg check the TU collective bargaining/recognition agreement)
- ✓ How will you seek employee consent to the change? Communication is likely to be fundamental to effecting change but also to future relations
- ✓ What is the strategy if employees do not consent/consultation fails to secure agreement to the changes?

Legal issues to consider

- Current contracts may allow flexibility and a lawful change of terms
- The most successful changes will nonetheless be by agreement: consensus and employee support being likely to prove more important than ever in a period of change or transition
- If there are 20+ affected employees, collective consultation will be needed (with the TU, in accordance with the collective bargaining agreement, or otherwise with employee representatives) (see above). NB Consultation requirements may affect timing of changes
- A high risk approach is for an employer to purport to unilaterally impose the changes and not seek employee consent. This option is not to be taken lightly and detailed advice would be essential. This process can trigger collective consultation and can expose the employer to claims by individuals (unfair dismissal, breach of contract) but also from TU's if this undermines their collective bargaining rights (s145b TULR(C)A 1992)
- Consider adapting current contracts and policies to facilitate greater flexibility over ways of working but also "future-proofing", to improve resilience going forwards

Useful links

- [Our alert](#)
- [Our webinar](#)
- [Acas Guidance: Changing an employment contract](#)

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